

Merit System Protection Board Annual Report FY2015

Members:

Raul E. Chavera, Jr., *Chair*
Michael J. Kator, *Vice Chair*
Charlotte Crutchfield, *Associate Member*

Executive Director:

Bruce P. Martin

**Montgomery County, Maryland
Merit System Protection Board
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FY 2015
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (Board or MSPB) is composed of three members who are appointed by the County Council pursuant to Article 4, Section 403, of the Charter of Montgomery County, Maryland. Board members must be County residents and may not be employed by the County in any other capacity. No member may hold political office or participate in any campaign for any political or public office during the member's term of office. One member is appointed each calendar year to serve a term of three years. Members of the Board conduct work sessions and hearings during the work day and in the evenings, as required, and are compensated with a set annual salary as prescribed by law. The Board is supported by a part-time Executive Director and an Office Services Coordinator.

The Board members in Fiscal Year 2015 were:

Raul E. Chavera, Jr.	Chair
Michael J. Kator	Vice Chair
Charlotte Crutchfield	Associate Member
Julie Martin-Korb	Vice Chair & Associate Member (until December, 2014)

DUTIES AND RESPONSIBILITIES
OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in the Charter of Montgomery County, Maryland, Article 4, "Merit System and Conflicts of Interest," Section 404, *Duties of the Merit System Protection Board*; the Montgomery County Code, Article II, Merit System, Chapter 33; and the Montgomery County Personnel Regulations, Sections 33-7 and 35-20.

1. Section 404 of the Charter establishes the following duties for the Board:

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall

establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

2. Section 33-7 of the Montgomery County Code sets out the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein must be exercised by the Board as needed to rectify personnel actions found to be improper. The Board must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, must establish its staffing requirements and define the duties of its staff.

* * *

(c) *Classification standards.* With respect to classification matters, the County Executive must provide by personnel regulation, adopted under Method (1), standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

- (1) The necessary components of class specifications;
- (2) Criteria for the establishment of new classes, modification or elimination of existing classes;
- (3) Criteria for the assignment of positions to classes;
- (4) Kinds of data required to substantiate allocation of positions;
- (5) Guidelines for comparing levels of job difficulty and complexity; and
- (6) Criteria for the establishment or abolishment of positions.

The Board must conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and must submit audit findings and recommendations to the County Executive and County Council.

* * *

(f) *Personnel regulation review.* The Merit System Protection Board must meet and confer with the Chief Administrative Officer and employees and their organizations from time to time to review the need to amend these regulations.

(g) *Adjudication.* The Board must hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(h) *Retirement.* The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

(i) *Personnel management oversight.* The Board must review and study the administration of the county classification and retirement plans and other aspects of the merit system and transmit to the Chief Administrative Officer, County Executive and County Council its findings and recommendations. The Board must conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations must cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this section.

(j) *Publication.* Consistent with the requirements of State law, confidentiality and other provisions of law, the Board must publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

3. Section 35-20(a) of the Montgomery County Personnel Regulations states:

The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

APPEALS PROCESS **DISCIPLINARY ACTIONS**

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. An employee must file an appeal in writing or by completing the Appeal Form on the Board's website. Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), § 35-4. In accordance with MCPR § 35-3, the employee must file the appeal within ten (10) working days after the employee has received a Notice of Disciplinary Action involving a demotion, suspension or removal. The appeal must include a copy of the Notice of Disciplinary Action. MCPR § 35-4(d)(1). Employees are encouraged to complete the on-line Appeal Form, which permits the uploading of documents and is available on the Board's website: <http://www.montgomerycountymd.gov/MSPB/AppealForm.html>.

In accordance with § 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within thirty (30) days after receiving a final notice of disciplinary action, unless another law or regulation requires that an appeal be filed sooner.

After receipt of the Appeal Form, the Board sends a notice to the parties, requiring each side to submit a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which potential witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is set by the Board in consultation with the parties. The Board requires all parties to comply with its Hearing Procedures. After the hearing, the Board prepares and issues a written decision.

During fiscal year 2015 the Board issued the following decisions on appeals concerning disciplinary actions.

TERMINATION

CASE NO. 14-42

FINAL DECISION AND ORDER

On April 9, 2014, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the Kensington Volunteer Fire Department's (KVFD) elimination of his administrative employee position.¹ Appellant asserted that KVFD "terminated him without proper notice and in retaliation for bringing to attention certain financial irregularities." Appellant's Appeal. In his appeal, Appellant requested that the Board restore him to his full-time position and provide back pay including full payment of all accrued and unpaid benefits. *Id.* The Board noted the appeal and sent it to the County and the President of KVFD for a response.

On April 17, 2014, Appellant notified the Board that the County should not be a party to this matter. The County filed a Motion to Dismiss, noting that Appellant was an employee of KVFD, and as such was not a Montgomery County merit system employee. In support of this proposition, the County filed an affidavit from the County's Office of Human Resources (OHR) Director, attesting to the fact that Appellant is not a County employee. *See* County's Motion to Dismiss, Exhibit (Ex.) 1.

Subsequently, on May 7, 2014, KVFD through its counsel filed a Motion to Dismiss and in the alternative, Motions for a More Definite Statement and to Postpone Appellee's Prehearing Statement. On June 4, 2014, Appellant, through his counsel, filed an Opposition to KVFD's Motion to Dismiss. Appellant's Opp'n to Motion to Dismiss (Opp'n). Appellant alleged that he is an employee of KVFD but is entitled to the protections of the County's Personnel Regulations. Appellant's Opp'n at 2.

On October 6, 2014, the Board granted the County's Motion to Dismiss. On October 7, 2014, the Board ordered the Appellant and the County to submit a brief on jurisdictional issues. On October 13, 2014, KVFD filed a Motion for One Week Extension of Time to November 3, 2014 to file a reply brief on jurisdictional issues to Appellant's brief submission addressing jurisdictional issues. On October 20, 2014, Appellant filed their brief submission addressing jurisdictional issues. On October 20, 2014, the Board issued an order denying KVFD's Motion for an Extension of Time and ordered KVFD to submit brief and Prehearing submission. in response to the Board's October 7, 2014 Based on the record of evidence in this case and the governing statutory provisions, the Board is requesting that all remaining parties submit briefs addressing jurisdictional issues.

¹ Appellant was an Administrative Services Coordinator with KVFD. *See* Appellant's Opp'n to Motion to Dismiss Ex. 1.

APPLICABLE LAW

Montgomery County Code, Section 21-7, Appeals of certain disciplinary actions, which states in applicable part:

- (a) *Jurisdiction.* Except as provided in subsection (g), the Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee.
- (b) *Filing Appeals.* Any party covered by this Section may appeal the action within 30 days after the action unless another law or regulation requires that an appeal be filed sooner. An appeal must not stay the disputed action.
- (c) *Procedures.* The Executive by regulation must establish procedures for hearing and deciding appeals under this Section. The regulation must specify which categories of appeals may be heard by a hearing examiner or otherwise must be decided on the basis of a written record. The Merit System Protection Board must hear an appeal if it complies with all applicable procedures. If the Board receives more than one appeal involving the same individual personnel action, the Board must consolidate the appeals.

...

- (g) *Exceptions.* This Section does not apply to, and the Board must not consider an appeal of, a personnel matter subject to an employee grievance procedure under a collective bargaining agreement.

Montgomery County Code, Section 21-16, Personnel administration for local fire and rescue departments, which states in applicable part:

- (a) **Applicability of County Regulations.** Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).
- (b) **Personnel services.** The Office of Human Resources must provide the following services to the local fire and rescue departments:
 - (5) Use of the Merit System Protection Board.

- (c) Limitations. Nothing in this Chapter means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis. Nothing in this Chapter abrogates the authority of each local fire and rescue department over such functions as hiring, promotion, discipline, and discharge of employees of that department; the assignment of administrative staff; and day-to-day assignments of volunteer personnel at that department. This Section does not diminish the authority of County government to act under Sections 21-13 and 21-14 or the authority of the Fire Chief to discipline an employee or volunteer of a local fire and rescue department as provided in Section 21-3(g).

ISSUES

Does the Board have jurisdiction over the instant appeal?

ANALYSIS AND CONCLUSIONS

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulations. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; MSPB Case No. 11-09; MSPB Case No. 11-37; MSPB Case No. 13-03; *see also, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The County Code is clear that "the Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee." Montgomery County Code (Code) Section 21-7(a). *Compare* 1998 L.M.C., ch. 4, § 1 (codified at Code Sec. 21-7(g) (1998)) ("Any employee of or volunteer at a local fire and rescue department or any other aggrieved person may appeal a decision of the Commission involving a specific personnel action, or the failure to take any such action, to the Merit System Protection Board as if the aggrieved person were a County merit system employee.") *with* 2004 L.M.C., ch. 5, § 1 (codified at Code Sec. 21-7(f) (2005)) ("[A] volunteer at a local fire and rescue department may appeal a decision of the Commission concerning a specific personnel action, or the failure to take any such action, to the Merit System Protection Board as if the appellant were a County merit system employee.") *with* 2009 L.M.C., ch. 5, § 1 (codified at Code Sec. 21-7(a) (2009)) ("[T]he Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee.").

