

**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. 24-06

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DECISION GRANTING MOTION TO DISMISS

On August 16, 2024, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging his termination from the Montgomery County Department of Transportation (DOT), Division of Traffic Engineering and Operations. On August 28, 2024, the County filed a Motion to Dismiss arguing that the MSPB lacked jurisdiction over the matter. Appellant filed his response to the Motion to Dismiss on October 23, 2024.

FINDINGS OF FACT

Appellant was a supervisor in the Sign and Marking Unit with DOT's Division of Traffic Engineering and Operations. County Prehearing Submission Exhibit (C. Ex.) 2. On December 26, 2023, DOT issued a Notice of Termination (NOT) to Appellant, terminating his employment with the County for failing to provide DOT with a copy of a valid Commercial Driver's License (CDL), which is a requirement for Appellant's position. *Id.* The NOT was defective, as the effective date of the termination – "upon receipt" – did not comply with the Montgomery County Personnel Regulations, 2021 (MCPR). See MCPR § 29-6(b)¹. *Id.* The appeal rights language in the NOT was also

¹ **29-6. Effective date of termination.**

* * *

(b) A department director must issue a notice of termination to an employee with merit system status at least 5 working days before the effective date of the proposed termination.

defective as it failed to inform Appellant of his right to file a grievance per MCPR Section 34. *See* MCPR § 29-7².

On April 9, 2024, the MSPB Office Services Coordinator (OSC) sent an email to the Appellant on behalf of the Board. The email stated:

It has come to our attention that your Notice of Termination, dated December 26, 2023, failed to inform you of your right to file a grievance under the County grievance procedure pursuant to Montgomery County Personnel Regulations Section 34-5. This regulation allows you to file a direct appeal to the MSPB, which you did on January 4, 2024, or to file a grievance. If you choose to file a grievance, you may appeal the final grievance decision by the Chief Administrative Officer to the MSPB.

If you would like to file a grievance, MSPB will stay your appeal until the completion of the grievance process. If you do not wish to file a grievance and instead decide to proceed with the direct appeal to the MSPB you have previously filed, the appeal process will continue and the next step will be scheduling a prehearing conference. Please let us know your decision within the next 14 days.

On April 24, 2024, Appellant notified the Board that he “would like to go with the grievance process.” The Board found that it was appropriate to hold the instant appeal in abeyance until the end of the grievance process. *See* MCPR 35-6(b)³. The Board issued a Stay Order on April 29, 2024, which stated that if Appellant is not satisfied with the Chief Administrative

² **29-7. Appeal of Termination.**

- (a) An employee with merit system status who is terminated may appeal the termination under Section 34 or Section 35, unless the employee is a term employee:
 - (1) whose term of employment has expired; or
 - (2) who has completed the work the employee was employed to perform.

* * *

³ **35-6. Appeal does not act as automatic stay of action.**

* * *

- (b) The MSPB on its own motion may stay the action or grant a stay requested by the appellant based on reasons that the MSPB believes are proper and just.

* * *

Officer's (CAO) response at Step 2 of the grievance procedure, he may appeal the final grievance decision to the MSPB within 10 working days after the CAO's decision is received.

Appellant filed a grievance with DOT on May 23, 2024. County MTD, p. 1. Per Step 1 of the MCPR Section 34 grievance process, DOT filed a response on June 7, 2024. County Motion Exhibit (CM. Ex.) 1. However, the June 7, 2024, Step 1 response failed to include a notice of appeal rights to Step 2 of the process. *Id.* DOT corrected the error by reissuing the Step 1 response on August 7, 2024, with the following appeal rights language:

. . . The Department is amenable to proceeding with the alternative dispute resolution (ADR) process in conjunction with this grievance submission. If you are not satisfied with the Department Director's response to your grievance, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OLR within 10 calendar days after receiving the Department's response. The process can be found online at: [https://www.montgomerycountymd.gov/HR/Resources/Files/Regulation/SECTION 34 10 18 2021.pdf](https://www.montgomerycountymd.gov/HR/Resources/Files/Regulation/SECTION%2034%2018%202021.pdf). Please note that you were served with the response on June 7, 2024 and now have 10 days to request step two of the process.

CM. Ex. 2.

On August 16, 2024, Appellant sent an email to the Board notifying the Board of his intent to appeal DOT's decision to the MSPB, stating in part, "Here is a copy of appeal from my termination." Attached to the email was a Word document in which the Appellant outlined his version of events leading to his termination, his findings, and his questions. That same day, the County responded by email acknowledging receipt and questioning whether Appellant had elected to proceed with a grievance.

On August 19, 2024, the Board's OSC sent an email to Appellant which copied the County:

You notified the Board on April 24 that you chose the grievance process, and that same day Ms. [REDACTED] provided the link to the grievance form as well as the email address for the form's submission (see attached emails). On April 29, the Board issued the attached Stay Order explaining that if you are not satisfied with the Chief Administrative Officer's (CAO) response at Step 2 of the grievance procedure, you may appeal the final grievance decision to the MSPB within 10 working days after the CAO's decision is received.

It is not clear in your email whether you have received the CAO's decision. If you have received the CAO's decision and wish to proceed with your MSPB appeal, you must provide the Board with

a copy of the CAO's decision per Section 35-4(d)(2) of the Montgomery County Personnel Regulations (MCPR).

