

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

IN THE MATTER OF

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██████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 25-03

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ORDER DENYING MOTION TO DISMISS

Appellant, a uniformed Firefighter/Rescuer III, filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) concerning a Notice of Disciplinary Action - Dismissal issued by the Fire and Rescue Service (FRS). The appeal was submitted electronically on September 10, 2024, at 9:49 p.m., a time when the MSPB office is not open. The appeal was officially received by the Board on September 11, 2024, which is the next Board business day. *See* MSPB Case No. 18-13 (2018). On October 23, 2024, the County filed a Motion to Dismiss the appeal as untimely. Appellant did not file a response to the County’s Motion to Dismiss.

Appellant was initially served with a Notice of Disciplinary Action on August 8, 2024. County Motion Attachment (Cx.) A. On August 14, 2024, Appellant’s certified representative, Montgomery County Career Firefighters Association, International Association of Fire Fighters, AFL-CIO, CLC, Local 1664, (IAFF) filed an “Informal Grievance” with the County, noting that while contract grievance rights were provided, the August 8 Notice of Disciplinary Action lacked language providing Appellant with notice of his appeal rights to the MSPB. Cx. B. The County subsequently amended the Notice of Disciplinary Action, which was served on the Appellant on August 28, 2024. Cx. C. The Amended NODA included the following appeal rights notice:

An appeal or grievance may be filed in accordance with Article 38 of the CBA within twenty (20) calendar days of the employee's in-hand receipt of the final Notice of Disciplinary Action. You may appeal this action in accordance with Section 35 of the MCPR by noting an appeal to the Merit System Protection Board ("MSPB") within 10 working days of the date that you receive this notice. If you elect to have the Union file a grievance, you waive your right to file an appeal with the MSPB and if you elect to file an appeal with the MSPB, you waive your right to have the Union file a grievance on your behalf.

Appellant then appealed to the MSPB using the Board's online Appeal Form on September 10, 2024, at 9:49 p.m. Cx. D. On Thursday, September 12, 2024, the MSPB issued an acknowledgement of appeal letter, noting the following:

This is to acknowledge receipt of your online appeal of a dismissal, which was submitted on September 10, 2024, at 9:46 p.m. [sic] after Merit System Protection Board (MSPB or Board) business hours. Accordingly, the appeal is considered to have been officially received yesterday, the MSPB's next business day.

Cx. E. Thus, the MSPB officially received the Appeal on Wednesday, September 11, 2024.

In its motion, the County argues that the appeal was untimely, as it was filed more than twenty-nine (29) business days from the date the original NODA was issued, and eleven (11) business days from the date of the amended NODA.

Original NODA

The County's argument that the appeal is untimely as it was filed more than twenty-nine (29) days from the date of the original NODA is without merit. The original NODA was clearly procedurally deficient, as it lacked language regarding the Appellant's right to appeal to the MSPB, which is required per Montgomery County Personnel Regulations (MCPR), 2001 § 33-6(c)(1)(E).¹ Therefore, the Appellant was without notice regarding his appeal rights to MSPB when the original NODA was issued. Additionally, the Amended NODA changed the effective date of the discipline

¹ The MSPB recognizes that, per Article 30, Section 30.2(E)(6) of the Collective Bargaining Agreement between the County and the IAFF, the right to appeal to MSPB is not specifically included in the Notice of Disciplinary Action requirements. However, Per MCPR § 2-9, "[i]f a provision of these Regulations is inconsistent with a collective bargaining agreement, the agreement applies to any employee in the bargaining unit." The Board finds no conflict between the CBA language and the MCPR; rather the provisions can be read in harmony. The CBA language requires that the County include "a statement of the employee's right to grieve or appeal the disciplinary action, other than an oral admonishment." IAFF CBA § 30.2(E)(6). Because employees in the bargaining unit represented by IAFF may appeal disciplinary actions (excluding oral admonishments) to the MSPB per MCPR § 33-9(b), the right to appeal to MSPB must be included in a Notice of Disciplinary Action issued to a bargaining unit employee covered by the IAFF CBA.

from August 15, 2024, to September 2, 2024. Accordingly, the 10-day period for Appellant to file his appeal must be based upon the date the Amended NODA was served on Appellant.

Amended NODA

Generally, an employee has ten (10) “working days” from the date they receive a Notice for Disciplinary Action for dismissal to file an appeal with the MSPB. *See* MCPR § 35-3(a)(1). The MCPR defines “working days” as “[a]ll days except Saturdays, Sundays, and official or special County holidays.” *See* MCPR § 35-1(i). However, “calendar days” are used for calculating periods of time for appeals filed by uniformed fire/rescue employees, such as Appellant. *See* MCPR § 2-5(d). When a deadline falls on a Saturday, Sunday, legal holiday, or a day which MSPB is closed, the deadline is extended to the next business day that the MSPB is open. *See* MCPR § 2-5(c). Applying MCPR § 2-5(c) & (d) to the facts of this case, the deadline for Appellant to file his appeal was Monday, September 9, 2024. Because the appeal was officially received by the MSPB on Wednesday, September 11, 2024, the appeal is technically untimely.

Waiver of 10-day Period for Filing Appeal

The Board’s decision to dismiss an untimely appeal is discretionary. *See* MCPR § 35-7. In the past, the Board has not waived the 10-day period for filing an appeal without good cause. *See* MSPB Case No. 21-113 (2021) (29 working days after receipt); MSPB Case No. 20-06 (2020) (11 working days after receipt); MSPB Case No. 19-27 (2020) (11 working days after receipt); MSPB Case No. 14-43 (2014) (23 working days after receipt).


The Board notes that the appeal rights notice provided in the Amended NODA did not notify the Appellant that he had ten (10) calendar days to file his appeal; rather, the notice indicated that the Appellant had ten (10) *working days* to file his appeal. Applying the appeal rights notice language contained in the Amended NODA to the facts of this case by excluding Saturdays, Sundays, and Labor Day, the deadline to file the appeal was September 12, 2024. Because the appeal was officially received by the MSPB on September 11, 2024, the appeal would technically be timely filed per the appeal rights language in the Amended NODA.²

In circumstances where an appeal is untimely, the MSPB typically issues Show Cause Orders requiring appellants to provide good cause why the 10-day period for filing an appeal should be waived. Had Appellant not filed within the timeframe listed in the Amended NODA, the MSPB would have issued a Show Cause Order to Appellant. However, considering the circumstances surrounding this appeal, a Show Cause Order is not necessary. Because Appellant filed his appeal within the period that the County listed in the Amended NODA, and because the County failed to provide the proper appeal rights notice to Appellant, the Board finds good cause and will exercise its discretion and waive the 10-day filing period.

² The MSPB suggests that the County review its process and procedures to ensure the appeal language contained in future NODAs is consistent with the MCPR.

Accordingly, the Motion to Dismiss is **DENIED**.

For the Board
November 25, 2024


Barbara S. Fredericks
Chair