The record of evidence establishes that Appellant was an employee of the local fire and

rescue department, but not a volunteer firefighter or rescuer. Further, the record does not establish that the Appellant's action involves a "removal, demotion or suspension of, or other disciplinary action." Appellant's position was eliminated by letter dated February 24, 2014. Appellant's Opp'n Ex. 2. Based on this, the Board is not convinced that it has jurisdiction in this matter and that Appellant is entitled to a hearing. In order to address the Board's various jurisdictional questions, the Board is ordering that parties submit briefs in response to the Board's order.

The Board is of the opinion that all other arguments can adequately be addressed by the Board at the hearing on the matter if the Board determines it has jurisdiction.

ORDER

The Board hereby orders Appellant to submit a brief addressing jurisdiction by **COB October 20, 2014**. The Board hereby orders KVFD, through counsel,² to submit its response to Appellant's brief by **COB November 3, 2014**. If the Board determines it has jurisdiction, an expedited Pre-Hearing and Hearing will be scheduled for mid November 2014 in this matter.

For the Board
October 20, 2014

² The Maryland Court of Special Appeals has ruled that practice before the Board constitutes the practice of law. See Lukas v. Bar Association of Montgomery County, Maryland, Inc., 35 Md. App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977).

DEMOTION AND SUSPENSION

CASE NO. 15-25

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Director of the Department of Correction and Rehabilitation to suspend Appellant for thirty days and demote him to the rank of Corporal. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was a Lieutenant (Shift Administrator) at the time this matter took place. *See* Notice of Disciplinary Action – Thirty (30) Day Suspension and Demotion to the Rank of Corporal (NODA), dated 02/19/15. On February 19, 2015, Appellant received a NODA, notifying him that he would be suspended for thirty days,¹ commencing on March 2, 2015, and then his demotion to Corporal would become effective after the period of his suspension was served. *Id.*

On March 4, 2015, Appellant filed an appeal with the Board. Subsequently, the County filed a Motion to Dismiss the appeal, alleging that Appellant retired from his position as a Lieutenant on March 1, 2015, prior to the effective date of any disciplinary action, to include a demotion or suspension. County's Motion to Dismiss at 1. Appellant, through counsel, filed a Response to the County's Motion to Dismiss (Appellant's Response), agreeing with the County's assertion that he did retire effective March 1, 2015, but alleging that the Department did in fact penalize him as it withheld his last paycheck. Appellant's Response at 1.

APPLICABLE LAW AND REGULATION

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-7, County Executive and Merit System Protection Board responsibilities, which states in applicable part,

...

- (e) **Adjudication.** The Board shall hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended)

¹ The NODA indicated that the thirty-day suspension would be taken as a 15-day forfeiture of annual leave and a 15-day leave without pay. *See* NODA.

February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), Section 35, Merit System Protection Board Appeals Hearing and Investigations, which states in applicable part

...

35-2. Right of appeal to MSPB.

- (a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status or a Local Fire and Rescue Department employee has the right to 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.

ISSUE

Is the instant appeal moot?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction is Limited.

The Board's jurisdiction is not plenary but rather is limited to that which is granted it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; MSPB Case No. 11-09; MSPB Case No. 11-37; MSPB Case No. 13-03; *see also, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

As Appellant Retired Before Either Appealable Action Took Effect, His Appeal Is Moot.

The County Code provides that the MSPB "must hear and decide disciplinary appeals . . . upon the request of a merit system employee who has been removed, demoted or suspended . . ." Appellant filed his appeal on March 4, 2015. Appellant's Appeal. However, prior to filing his appeal he retired from his position with the County on March 1, 2015, one day before his suspension action was scheduled to take effect. Appellant's Response at 1. Since the Appellant was retired at the time his suspension was to begin and prior to when his demotion would occur, neither the suspension nor the demotion became effective and this appeal is moot. *See, e.g., Sarginson v. Dep't of Army*, 21 M.S.P.R. 764, 765 (1984).

Appellant argues his appeal is not moot due to his retirement as the County Code indicates that if Appellant were rehired on a full-time basis his pension would be suspended and if rehired on a part-time basis as his pension would be partly suspended. Appellant's Response

at 1. Appellant's argument has no effect on the fact that the Board lacks jurisdiction over his appeal.

Appellant also alleges that although his retirement was effective March 1, 2015, the Department did in fact penalize him as it withheld his last paycheck. Appellant's Response at 1. The Board finds that Appellant's allegation about not being paid does not state a claim that he was in fact suspended but rather alleges a separate violation of the Maryland Wage Payment law, which is not within the Board's statutory jurisdiction.

ORDER

Based on the above analysis, the Board dismisses Appellant's appeal as moot.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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
May 20, 2015

APPEALS PROCESS DENIAL OF EMPLOYMENT

Montgomery County Code, § 33-9(c), permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with § 6-14 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015), an employee or an applicant may file an appeal directly with the Board 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.

Section 35-3 of the MCPR specifies that an employee or applicant has ten (10) working days after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position to file an appeal with the Board. The appeal must be filed in writing or by completing the Appeal Form on the Board's website, available at: <http://www.montgomerycountymd.gov/MSPB/AppealForm.html>. The appeal must include a copy of the notification of nonselection or nonpromotion. MCPR § 35-4(d)(3). Copies of such documents may be uploaded with the online Appeal Form.

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

During fiscal year 2015, the Board issued the following decisions on appeals concerning the denial of employment.

EMPLOYMENT DECISIONS

CASE NO. 14-39

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal¹ challenging his nonselection for the position of Transit Information System Technician (TIST), with the Department of Transportation, Division of Transit Services ("DOT" or "the Department"). The County filed its response (County's Response) to the appeal on March 5, 2014, which included three attachments.² Appellant filed a response (Appellant's Reply) to the County's Response. On June 25, 2014, the Board issued a letter notifying Appellant of its decision to extend the time for issuing a decision in his appeal. On July 29, 2014, the Board forwarded a request to the County for additional information.³ On August 6, 2014, the County filed its response to the Board's July 29, 2014 request. (County's Supp. Response). On August 11, 2014, Appellant filed a response to County's August 6, 2014 submission. (Appellant's Supp. Reply).

This appeal followed.

¹ The Board notes that in MSPB Case No. 13-12, the Board found that Appellant had met the minimum qualifications for the Transit Information System Technician position, and ordered that Appellant be given priority consideration for the next Transit Information System Technician position. MSPB Case No. 13-12 (2013).

² The County's attachments were: Attachment 1 – Job Vacancy Announcement for the Transit Information System Technician position (#IRC11302); Attachment 2 – Affidavit of P.P. and Attachment 3 – December 26, 2013 Bypass Priority Candidate Letter from Chief, Division of Transit Services to Director of Office of Human Resources.

³ Prior to rendering a decision, the Board requested the following additional information:

- Copy of signed Selection Panel Consensus Evaluation Form for Appellant's interview for the TIST position.
- Copy of the signed Selection Panel Consensus Evaluation Form for selectees for the TIST position.
- Copy of Appellant's application submission in response to the TIST position.
- Copy of selectees' application submissions in response to the TIST position.
- Copy of written justification for not selecting priority applicants to the TIST position.
- Any other evidence that demonstrates that Appellant was provided with priority consideration in compliance with the Board's July 10, 2013 Order in MSPB Case No. 13-12.

FINDINGS OF FACT

Appellant submitted his application for the Transit Information System Technician, #IRC11302, position on July 10, 2013. County's Response at 1. Appellant was given priority consideration status for the TIST position. *Id.* at 2. Appellant was interviewed in person on November 27, 2013. *Id.* On December 26, 2013, the Chief, Division of Transit Services forwarded a letter requesting authorization to bypass the selection of the Appellant, a candidate with priority consideration, for the vacant TIST position. *Id.*

On February 6, 2014, the County informed Appellant by email that Appellant had not been selected for the TIST position. Appellant's Reply at 3. This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- The County was ordered by the Board to give Appellant priority consideration for the TIST position.
- Appellant believes that he has been overlooked for the position which he performed for nearly two and half years.
- Appellant has more experience than the two candidates chosen for the TIST position.
- Appellant believes that he continues to be treated differently from other individuals who have participated in the PACE program.⁴
- Appellant wants the Board to retroactively promote him to the TIST position.