If you have not yet received the CAO's decision, please indicate so.

On August 21, 2024, Appellant responded by email, "I was told I could appeal the grievance decision to the MSPB if I did not like the decision. If I read the process that was sent to me this is where it should go unless I misread it. Here is the letter I forgot to attach from Mr. [REDACTED]." The MSPB's OSC was unable to open the attachment, but on August 22, 2024 the County replied to Appellant's email, indicating that a Step 1 response was issued to Appellant, and that the response included specific instructions on how to appeal the matter to the Office of Labor Relations (OLR). The County's August 22 email reply stated, in part, that the Appellant did not appeal to the CAO in a timely manner and that the appeal to the MSPB "is not triggered." On August 27, 2024, the County confirmed with the Chief Labor Relations Officer (CLRO) that as of that date, Appellant had not communicated with OLR as instructed to initiate the Step 2 process. County MTD, p. 2.

On August 28, 2024, the County filed a Motion to Dismiss (County MTD), asserting on page 3 that:

Appellant has failed to comply with established appeal procedures in both MCPR section 34 and section 35. Additionally, as Appellant pursued a grievance which did not result in a decision by the CAO, the MSPB lacks jurisdiction to hear this matter. Therefore, this appeal is no longer properly before the MSPB and should be dismissed.

Appellant responded to the Motion on October 23, 2024. However, he did not address the allegation in the Motion regarding his failure to appeal to Step 2 of the MCPR Section 34 grievance process.

ISSUE

Does the Board have jurisdiction over Appellant's appeal?

ANALYSIS AND CONCLUSIONS

This Board's jurisdiction is not plenary but is limited to that which is granted to it by statute. *See* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; *see also Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the

Board is obligated to ensure that it has jurisdiction. *See* MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009); *see also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). If the Board lacks jurisdiction to hear an appeal, the appeal must be dismissed. *See* MCPR § 35-7(c)⁴.

The grievance procedure found in MCPR Section 34 includes various prerequisites before a merit system employee may appeal to the MSPB. *See* MCPR § 34-9 (e)⁵. In matters where a merit

⁴ **35-7. Dismissal of an appeal.**

* * *

(c) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.

⁵ **34-9. Grievance procedure.**

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Steps of the grievance procedure. The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of individual*
1	Employee	Present job-related problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor and department director within 30 calendar days.
		If the grievance is based on an action taken or not taken by OLR, submit the written grievance to the OLR Chief.
	Department Director	Give the employee a written response within 15 working days after the written grievance is received.
2	Employee	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the OLR within 10 calendar days after receiving the department's response.
	CAO's Designee	Must meet with the employee, employee's representative, and department director's designee within 30 calendar days to attempt to resolve the grievance.
	Employee and Dept. Director	Present information, arguments, and documents to the CAO's designee to support their positions.
	CAO's Designee	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	CAO	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.
3	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under 33.07.01.35 of these Regulations.
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

system employee files a grievance per MCPR Section 34, the MSPB has consistently held that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal to bring the matter before the Board for review. *See* MSPB 17-28 (2017); MSPB 11-08 (2011).

Appellant was informed on various occasions that he must receive a CAO decision regarding his grievance prior to appealing to the MSPB. The April 9, 2024, email sent to the parties notified Appellant that a CAO decision was required prior to appealing a grievance to the MSPB, should he decide to file a grievance in the matter. Rather than continue with his original direct appeal, Appellant opted to file a grievance. The subsequent Stay Order also notified Appellant that a Step 2 CAO decision was a prerequisite for filing a grievance appeal with the MSPB. DOT's Step 1 response to the grievance reissued on August 7, 2024, included the proper appeal rights, notifying Appellant that if he wasn't satisfied with DOT's Step 1 response, he could appeal to the CAO at Step 2 of the process by filing his grievance with OLR. However, Appellant appealed directly to the MSPB on August 16, 2024, skipping the Step 2 requirement. Appellant was subsequently informed by the MSPB OSC that a CAO response was required before MSPB could process his appeal. The County's August 22, 2024, response also indicated that Appellant had not exhausted the MCPR Section 34 grievance procedure.

Appellant has not provided any proof that he has exhausted the various steps of the MCPR Section 34 grievance process. He has not provided the MSPB with a copy of a CAO Step 2 decision; nor has he provided any information in his response to the County's Motion to Dismiss that he filed the grievance with the CAO at Step 2 of the process. The CLRO's acknowledgment on August 27, 2024, that OLR had not received Appellant's to process at Step 2 further indicates that Appellant has failed to exhaust the steps of the MCPR Section 34 grievance process. Accordingly, for the foregoing reasons, the Board concludes that it lacks jurisdiction over Appellant's appeal.

ORDER

Because the Appellant has not provided the Board with a copy of the CAO's decision per MCPR § 35-4(d)(2), the Board concludes that it lacks jurisdiction over the instant appeal. Accordingly, the County's Motion to Dismiss is **GRANTED** and Case No. 24-06 is dismissed for lack of jurisdiction.

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*, an appeal 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 11, 2024


Barbara S. Fredericks
Chair