

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

**IN THE MATTER OF**

**[REDACTED]  
[REDACTED],**

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE NO. 25-05**

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**DECISION GRANTING MOTION TO DISMISS**

Appellant is a Program Manager I (grade 23) with the Montgomery County Department of Housing and Community Affairs who filed an appeal with the Merit System Protection Board (Board or MSPB) on October 14, 2024, challenging the County’s decision regarding Appellant’s recent promotion to Program Manager II (grade 25) and subsequent removal and reassignment back to her current position. On October 23, 2024, the County filed a Motion to Dismiss arguing that the MSPB lacked jurisdiction over the matter. Appellant did not file a response to the County’s Motion.

**FINDINGS OF FACT**

On February 11, 2024, Appellant was promoted from Program Manager I (grade 23) to Program Manager II (grade 25) with the Department of Housing and Community Affairs (DHCA). County Motion Exhibit (CX) 2. In accordance with Section 7 of the Montgomery County Personnel Regulations (MCPR), 2001, as amended, Appellant was subject to a six (6) month promotional probationary period. *Id.* The six (6) month period was scheduled to end on August 10, 2024. *Id.* On August 9, 2024, in accordance with MCPR Section 7, DHCA issued a Memorandum to Appellant extending her promotional probationary period for three (3) months, ending on November 10, 2024. *Id.* The stated purpose of the extension was “to further evaluate [Appellant] and [Appellant’s] ability to satisfactorily perform the duties of [the Program Manager II position].” *Id.*

On Wednesday, October 9, 2024, DHCA issued another Memorandum to Appellant, this time informing Appellant that effective Sunday, November 17, 2024, Appellant will be removed from the Program Manager II (grade 25) position and reassigned to a Program Manager I (grade 23) position. CX 3. The reason provided for the removal and reassignment was that Appellant's "performance in the new position has been inadequate during the promotional probationary period." *Id.* The Memorandum included the following appeal rights language:

Pursuant to MCPR Section 7-2(f)(4) and MCPR Section 34-9(a), you may file a grievance over your removal from the promoted position within 30 calendar days of the date of your removal from the promoted position and reassignment.

*Id.*

On October 14, 2024, Appellant appealed DHCA's action using the MSPB's online appeal form. CX 1. Per the online appeal form, Appellant characterized the action as an involuntary demotion. *Id.* Appellant noted a number of grievances in the online appeal form; however, Appellant did not state in any of these grievances that she was seeking review over the demotion and reassignment back to her former position from Program Manager II (grade 25) to Program Manager I (grade 23). Nor did she attach a copy of a final decision of a grievance from the Chief Administrative Officer on that specific allegation.

## ISSUE

Does the Board have jurisdiction over Appellant's appeal?

## ANALYSIS AND CONCLUSIONS

Appellant is appealing her removal from the Program Manager II (grade 25) position and reassignment back to the Program Manager I (grade 23) position, requesting the Board to reinstate her to the Program Manager II position. Per her appeal, Appellant suggests that the County's actions amounted to an involuntary demotion, which provides her the ability to file a direct appeal to the MSPB. In its Motion to Dismiss, the County contends that the MSPB lacks jurisdiction over the subject matter of this appeal, arguing that because Appellant was still within her promotional probationary period, Appellant cannot file a direct appeal to the MSPB. The County further contends that the MSPB also lacks jurisdiction because Appellant failed to either submit or pleaded to the existence of a final decision on a grievance from the Chief Administrative Officer (CAO) under the County's grievance procedure.

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).<sup>1</sup>

Generally, County non-probationary merit system employees have a right to a direct appeal to the MSPB for disciplinary actions resulting in suspension, demotion, or removal. *See* MCC § 33-12(a)<sup>2</sup>; MCPR § 35-2(a)<sup>3</sup>. Non-probationary merit system employees may also file a grievance or direct appeal with the MSPB if they are the subject of an involuntary demotion. *See* MCPR § 36-4(a)<sup>4</sup>. Notwithstanding the foregoing, employees in a promotional probationary status do not have a right to a direct appeal to MSPB if the County removes the employee from the promoted position and reassigned the employee during the promotional probationary period.

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<sup>1</sup> **35-7. Dismissal of an appeal.**

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

<sup>2</sup> **Montgomery County Code § 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.

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<sup>3</sup> **35-2. Right of appeal to MSPB.**

- (a) Except as provided in 29-7, of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the MSPB.