County:

- Appellant was given priority consideration in the application process for the TIST position.
- Priority consideration does not guarantee that a candidate will be selected for appointment, reassignment or promotion.
- Appellant was interviewed on November 27, 2013 prior to other candidates being considered for the TIST position.
- At the conclusion of the interview, the consensus of the panel was that Appellant should not be offered the position because he did not demonstrate an acceptable level of skill and experience.
- Due to the interview results, the Department forwarded a bypass letter to the Director of OHR requesting approval to not select Appellant and to interview other candidates for the TIST position.
- Based on the contents of the bypass letter, the OHR Director approved the Department's recommendation not to select Appellant for the position and

⁴ PACE stands for Position and Career Education System. *See* PACE Contracts on OHR's website available at <http://www.montgomerycountymd.gov/ohr/staffing/staffing.html>.

- allowed the Department to interview and consider other candidates.
- The County conducted a fair interview process that did not violate the law or personnel regulations.
- All of the interviewees were given time to review a copy of the questions prior to their interview and all were asked the same questions.
- Appellant cannot meet his burden of proof under the Personnel Regulations to show that the County’s decision on his application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **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 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.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board, which states in applicable part,

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:
 - (3) Order priority consideration is given to an employee found qualified before consideration is given to other candidates; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, and December 11, 2012), Section 1, Definitions, which states in applicable part:

- 1-56. Priority consideration:** Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others is considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February

15, 2005, October 21, 2008, March 9, 2010, and July 23, 2013), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which states in applicable part:

7-1. Use of eligible list. If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

- (a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

Montgomery County Personnel Regulations (MCPR), 2001, Section 27, Promotion, which states in applicable part:

27-1. Policy on promotion.

- (d) A department director must not give a temporary promotion to an employee unless the employee:
 - (2) Meets the minimum qualifications for the vacant position.

ISSUES

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

In MSPB Case No. 13-12, the Board ordered that "Appellant is to be placed on the eligible list for the Transit Information Systems Technician" and that "Appellant is to be granted priority consideration for the next Transit Information Systems Technician vacancy". Under the applicable Personnel Regulations, priority consideration requires the County to consider "a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion." MCPR § 1-56.

In the instant case, the County interviewed the Appellant on November 27, 2013. The other candidates were not interviewed until January 17, 2014. Appellant was interviewed by an appropriate panel and received a below average rating. At the conclusion of the interview, the consensus of the panel was that "Appellant should not be offered the position because he did not demonstrate an acceptable level of skill and experience for any of the five criteria for the position – Job Qualification, Problem Solving/Judgment, Results Orientation, Planning and Organization, and Personal Accountability and Ethics."⁵ County's Response at 2. Appellant responded to the

⁵ The Board finds, and Appellant does not contest, that the County's selection criteria were legitimate and valid criteria upon which to base a selection decision for the TIST position.

County's submission, contending that the "below average" rating was "an effort to overshadow the lack of integrity exercised by the interviewing panel in the selection made to fill the two vacant positions" Appellant's Supp. Reply.

To afford bona fide priority consideration, the County was required to: (1) refer the Appellant's application for consideration by itself, without competition or comparison with other candidates, and (2) afford "real, actual, genuine, and not feigned" consideration of his qualifications. *See, e.g., Perry v. Dep't. of the Army*, 992 F.2d 1575, 1579 (Fed. Cir. 1993). Whether priority consideration "was given must be reviewed based on the totality of the circumstances." *Id.* Priority does not guarantee selection.

Referral for Non-Competitive Consideration

With respect to the first requirement – referral for non-competitive consideration – the County asserts that Appellant was "interviewed before other candidates were considered." County's Response at 2. Appellant does not contest that the County did so. Accordingly, the County has fulfilled the requirement to refer Appellant's application for consideration by itself, without competition or comparison with other candidates. *Perry*, 992 F. 2d at 1579.

Genuine Consideration

With respect to the second requirement – "real, actual, genuine, and not feigned" consideration – Appellant claims that "after nearly two years in the position one would logically conclude that I would've rated higher in at least one if not more of the areas being evaluated." Appellant's Supp. Reply. The Board finds otherwise.

The County offered detailed reasons why the interview panel rated Appellant below average in all categories. For example, Appellant's response to the tools and test equipment question only indicated that he had experience working with a multi-meter, screwdriver, and utility knife. When asked about inventory management, Appellant said that he used whatever was on his work computer without providing any details about the programs or processes in place. With respect to customer service, Appellant mentioned that he worked with bus operators under time constraints, but provided no examples or when or how he was able to communicate effectively with individuals who lack a technical background. When asked about performing preventative maintenance, Appellant said that it was more important to be big picture oriented, whereas the desired response was that it is more important to be detail oriented so as not to miss anything when performing all the steps in the process. These detailed examples of Appellant's deficient performance in his interview demonstrate that the County made a "real, actual, genuine, and not feigned" evaluation of Appellant's application. *Perry*, 992 F.2d at 1579.

The Board does not find any evidence in the record to substantiate Appellant's belief that he was not provided with priority consideration. Rather, it appears that Appellant simply did not interview well. Accordingly, we find that under the totality of the circumstances, the County has afforded the Appellant bona fide priority consideration.

ORDER

Based on the above, the Board denies Appellant's appeal of his nonselection for the position of Transit Information System Technician, IRC11302.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
September 30, 2014

CASE NO. 14-43

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging his nonselection for a Program Manager I (PM) position with the Montgomery County Division of General Services (DGS). The County filed its response (County's Response) to the appeal on May 19, 2014 which included six attachments.¹ Appellant filed a response (Appellant's Reply) on June 9, 2014, which included one attachment.² The appeal was considered and decided by the Board.

FINDINGS OF FACT

On March 24, 2014, Appellant, an Equipment Maintenance Crew Chief (EMCC) with the Division of Fleet Management Services (Fleet Management) in the Department of General Services (DGS) applied for a position of Program Manager I (PM) with Fleet Management in DGS, IRC13882. County's Response at 1. The Office of Human Resources (OHR) received thirty-three applications for this position. *Id.* According to the County, OHR reviewed the applications to determine which applicants met the minimum qualifications for the position. *Id.* Four of the thirty-three met the minimum qualification and were placed on the eligible list with a rating of "Qualified." *Id.* On March 26, 2014, Appellant was notified of OHR's determination that he was not qualified for the PM position. Appellant's Appeal; Appellant's Reply at 1; County's Response at 1.

¹ The County's attachments were: Attachment 1 – Job Vacancy Announcement for the Program Manager I position; Attachment 2 - Affidavit of the Human Resources Specialist; Attachment 3 – Copy of the Class Specification for the Program Manager I position; Attachment 4 – Copy of the Appellant's Resume; Attachment 5 – Copy of the Class Specification for the Appellant's current position; and Attachment 6 – Explanation of Equivalencies for Education and Experience that appears on OHR website..

² Appellant's attachment was a Copy of the Job Vacancy Announcement for the Program Manager I position.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant applied for the PM position and was denied the position because OHR notified him that he did not meet the minimum qualification for the position.
- Appellant was told that he did not meet the minimum qualifications because he did not have the professional experience required by the PM vacancy announcement.
- Appellant was made to understand that professional experience means that he did not have experience in a job that required a college degree.
- Appellant recently learned that OHR interviewed at least two candidates who are in the same class and grade as he is currently in with the County.
- To the best of Appellant's knowledge, these two individuals have never held a job that requires a college degree.
- Appellant has noted inconsistencies surrounding the professional experience requirements with PM vacancy announcements.
- Appellant decided to appeal based on information that he did not discover until after the ten (10) day filing period.
- Appellant meets all minimum qualifications and most preferred criteria for the PM position.
- Appellant wants to be retroactively placed on the eligible list as Qualified and granted an interview.

County:

- Appellant's appeal is untimely.
- Appellant was notified on March 26, 2014 that he did not meet the minimum qualifications for the position because of his lack of professional experience.
- Appellant should have filed a timely appeal at the time he was notified of his nonselection.
- The period of ten (10) working days to file an appeal with the MSPB under the Personnel Regulations begins to run after an applicant receives notice that he will not be appointed to a County position.
- Even if Appellant's complaint was timely, there is no basis for granting his appeal.
- The OHR Business Operations, Classification and Compensation team determines the requirements for each and every County position. This team determines whether a position is professional, technical, clerical, etc. by applying universal classification standards.
- The Job Vacancy Announcement and the Class Specification states that the PM is a professional level position.
- Appellant cannot meet his burden of proof under the personnel regulations and County Code to show that the County's decision on his application was arbitrary and capricious,

- illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- The Board should dismiss the appeal based on it being untimely.

