

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

IN THE MATTER OF

[REDACTED],

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

*
*
*
*
*
*
*
*
*
*
*
*

CASE NO. 25-01

=====

DECISION GRANTING MOTION TO DISMISS

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 15, 2024¹, challenging: 1) a disciplinary action for a three-day suspension, issued on July 31, 2024, 2) two disciplines involving written reprimands, one issued in April 2024, and one issued in May 2024, and 3) Appellant's FY2023 Performance Evaluation². The County filed a Motion to Dismiss (MTD) on October 2, 2024, stating that because the three-day suspension has been rescinded, the grievance related to that discipline is moot and that the MSPB lacks jurisdiction over Appellant's complaints regarding the two written reprimands and the FY23 Performance Evaluation. *See* County MTD.

The County provided proof with the MTD that the Department rescinded the three-day suspension, that the Office of Human Resources (OHR) deleted the suspension from Appellant's OHR file and in Oracle, and that the Department issued a timecard correction to ensure Appellant receives pay for the days she was suspended. *See* C. Ex. 2, Recission Memo, C. Ex. 3, OHR Emails Showing Removal of Suspension, and C. Ex. 4, Timecard Correction.

¹ The appeal was submitted electronically at 11:08 p.m. on August 14, 2024, a time when the MSPB office was not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

² Appellant stated the following in the Appeal Form she submitted to the MSPB: "... I am appealing to the [three-day suspension] NODA because there are inaccuracies with the basis explained in the memo for a 3-Day suspension and the two prior NODAs that I responded orally and in writing to Mr. [REDACTED] as requested . . . [i]n addition, I was denied the revaluation [sic] I requested to the HHS Director Dr. [REDACTED] for the FY23 Performance Evaluation to me by [REDACTED] . . ."

In fact, on October 2, 2024, Appellant also appeared to acknowledge the facts in the County's Motion.³ The Board's Office Services Coordinator provided Appellant with Montgomery County Personnel Regulation (MCPR) § 35-11(a)(4) which stated the opportunity for Appellant to respond to the motion before the Board rules on the motion. Appellant did not respond to the motion or otherwise object to the actions taken.

Pursuant to MCPR, §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where the action appealed has been completely rescinded. *See, e.g.*, MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014). The County has demonstrated to the Board that it has fully rescinded the three-day suspension.

The MSPB does not have jurisdiction over the two reprimands or Appellant's complaints regarding her FY2023 performance evaluation. 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) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction.").

Written reprimands may not be appealed directly to the MSPB. MSPB Case no. 19-07; MSPB Case No. 18-26 (2018); MSPB Case No. 15-10 (2015). A merit system employee must first exhaust the grievance procedure found in MCPR Section 34 before appealing a grievance to the MSPB. There is no evidence that Appellant has done so in this case. MSPB 17-28 (2017); MSPB 11-08 (2011). Furthermore, performance ratings may not be appealed to the MSPB. *See* MCPR 11-10(d) ("The CAO's decision on a grievance over an employee's performance rating may not be appealed to the MSPB.").

Accordingly, for the foregoing reasons, it is hereby **ORDERED** that the appeal in Case No. 25-01 be and hereby is **DISMISSED** as the grievance related to the three-day suspension is moot and the MSPB lacks jurisdiction over the balance of Appellant's claims.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to

³ In her October 2, 2024, email sent to the County's counsel and the OSC, Appellant stated that she had "seen the exchange of emails today about the actions taken to resolve this matter. I just would like to make sure if there is anything expected from my end."

Decision Granting Motion to Dismiss


MSPB Case No. 25-01

Page 3

Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Decision 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 18, 2024


Barbara S. Fredericks
Chair