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<sup>4</sup> **36-4. Appeal of involuntary demotion.**

- (a) An employee with merit system status may appeal an involuntary demotion and the amount of the salary reduction associated with the demotion by filing a grievance under Section 34 of these Regulations or by filing a direct appeal with the MSPB under Section 35.

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All employees who are promoted must serve a promotional probationary period of at least six (6) months. *See* MCPR § 7-2(a)(4) & (b)(4)<sup>5</sup>. The purpose of the promotional probationary period is for the employee to “demonstrate that the employee is able to perform the duties of the new job satisfactorily.” *Id.* The promotional probationary period may be extended up to an additional three (3) months. *See* MCPR § 7-2(c)(1)<sup>6</sup>. If during the promotional probationary period the County determines that the employee’s performance has been inadequate, the County must remove the employee from the promoted position and “reassign the employee to a position at the same grade as the employee had before the employee was promoted.” MCPR § 7-2(f)(1)<sup>7</sup>. An employee who is

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<sup>5</sup> **7-2. Probationary period; promotional probationary period.**

- (a) Purpose of probationary period and promotional probationary period.

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- (4) An employee promoted to a full-time or part-time merit position must serve a promotional probationary period, as defined in Section 1-63, in order to demonstrate that the employee is able to perform the duties of the new job satisfactorily.

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- (b) Length of probationary period.

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- (4) The promotional probationary period is 6 months for an employee newly promoted to a full-time or part-time position.

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<sup>6</sup> **7-2. Probationary period; promotional probationary period.**

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- (c) Extension of probationary period or promotional probationary period.

- (1) The CAO may approve an extension of the probationary period or promotional probationary period for a person appointed or promoted to a full-time or part-time merit system position, up to 50 percent of the original probationary period.

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<sup>7</sup> **7-2. Probationary period; promotional probationary period.**

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- (f) Reassignment of a merit system employee during the promotional probationary period.

- (1) The OHR Director must reassign a merit system employee who has been promoted if the employee’s performance in the new position has been inadequate during the promotional probationary period. The OHR Director must reassign the employee to a position at the same grade as the employee had before the employee was promoted. The OHR Director

removed and reassigned during the promotional probationary period may file a grievance pursuant to the grievance procedures listed in MCPR Section 34. *See* MCPR § 7-2(f)(4)<sup>8</sup>. MCPR Section 7 does not provide merit system employees who are removed and reassigned during a promotional probationary period for inadequate performance the right to file a direct appeal with the MSPB. Accordingly, a removal and reassignment under MCPR § 7-2(f) is not an “involuntary demotion” for the purposes of determining direct appeal rights to the MSPB.

In this case, Appellant is not appealing an involuntary demotion; rather, she is appealing the County’s decision to remove and reassign her during the required promotional probationary period. The County extended the original promotional probation by three months, ending on November 10, 2024, consistent with the County’s authority per MCPR Section 7. The Appellant was still within the promotional probationary period at the time the County provided notice of the County’s action to Appellant on October 9, 2024. Consistent with MCPR § 7-2(f)(4), for Appellant to challenge the County’s action, Appellant was required to file grievance through the MCPR Section 34 grievance procedure rather than appeal directly to the MSPB.

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(a) & (e)<sup>9</sup>. In matters where a

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must not reduce the grade of, or terminate, another employee to reassign the employee who was promoted.

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<sup>8</sup> **7-2. Probationary period; promotional probationary period.**

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(f) Reassignment of a merit system employee during the promotional probationary period.

(4) A merit system employee who is reassigned during the promotional probationary period may file a grievance under Section 34 of these regulations.

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<sup>9</sup> **34-9. Grievance procedure.**

(a) Time for filing a grievance.

(1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or

(B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

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grievance must be filed 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 has not provided any proof that she has exhausted the various steps of the MCPR Section 34 grievance process. Accordingly, for the foregoing reason, the Board concludes that it lacks jurisdiction over Appellant's appeal.

### ORDER

For the reasons discussed above the County's Motion to Dismiss is **GRANTED** and the appeal is **DISMISSED WITHOUT PREJUDICE** because the Board lacks jurisdiction to address

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- (e) 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.		

Appellant's appeal. The Board encourages Appellant to review MCPR Section 34 to determine her appeal rights on the specific matter about which she is seeking Board review.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 21-7(f), *Appeals of Board decisions*, 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 5, 2024

  
Barbara S. Fredericks  
Chair