APPLICABLE CONTRACTUAL PROVISIONS, CODE PROVISIONS, AND REGULATIONS

Montgomery County Code, Chapter 1, General Provisions, Article 3. The Meaning of Provisions of This Code, Section 1-301, *Rules of interpretation*, which states in applicable part,

The following rules of interpretation apply to resolutions adopted by the Council and to laws enacted by the Council in legislative session:

- (3) *How to compute deadlines.* If the Code requires or allows a person to perform an act within a specific time period measured in days, the person must compute the deadline in the following manner:
 - a. Count the day after the event as the first day of the period, if the period follows an event.
 - b. Count the remaining number of days in the period
 - c. Do not count the last day if it is a Saturday, Sunday, or legal holiday or if the office where the person must file a paper or perform an act is not open during the regular hours of that office.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **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 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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, and October 21, 2008), Section 6, *Recruitment and Application Rating Procedures*, which states in applicable part:

6-4. Reference and background investigation requirements; Review of applications.

(a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

35-2. Right of appeal to MSPB.

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

35-3. Appeal period.

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee: . . .

(5) knows or should have known of a personnel action.

(b) An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position.

ISSUE

Is Appellant’s appeal timely?

ANALYSIS AND CONCLUSIONS

Appellant’s Appeal To The Board Is Untimely.

Under applicable personnel regulations, Appellant had ten (10) working days to file an appeal challenging a denial of employment. . It is undisputed that Appellant was notified by the County on March 26, 2014, of its determination that Appellant did not meet the minimum qualifications for the vacant PM position in DGS. Thus Appellant had notice of his denial of employment on March 26, 2014.³ Ten working days from that date would have been April 9, 2014. However, Appellant did not file his appeal until April 28, 2014, more than ten working days after it was due. *See* Appellant’s Appeal.

³ It is well-established under Board precedent that a denial of employment occurs when the County provides notice that an employee or applicant does not meet the minimum qualifications for a position or other notice that the employee or applicant will not receive further consideration for a position. MSPB Case No. 14-12; MSPB Case No. 10-10; *cf.* MSPB Case No. 14-41 (where Appellant has been deemed “qualified” for position and placed on eligible list, but no selection has been made yet, Board lacks jurisdiction over appeal because no denial of employment has occurred); MSPB Case No. 14-16 (same); MSPB Case No. 14-14 (same).

Appellant acknowledges that his appeal was untimely but he asserts that he was unaware of the basis for filing an appeal until he learned that two individuals, who in his view had comparable qualification to his own, were deemed qualified and interviewed for the position. Appellant further asserts that the Board, by sending an Acknowledgement Order in response to his facially-untimely appeal, has already determined that his appeal is timely. Neither of these arguments excuses the untimeliness of his appeal.

As an initial matter, the Board's issuance of an Acknowledgment Order in response to the filing of Appellant's appeal in no way can be deemed an adjudication of any issue in his appeal. Nor could it reasonably be read to do so. There is no reference in that Order to the timeliness of Appellant's appeal and nothing from which a conclusion could be drawn that the Board had made a final decision on the timeliness of the appeal. In certain circumstances the Board will issue Show Cause orders requesting that the parties address specific issues. But irrespective of whether such an order has been issued, unless and until the Board issues an order addressing a specific issue, that issue remains open through the Board's final disposition of the appeal.

Appellant's second argument is similarly unavailing. Appellant complains in this case that the OHR wrongly determined that he was unqualified for the PM position. His assertion that "it would have been impossible . . . to have filed an appeal in good faith within ten (10) days of notification, as [he] was unaware of any wrongdoing at the time" is simply incorrect. That he may have discovered evidence at a later date that might have supported his claim does not change the fact that at the time he was notified of the determination of his lack of qualifications for the position he knew or should have known whether he believed that decision was correct. Appellant's challenge hinges on the County's interpretation of the requirement for "professional experience." If he thought OHR had erroneously applied that definition with respect to his application then he should have timely filed an appeal. That he subsequently discovered evidence that he believed might have bolstered his appeal does not excuse the untimeliness of his appeal.

The Board in the past has not waived the 10-day filing limit for filing an appeal and there is no basis for it to do so here. Accordingly, Appellant's appeal must be dismissed as untimely.

ORDER

Based on the foregoing, the Board hereby dismisses Appellant's appeal regarding his denial of employment based on OHR's determination that he did not meet the minimum qualifications for the PM position in DGS as untimely.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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
October 6, 2014

CASE NO. 14-45

FINAL DECISION AND ORDER

On May 13, 2014 Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the May 9, 2014 determination by the Office of Human Resources (OHR) that he did not meet the minimum qualifications for the Program Manager II (911 Coordinator), IRC 14342 position with the Montgomery County Police Department, (Department). On June 10, 2014, the County notified the Board that OHR has suspended the recruitment process for the Program Manager II position in order to review the classification. This process will include in part a review of the duties, responsibilities, and minimum qualifications for this position.

It is longstanding Board precedent that an appeal must be dismissed as moot where an agency completely rescinds the action appealed. MSPB Case No. 12-06 (2006); MSPB Case No. 14-11 (2014); *see Hodge v. Dep't of Veterans Affairs*, 72 M.S.P.R. 470 (1996). The County has demonstrated to the Board that it has rescinded the action appealed by suspending the recruitment process in order to review the classification and notifying all candidates who applied for IRC 14342 that the position will not be filled at this time. Accordingly, the Board hereby dismisses the appeal.

ORDER

Based on the above, the Board hereby dismisses Appellant's appeal based on mootness.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
July 30, 2014

CASE NO. 15-01

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board

(Board or MSPB) on Appellant's appeal¹ challenging the determination by the Office of Human Resources' (OHR's) Director to rescind a conditional offer of employment made to Appellant based on his failure to disclose information he was directly asked about in the interview process. The County filed its response (County's Response) to the appeal, which included five attachments.² Appellant filed a reply (Appellant's Reply) to the County's Response. Subsequently, after a review of the written record, the Board requested the County provide additional information. The County filed its response to this request (County's Supplemental Response), which included eight attachments.³ The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant works for BAE Systems, Information Solutions. Appellant's Response at 1; Appellant's Appeal, Attach. 4. He serves as a Suspense Analyst for BAE's client, the Pension Benefit Guaranty Corporation, processing premium payments. *Id.*

Appellant submitted his application for the Administrative Specialist II, Grade 21 position, with the Montgomery County Employee Retirement Plans (MCERP). County's

¹ After filing his appeal on July 8, 2014, Appellant provided the Board with various documents concerning his appeal on July 14, 2014. Appellant did not, however, label his documents. For ease of reference, the Board has done so. Appellant's attachments to his appeal consist of: Attachment (Attach.) 1 – Withdrawal of Conditional Offer of Employment Letter from OHR's Director, dated 07/02/14; Attach. 2 – Financial Background Disclosure Letter from Appellant to N.M.; Attach. 3 – Re-announcement of Job Vacancy for the Administrative Specialist II position (#IRC13740); Attach. 4 – Appellant's Resume; Attach. 5 – Email from Appellant to L.H., dated 06/10/14; Attach. 6 – Six emails between Appellant and M.P., with various dates, concerning the conditional offer of employment; Attach. 7 – Three emails between Appellant and N.M., all dated 06/12/14, concerning the Background Investigation; Attach. 8 – Three emails between Appellant and M.P., dated 06/19/14, concerning the status of the conditional offer of employment; Attach. 9 – Kroll Release Form; and Attach. 10 – Financial Background Disclosure Letter from Appellant to N.M.

² The County's attachments were: Attach. 1 – Email from M.P. to Appellant, dated 06/11/14; Attach. 2 – Withdrawal of Conditional Offer of Employment Letter from OHR's Director, dated 07/02/14; Attach. 3 – Affidavit of L.H. (H. Affidavit); Attach. 4 – Affidavit of D.C. (C. Affidavit); and Attach. 5 – Financial Background Disclosure Letter from Appellant to N.M.

³ The County's attachments were: Attach. A – Selection Panel Consensus Evaluation Form for Appellant's interview, dated 05/10/14; Attach. B – Selection Panel Individual Evaluation Forms for Appellant's interview, all dated 05/08/14; Attach. C – L.H.'s interview notes; Attach. D – M.H.'s interview notes; Attach. E – Kroll Background Investigation of Appellant; Attach. F – L.H.'s Check-list regarding General Office Overview for Appellant's interview; Attach. G – Affidavit of L.H. (H. Affidavit II); and Attach. H. – Job Vacancy Announcement for the Administrative Specialist II position (#IRC13740).

Response at 1. The primary responsibility of MCERP is to administer the retirement benefit programs, including handling the processing and payment of retirement annuities, as well as the investment of the trust funds. County's Supplemental Response, Attach. G, H. Affidavit II. The incumbent of the Administrative Specialist II position in MCERP processes annuity payments for retirees, prepares quarterly and annual financial reports, processes and tracks revenues and expenditures, and ensures the activities of the County's Retirement Plans are in compliance with governance requirements, and administrative policies and procedures. County's Supplemental Response, Attach. H at 2; *see also* Appellant's Appeal, Attach. 3, H. Affidavit.

During the selection process for the Administrative Specialist II, Appellant had two separate interviews – one with an interview panel⁴ on May 8, 2014 and one solely with MCERP Executive Director L.H. on June 10, 2014. County's Response, Attach. 3, H. Affidavit & Attach. 4, C. Affidavit. According to both Ms. H. and Mr. C., during Appellant's May 8 interview, Ms. H. advised Appellant that because of the nature of MCERP's business, MCERP would be conducting a background investigation of the selected applicant, which would include a search of the applicant's criminal history, department of motor vehicles driving record and credit information. *Id.* Both Ms. H. and Mr. C. asserted that Appellant was specifically asked during the May 8 interview whether there was any negative information in his background that should be disclosed and he responded "no" to this question. *Id.* According to Ms. H., she utilized her Check-list during Appellant's May 8 interview and personally checked off each item after discussing it with Appellant. County's Supplemental Response, Attach. G, H. Affidavit II. Item 5 on the Check-list states as follows:

Background Investigation – why it is performed, how it is performed, and that it includes criminal, credit, and department of motor vehicle reports. Inform the candidate that, due to the processing of millions of dollars in payments, the position needs to have a clean report from all 3 sources. Ask whether there is anything negative on the applicant's report.

County's Supplemental Response, Attach. F. Ms. H. states that after discussing Item 5 with Appellant and Appellant responding that there was nothing negative in his background, she wrote "No background issues" on her interview notes. County's Supplemental Response, Attach. G, H. Affidavit II; *see also* County's Supplemental Response, Attach. C.

During Ms. H.'s second interview with Appellant, she purportedly indicated to him that she did not want to waste his time if there was any negative information in his background that might preclude MCERP from offering him the position.⁵ County's Response, Attach. 3. Ms. H. states that Appellant again assured her that there was nothing he needed to disclose. *Id.*

On June 11, 2014, Appellant was extended a conditional offer of employment with

⁴ The interview panel consisted of L.H., D.C., R.G., C.C., C.R. and M.H. County's Response, Attach. 3 & Attach. 4.

⁵ As noted *supra*, the only attendees at this interview were Ms. H. and Appellant. County's Response, Attach. 3, H. Affidavit.

MCERP, based on completion of a successful background investigation and medical history review. County's Response, Attach. 1; Appellant's Appeal, Attach. 6. Attached to the email extending the conditional offer of employment sent to Appellant by M.P. were the Kroll Disclosure and Release Form (Kroll Form) for Appellant's background investigation and a Medical History Form for Appellant's medical history review. *Id.* Appellant completed the Kroll Form and sent it along with a Letter, entitled Financial Background Disclosure, to N.M. Appellant's Appeal, Attach. 7, Attach. 9 & Attach. 10; *see also* County's Response, Attach. 5. In the Financial Background Disclosure letter, Appellant indicated that he had delinquent accounts on his credit report which would be seen once the County's background check was completed. *Id.* According to Appellant, his mother, without his knowledge opened various credit cards in his name. *Id.* Once he found out, he came to an agreement with his mother to settle the debts with the creditors. *Id.*

Appellant followed up with OHR about the status of his conditional offer of employment on June 19, 2014. Appellant's Appeal, Attach. 8. He was informed by M.P., a Human Resources Specialist in OHR, that he had successfully passed the medical requirement for the position but that OHR was awaiting receipt of his educational credentials as well as the results of his background investigation. *Id.*

By letter dated July 2, 2014, the OHR Director notified Appellant he was withdrawing the conditional offer of employment, based on Appellant's failure to disclose negative information on his credit report during the interview process. County's Response, Attach.2; Appellant's Appeal, Attach. 1. Appellant was informed by the OHR Director that Appellant's failure to disclose the negative information during his interviews resulted in the County having serious misgivings about Appellant's integrity and ability to be involved with financial transactions. *Id.*; *see also* County's Response, Attach. 3, H. Affidavit.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant currently works in the Financial Operations Department of the Pension Benefit Guaranty Corporation, a federal government agency that protects the retirement incomes of American workers.
- As a Suspense Analyst, Appellant is responsible for processing daily premium payments that exceed over one million dollars.
- As Appellant passed the federal government's background investigation without any problems, Appellant didn't view his minor credit issues from the past as negative background information that would cause his offer to be rescinded.
- Neither Ms. H. nor Mr. C. are being truthful about whether Appellant was questioned by Ms. H. about his credit history. The word "credit" was not even mentioned at either interview.
- While Ms. H. did inform Appellant that there would be a background investigation, she only mentioned looking into Appellant's criminal history.

- The only concern Appellant had during the interview process was his disappointing grades at Slippery Rock University. However, Appellant didn't hide this information; instead he let Ms. H. know he only had a 2.5 grade point average.
- Appellant also told Ms. H. that he had been evicted from his apartment in 2010 as he didn't have enough financial aid to cover the rent.
- The hiring procedure that the MERP has adopted has and will continue to have a disparate impact on African American candidates. There isn't an African American male on the MERP staff.⁶
- Minorities are individuals growing up in the ghetto and living in poverty and it has become a norm within our culture for our parents to take out credit cards in our name and use it as their own.
- Trust and integrity are an important aspect of Appellant's life. Ms. H. and Mr. C. are the ones who lack integrity.

County:

- The vacancy announcement for the Administrative Specialist II indicates that the selected candidate would be required to successfully complete a medical history review and background investigation prior to appointment.
- Both Ms. H. and Mr. C. attest to the fact that during the May 8 interview of Appellant, Appellant was specifically asked if there was any negative information in his background that should be disclosed. Appellant replied: "No".
- During Appellant's second interview with Appellant, Ms. H. bluntly stated to Appellant that MCERP did not want to waste his time if there was any negative information in his background that might preclude an offer of employment. Again, Appellant stated there was nothing that he needed to disclose.
- When Appellant was extended a conditional offer of employment, the offer was conditioned on successful completion of a background investigation.
- The conditional offer letter also noted that the offer was conditioned on the accuracy of non-medical information that Appellant had provided during the application process, and on the absence of any additional information that materially bears upon Appellant's qualifications and suitability for employment.
- Finally, the conditional offer letter indicated that while Appellant's medical fitness for employment was under review, if the County received new non-medical information evidencing a job-related factor that would hinder Appellant's satisfactory performance of the duties and responsibilities of the position, or evidence that Appellant had submitted inaccurate information of a material nature, the County reserved the right to withdraw the conditional job offer.
- It is noteworthy that Appellant thought it was significant enough to address the

⁶ To the extent Appellant is alleging discrimination in connection with the rescission of his conditional offer of employment, the Board lacks jurisdiction to consider such a claim. *See* Montgomery County Code, Section 33-9 cited *infra*; Montgomery County Personnel Regulations, 2001, Section 35-2(d) cited *infra*; MSPB Case No. 14-40. Accordingly, the Board will not address this allegation.

delinquent credit accounts in advance of the credit report being run on him but not when he was asked about any negative information in his background during his interviews.

- Trust and integrity are of paramount importance in a position that provides administrative support in an office that handles financial transactions. The failure of Appellant to disclose negative credit information during his interviews raises issues of trust and integrity.
- Ms. H. only checked off item 5 on her Check-list after reviewing with Appellant the purpose of the background investigation, that the investigation included criminal, credit and department of motor vehicle reports, and that Appellant would need to have a clean report from all three sources. She wrote “No background issues” on her interview notes only after Appellant assured her he had nothing negative in his background.
- The Board has repeatedly held that making false statements or misrepresentations is serious misconduct which affects an individual’s reliability, veracity, trustworthiness and fitness for employment. The County submits that failing to disclose information that an applicant is directly asked about in the interview process is equivalent to a misrepresentation.
- Appellant cannot meet his burden of proof under the Personnel Regulations and County Code to show that the County’s decision on his application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAWS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 27,⁷ “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 non-merit factors, may be filed directly with the Merit System Protection Board. . . . The Board may order such relief as is provided by law or regulation.

⁷ Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, marital status, age, sex, disability, genetic status, presence of children, family responsibilities, source of income, sexual orientation, or gender identity.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33.14, Hearing authority of Board, which states in applicable part,

...

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

...

- (3) Order priority consideration be given to employee found qualified before consideration is given to other candidates; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

6.4. Reference and background investigation requirements; Review of applications.

- (a)
 - (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.
 - (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
 - (3) All applicants and employees must comply with established reference and investigation requirements.
- (b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if:

...

- (2) the applicant submits inaccurate or false information in the application or associated forms;
- ...
- (5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; or
- (6) the applicant fails to comply with established procedures or reference and investigatory requirements.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

ISSUE

Has Appellant shown that the County's rescission of its conditional offer of employment made to Appellant was arbitrary, capricious, or otherwise not in accordance with law?

ANALYSIS AND CONCLUSIONS

As the County correctly points out, Appellant has the burden of proving that the County's decision to rescind its conditional offer of employment was arbitrary, capricious or based on other non-merit factors. Montgomery County Code, Section 33-9(c). The Board concludes that Appellant has failed to meet this burden.

The County has the right to establish the qualifications for a position and conduct a background investigation before selecting an applicant for a position. MCPR, 2001, § 6-4(a)(1). It is clear from the record of evidence in this case, that Appellant was informed during the interview process that, if selected, he would be subject to a background investigation. County's Response, Attach. 3, H. Affidavit & Attach. 4, C. Affidavit; County's Supplemental Response,

Attach. F & Attach. G, H. Affidavit II. While Appellant asserts that the word “credit” was never used during his interviews, Appellant does concede that he was told by Ms. H. that a background investigation would be conducted. Appellant’s Reply at 1-2.

The Board considered the position the Appellant was applying for – a position requiring a high degree of public trust and integrity and requiring a seasoned experienced professional in all aspects of financial transactions and administration. The Board, in considering its final opinion, took into account that Appellant was already entrusted to a significant financial portfolio in his federal work requiring a seasoned employee with excellent sound judgment qualities. In one instance, the Appellant conceded that he was essentially familiar with background checks in general for financial-type positions. Appellant’s Reply at 1. At one point, he indicated that once he did not receive the same financial background form as was provided by his current employer, he took it upon himself to determine what to submit or not submit. *Id.* at 3. The Appellant admits to a shortcoming in not providing more information on his initial interview. As a seasoned financial and administrative support expert, the Board considered that the Appellant was savvy enough to know that any small or significant financial discrepancy in his background check would eliminate him from further advancement in the interview process.

Thus, if Appellant was hired, he would have fiduciary responsibilities.⁸ Again, as an employee with fiduciary responsibilities, Appellant would be held to a higher standard of conduct. Given the fact that at the time he applied, he had fiduciary responsibilities on behalf of the federal government and had undergone a federal background investigation for that position, Appellant should have recognized that any blemish on his credit record, even if it had eventually been resolved, could call into question his fitness for the County’s position. Therefore, the Board finds that even if Appellant did not hear the word “credit” during the interview process, Appellant, who at the time was in a fiduciary position, should have been more forthcoming when asked about negative background information and explained the credit delinquencies in his past.

The County is authorized under MCPR 6.4(b)(2) to withdraw a conditional offer of employment “at any time in the hiring process” if “the applicant submits inaccurate or false information in the application or associated forms.” This regulation is broad enough to encompass inaccurate or incomplete information provided in the interview process. By failing to disclose the issues with his credit history, irrespective of whether he heard the word “credit” used in connection with the background investigations he would be required to undergo, Appellant failed to provide complete and accurate information in the application process.⁹

⁸ According to Black’s Law Dictionary, a fiduciary “is a person holding the character of a trustee . . . in respect to the trust and confidence involved in it and the scrupulous good faith and candor it requires. . . .” *Black’s Law Dictionary, available on line at <http://thelawdictionary.org/fiduciary/>.*

⁹ We need not decide whether the rescission of the conditional offer was also consistent with MCPR 6.4(b)(5), which allows rescission where “there is evidence of a job-related factor that would hinder or prohibit the applicant’s satisfactory performance of the duties and responsibilities of the position.” The Board makes no findings as to Appellant’s integrity or trustworthiness. Simply that he did not provide full and accurate information during the interview process is a sufficient basis for the County to withdraw its offer.

Therefore, the Board finds that the County was justified in rescinding its conditional offer of employment to Appellant.

ORDER

Based on the above analysis, the Board denies Appellant's appeal of OHR's rescission of his conditional offer of employment.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
February 9, 2015

CASE NO. 15-02

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) to no longer consider Appellant for the position of Public Safety Communications Specialist I (PSCS I) in the Communications Section of the Department of Fire and Rescue Services (DFRS). The County filed its response (County's Response) to the appeal, which included five attachments.¹ Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of PSCS I in DFRS on July 23, 2014. County's Response at 1. The vacancy announcement for the PSCS I indicated that there would be a multi-step rating process for the position. County's Response, Attach. 1 at 3-4. First, OHR would review all applicants to ensure they met the minimum qualifications for the position. *Id.* at 3. Then, those applicants meeting the minimum qualifications would be scheduled for a written

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for Public Safety Communications Specialist I (IRC15062); Attach. 2 – Email from the HRS to Appellant, dated 08/21/14, notifying him that he did not have to retake the assessment tests; Attach. 3 – Email from the HRS to Appellant notifying him of the dates and times available for the oral interview; Attach. 4 – Affidavit of the HRS; and Attach. 5 – Emails from Appellant to the HRS, dated 09/25/14 and 09/30/14, requesting an update as to the status of his application.

exam. *Id.* Those passing the written exam would be scheduled for the computerized examination. *Id.* Finally, all applicants who passed the computerized examination would be scheduled for a structured interview. *Id.* at 4. As a result of the structured interview, the applicants would receive a rating of “Well Qualified” or “Qualified”. *Id.* Those rated “Well Qualified” would be placed on the Eligible List. *Id.*

The vacancy announcement also indicated that applicants on the Eligible List for the PSCS position (vacancy announcement IRC12938) with the Montgomery County Police (Police Department), who wished to be considered for the DFRS PSCS I position had to apply for this job but would not need to take the assessment testing. County’s Response at 1-2; County’s Response, Attach. 1 at 2. As Appellant had been placed on the Eligible List for IRC12938,² he contacted the Human Resources Specialist (HRS) handling the DFRS vacancy, about the need to retake the assessment testing. County’s Response at 2; County’s Response, Attach. 2. The HRS informed Appellant that he did not need to retake the assessments and she would be in contact with him once the other applicants had completed the testing phases. *Id.*

Finally, the vacancy announcement indicated that “[a]ll notifications about the hiring process, written examinations, computerized examination and interview will be via email. It is the *applicant’s responsibility to frequently check and respond to emails, . . .*” County’s Response, Attach. 1 at 4 (emphasis added).

On September 11, 2014, the HRS sent Appellant, along with all the other candidates who had passed the assessment testing, an email indicating that they were moving on to the next phase of the hiring process – the structured interview. County’s Response at 2; County’s Response, Attach. 3. The candidates were provided with a list of available dates and times for the interview and asked to select their first, second, and third choices and email these choices to the HRS. *Id.* Appellant never responded to the HRS’ email.³ County’s Response at 2; County’s Response, Attach. 4. The deadline for completing the oral interview process was September 22, 2014. *Id.* As Appellant failed to respond to the HRS’ email, she determined that he would no longer be considered for the PSCS I position. *Id.*

PROCEDURAL HISTORY

After reviewing Appellant’s instant appeal, as well as his appeals in Cases 15-04, 15-05, 15-06 and 15-07, on October 21, 2014, the Board issued a Show Cause Order, giving Appellant until October 28, 2014 to respond and show good cause why the Board should not summarily dismiss this appeal, as well as the others cited above.⁴ Show Cause Order; *see, e.g.*, MSPB Case

² Appellant’s nonselection for the PSCS position with the Police Department was the subject of his appeal in MSPB Case No. 15-04.

³ Appellant did send the HRS an email on 09/26/14 and again on 09/30/14, asking about the status of his application. County’s Response at 2; County’s Response, Attach. 5.

⁴ As noted above, the Show Cause Order also included the instant case as well as Appellant’s cases 15-06, 15-07 and 15-08. Having reviewed the entire record in each of these other cases, the Board has decided to issue decisions addressing the merits of these other cases. Final Decision, MSPB Case No. 15-04, at 2 n.2.

14-13 (2014); MSPB Case 14-48 (the Board does not have jurisdiction over claims of discrimination).

Appellant failed to respond to the Show Cause Order. Thereafter, on January 13, 2015, the County filed a Motion to Dismiss and Impose Sanctions. In its Motion to Dismiss, the County noted that Appellant failed to respond to the Board's Show Cause Order. Motion to Dismiss at 1, 2. The County also sought to have the Board impose sanctions on Appellant in all cases subject to the Board's Show Cause order as well as in MSPB Cases No. 15-14 and 15-15, even though they were not the subjects of the Show Cause Order. Motion to Dismiss at 3.

On February 17, 2015, the Board issued a Final Decision in Appellant's MSPB Case No. 15-04. In that Final Decision, the Board granted the County's Motion to Dismiss. Final Decision at 7. However, the Board indicated that it was denying the County's Motion to Dismiss as to Cases 15-02, 15-06, 15-07, 15-08, 15-14, and 15-15. *Id.* n.5. It also denied the County's request for sanctions. *Id.*

POSITIONS OF THE PARTIES

Appellant:

- Appellant was denied the PSCS position under vacancy announcement IRC12938 but has not been told who the background investigator handling his application is.
- Appellant's passing scores should count for vacancy announcement IRC15062.
- Appellant attempted twice to contact the HRS to determine the status of his application for vacancy announcement IRC15062.

County:

- The vacancy announcement for the PSCS I position indicated that the rating process would be a multi-step one. The last phase of the rating process was the structured interview process.
- The results of the structured interview process would determine whether a candidate was "Well Qualified" or "Qualified" for the position.
- Appellant failed to respond to the HRS' request to schedule an oral interview.
- Based on Appellant's failure to timely respond to the interview request, he was dropped from consideration for the PSCS position.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, *Recruitment and Application Rating Procedures*, which states in applicable part:

...

6-2. Announcement of open jobs.

(a) The OHR Director:

...

(2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position; . . .

...

6-5. Competitive rating process.

(a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, *Merit System Protection Board Appeals, Hearings and Investigations*, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

The Personnel Regulations require that the OHR Director include in the job vacancy announcement the rating process and rating criteria that will be used to create an eligible list. MCPR, 2001, Section 6-5(b). The Board finds that OHR complied with this requirement with regard to vacancy announcement IRC15062. The vacancy announcement clearly describes the multi-step rating process for applicants – review of minimum qualifications, written test, computerized test and structured interview. County's Response, Attach. 1 at 3-4. The announcement notes that the results of the structured interview would be used to determine which of the candidates were "Well Qualified" and which were "Qualified". *Id.* at 4. Those deemed "Well Qualified" would be placed on the Eligible List. *Id.*

The record of evidence in this case indicates that Appellant was sent an email on August 21, 2014 by the HRS, informing him that as he had previously passed the assessment tests for the PSCS position under vacancy announcement IRC12938, he did not need to retake the assessment tests again. County's Response, Attach. 2. The record of evidence also indicates that on September 11, 2014 the HRS sent Appellant another email, requesting he select three dates and times for his structured interview. County's Response, Attach. 3 & Attach. 4. Appellant failed to comply with the HRS' request to schedule an interview. County's Response at 2; County's Response, Attach. 4. As the vacancy announcement explicitly stated that the structured interview was a critical part of the rating process, County's Response, Attach. 1 at 4, the Board finds that OHR was correct to drop Appellant from consideration for the PSCS position after he failed to respond to the email from the HRS, asking him to schedule the interview.⁵

ORDER

Based on the above analysis, the Board denies Appellant's appeal from OHR's determination not to further consider him for the position of Public Safety Communications Specialist I with DFRS.

⁵ Appellant was placed on notice by the vacancy announcement that the notification about the interview would be via email and it was his responsibility to frequently check and respond to emails from the County about the vacancy. County's Response, Attach. 1 at 4.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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
February 25, 2015

CASE NO. 15-03

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) Director to rescind a conditional offer of employment made to Appellant based on the results of a background investigation. The County filed its response (County's Response) to the appeal, which included two attachments.¹ Appellant replied to the County's Response (Appellant's Reply) with several exhibits. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Bus Operator with the Department of Transportation (DOT or Department) and was given a conditional offer of employment on June 27, 2014. *See* County's Response at 1. The offer of employment was contingent upon Appellant's successful clearance of a background investigation. *Id.*

Appellant did not pass the background investigation performed by OHR. County's Response at 1. On August 11, 2014, the OHR Director, notified Appellant that the conditional job offer was being withdrawn because he did not pass the background investigation. *Id.*

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant was given a conditional offer of employment for the Bus Operator position.

¹ The County's attachments were: Attachment 1 – Copy of OHR's August 4, 2014 Letter to Appellant Withdrawing Contingent Job Offer, and Attachment 2 – Copy of Appellant's Background Investigation Report.

- Appellant completed all that was required of him during the hiring process for the Bus Operator position.
- The negative items on Appellant’s background report are in the past.
- Currently, there is not anything that would prohibit the Appellant from performing the assigned duties of a Bus Operator.
- Appellant should be considered by present ability.

County:

- The conditional offer of employment to Appellant indicated it was contingent on a satisfactory background check. The background check done by OHR showed multiple criminal convictions.
- It is reasonable to consider how long ago the offensive conduct occurred. However, Appellant’s offensive conduct was not in the very distant past, as Appellant’s assault, theft, and rogue and vagabond convictions occurred only four years ago.
- The County is sympathetic to the Appellant’s desire to move forward and to focus on the present and the future rather than the past.
- While that might be possible for some County jobs, a Bus Operator position, with its requirement of regular and continuous contact with the public, is not one of those positions.
- To put Appellant in the driver’s seat of a County Ride-On bus, notwithstanding his relatively recent criminal convictions for assault and theft, could expose the County to significant damages for negligent hiring should there be an incident or altercation on the bus.

APPLICABLE CONTRACTUAL PROVISIONS, CODE PROVISIONS, AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **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 27,² “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.

² Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, marital status, age, sex, sexual orientation, disability, genetic status, and family responsibilities.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007 October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, and December 11, 2012), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

6-4. Reference and background investigation requirement; Review of application.

- (a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.
- (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
- (3) All applicants and employees must comply with established reference and investigation requirements.

ISSUE

Was the County's decision to deny Appellant employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

ANALYSIS AND CONCLUSIONS

The County has the right to establish the qualifications for a position and conduct background investigations before finalizing the selection of an applicant for a position. MCPR, 2001, §6-4(a)(1). In the instant case, Appellant received a conditional offer of employment for the position of Bus Operator that was contingent on "successful clearance of a background investigation."

It is undisputed that Appellant's background investigation shows that he was convicted of the following misdemeanors: second degree assault in 2010, theft of less than \$1,000 in value in 2010, rogue and vagabond in 2010, and possession of controlled dangerous substances in 2008. County's Response, Attach. 2, Appellant admitted to being found guilty of the crimes in his record, but argues that "whatever is in my background check that resulted in the decision to withdraw the conditional offer was just that, in the past."

The Board finds the County was reasonable in its actions when it rescinded its conditional offer of employment to Appellant based on the results of the background investigation. Given Appellant's recent criminal convictions for assault and theft, coupled with the fact that the position in question requires direct interaction with the public, the County must be allowed to make employment decisions that are in the best interest of public safety. Appellant has not shown that the County's decision to deny Appellant employment was arbitrary and

capricious, illegal, or based on political affiliation or other non-merit factors. Based on the foregoing, Appellant's appeal is denied.

ORDER

Based on the foregoing, the Board hereby denies Appellant's appeal from OHR's determination to rescind Appellant's conditional offer of employment as a Bus Operator.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
November 13, 2014

CASE NO. 15-04

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Police Department (MCPD or Police Department) not to select him for the position of Public Safety Communications Specialist I in MCPD's Emergency Communications Center. The County filed its response (County's Response) to the appeal, which included six attachments.¹ The appeal was considered and decided by the Board.

PROCEDURAL HISTORY

After the County filed its response, Appellant requested a month extension to file a reply to the County's Response. County's Motion to Dismiss and Impose Sanctions (County's Motion to Dismiss), Attachment (Attach.) 1. The County agreed to the extension. *Id.*

Appellant then began making a series of requests for documents to various County employees related to this case. *See* County's Motion to Dismiss, Attach. 3. The County chose to

¹ The County's attachments were: Attachment (Attach.) 1 – Delegation of Authority from the Director, Office of Human Resources (OHR) to the Chief of Police for handling the recruitment and rating process for certain merit positions unique to MCPD; Attach. 2 – Letter to Appellant from Captain (Capt.), dated 07/23/14, notifying him of his nonselection; Attach. 3 – Affidavit of Sgt. J.F.; Attach. 4 – Affidavit of Capt.; Attach. 5 – Statement of Charges, dated 09/24/08; Attach. 6 – Memorandum to Appellant from the Chief of Police, dated 10/17/08, indicating the Statement of Charges is being sent by first class mail and certified mail, with attached delivery confirmation receipt; and Attach. 7 – Appellant's resignation from employment with MCPD, dated 10/19/08.

treat these as Maryland Public Information Act (MPIA) requests. County's Motion to Dismiss at 2.

After reviewing Appellant's instant appeal, as well as his appeals in Cases 15-02, 15-05, 15-06 and 15-07, on October 21, 2014, the Board issued a Show Cause Order, indicating that in earlier appeals filed by Appellant, it had found it lacked jurisdiction to consider appeals that allege human rights violations. *See, e.g.*, MSPB Case 14-13 (2014); MSPB Case 14-48. Appellant was given until October 28, 2014 to respond and show good cause why the Board should not summarily dismiss this appeal, as well as the others cited above.² Show Cause Order. Appellant was specifically informed in the Show Cause Order that the Board would not accept emails. *Id.*

Notwithstanding the Board's admonishment that emails were not acceptable, Appellant continued to email the Board about this case. By email dated November 7, 2014, Appellant indicated he needed certain documents from the County in order to proceed with his claim. In this email, Appellant stated he had applied for 50 County jobs and went on to indicate:

I want the records showing that Chief³ is a lying dishonest fraud whose supposed integrity stops at a written contract between the Jew he dislikes and he . . . and you can be sure as soon as I have the records I am seeking I will be telling everyone from the Ma[j]or Cities Chiefs Association[][w]here he is Superintendent, to contacting all of the college-employers of the County [e]mployees who are protecting this [a]nti[-]Semite and the records he is hiding. I'm sure the [c]olleges would love to know their adjunct professors are defending this cheap phony [s]limeball and his anti-Semitic corrupt staff.

Appellant's Email to Board and A.W., subject: MSPB 15-04, records request.

By email dated November 9, 2014, Appellant contacted the County Executive (with a copy to the Board) seeking to have Chief Manager and Director of OHR, terminated for "[f]ostering a [c]ulture of [sic] [c]orruption and [h]atred, [d]isability and [r]eligious [d]iscrimination, . . ." Appellant's Email to I.L., subject: Call to Terminate T.M. and J.A. On November 20, 2014, Appellant sent the Board an email, requesting an indefinite extension to file his reply to the County's response. County's Motion to Dismiss, Attach. 2. By memorandum dated December 9, 2014, the County opposed an indefinite extension. *Id.*

By email dated December 8, 2014, Appellant requested that the Board sanction Ms. W for failing to produce the requested records in this case. By email dated December 22, 2014, Appellant asked the Board to sanction the County Attorney's Office and A.W. for refusing to provide documents requested under the Maryland Public Information Act and to impose monetary penalties for each day they refuse to produce the documents is seeking.

² As noted above, the Show Cause Order also included Appellant's cases 15-02, 15-06, 15-07 and 15-08. Having reviewed the entire record in each of these other cases, the Board has decided to issue decisions addressing the merits of these other cases.

³ Chief is the head of the County's Police Department.

On January 6, 2015, Appellant sent an email to Ms. A.W., with a copy to the Board, subject: EEO Complaint: Montgomery County Police Anti-Semitism. In the email, Appellant noted that the Police Department was still refusing to produce records indicating “the department’s offensive treatment towards me, . . .” Appellant’s Email to Ms. A.W., subject: EEO Complaint: Montgomery County Police Anti-Semitism.

On January 7, 2015, Appellant sent an email to the Board, indicating it was Appellant’s Supplement to MSPB 15-04. In this email, Appellant asked the Board to consider: “[W]hether the Police Department would also try to mislead . . . regardless of whether the Appellant were Jewish, Black, Hispanic, or Female, for instance. To force the Appellant to seek litigation regarding public records or disciplinary statistics, just to try to interfere with an MSPB case that is ongoing, or to discourage an employee from seeking gainful employment, should be [t]estament to just how much contempt this County holds for me.” Appellant’s Email to Board, subject: MPIA request (Memo/Exhibit/Attachment Submission to MSPB 15-04).

On January 13, 2015, the Board denied Appellant’s request for an indefinite extension and ordered him to file any comments with the Board by January 27, 2015. On January 13, 2015, the County filed a Motion to Dismiss and Impose Sanctions. In its Motion to Dismiss, the County notes that Appellant failed to respond to the Board’s Show Cause Order. Motion to Dismiss at 1, 2. Instead, Appellant has focused his efforts in this case on serving the County with four separate demands for various documents that he believes will prove his case. *Id.* The County also seeks to have the Board impose sanctions on Appellant in all cases subject to the Board’s Show Cause order as well as in MSPB Cases No. 15-14 and 15-15, even though they were not the subjects of the Show Cause Order. Motion to Dismiss at 3.

APPLICABLE LAWS AND REGULATIONS

Montgomery County Code, Chapter 2-A, Administrative Procedures Act, Section 2A-2, Applicability, which states in applicable part,

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

- ...
- (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.

Montgomery County Code, Chapter 2-A, Administrative Procedures Act, Section 2A-7, Pre-hearing procedures, which states in applicable part,

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

- (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.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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,⁴ 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

⁴ Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

...

35-7. Dismissal of an appeal.

...

- (b) The MSPB may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. The MSPB must give the County and the appellant prior notice of its intent to dismiss for lack of prosecution or compliance with an MSPB rule or order.

...

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.

ISSUE

Does the Board have jurisdiction over the Appellant's appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute Or Regulation.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. MSPB Case No. 14-42. *See also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; MSPB Case No. 11-09; MSPB Case No. 11-37; MSPB Case No. 13-03; *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 were 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 jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over Appeals that Allege Human Rights Violations.

The Code provides that an applicant may challenge the Chief Administrative Officer's (CAO's) decision regarding an application for employment. However, the Code is crystal clear

that appeals alleging discrimination prohibited by Chapter 27 of the Code cannot be filed with the Board but instead may only be filed with the Human Rights Commission. County Code, Section 33-9(c). Among the various forms of discrimination prohibited by Chapter 27 are disability discrimination and discrimination based on religious creed. County Code, Section 27-1(a). It is abundantly clear from the record in this case, that Appellant is alleging that his nonselection in this case was due to disability and/or religious discrimination by Chief and the Police Department. *See, e.g.*, Appellant's Email to Board and A.W., subject: MSPB 15-04, records request (Nov. 7, 2014); Appellant's Email to I.L., subject: Call to Terminate T.M. and J.A. (Nov. 9, 2014). Accordingly, to the extent Appellant alleges that the Police Department discriminated against him on the basis of his disability or religion, the Board finds that it lacks jurisdiction over this appeal.

In The Alternative, The Board Would Dismiss Appellant's Appeal Based On His Failure To Follow The Appeal Procedures Established By The Board.

As the County has correctly pointed out, the Board's Show Cause Order instructed Appellant to provide a statement showing such good cause as exists for why the Board should not summarily dismiss this case. County's Motion to Dismiss at 1; Show Cause Order at 1. Appellant was further instructed that he had until October 28, 2014, to file his response and was also cautioned that his submission had to be filed by mail only as emails would not be accepted. Show Cause Order at 1-2.

Again, as the County points out, Appellant has failed to file any statement showing good cause as to why the Board should not summarily dismiss this case. County's Motion to Dismiss at 1. The Board agrees with the County's position that it should dismiss the instant case⁵ and, accordingly, to the extent Appellant has raised any issues that are within the Board's jurisdiction, the Board dismisses those allegations based on his failure to follow the appeal procedures established by the Board in this case. MCPR, 2001, Section 35-7(b).

The Board would be remiss if it did not address Appellant's Maryland Public Information Act requests to the County. The Board agrees with the County that discovery is **only permitted** under the County's Administrative Procedure Act in cases involving hearings before the Board. County's Motion to Dismiss at 2. As Appellant is alleging a nonselection, there is no right to a hearing before the Board. MCPR, 2001, Section 35-10(a)(1) & (2). Moreover, the Board lacks any jurisdiction with regard to a document request made under the MPIA. Therefore, the Board denies Appellant's various motions to sanction individuals with regard to the adequacy of the County's MPIA responses to him.

ORDER

Based on the above analysis, the Board dismisses Appellant's appeal from Appellant's nonselection for the position of Public Safety Communications Specialist I based on lack of

⁵ While the Board is granting the County's Motion to Dismiss any allegations it has jurisdiction over in this case, it is denying the County's Motion as to Cases 15-02, 15-06, 15-07, 15-08, 14-14, and 15-15. It is also denying the County's request for sanctions.

jurisdiction. To the extent Appellant may have raised allegations that fall within the Board's jurisdiction, the Board grants the County's Motion to Dismiss Appellant's appeal in this case based on his failure to follow appeal procedures established by the Board. The Board denies the County's and Appellant's motions for sanctions.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
February 18, 2015

CASE NO. 15-05

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources' (OHR's) Director that she did not meet the minimum qualifications for the position of Asset Forfeiture Program Manager II (Program Manager II) in the Special Investigation Division of the Montgomery County Department of Police (Police Department). The County filed its response (County's Response) to the appeal, which included five attachments.¹ Appellant filed a reply (Appellant's Reply) to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant is an Administrative Specialist II, Grade 21, with the Forensic Services Section of the Police Department. Appellant's Appeal; County Response at 1. She has been in this position since July 2012. County's Response, Attach. 3.

Appellant submitted her application for the Program Manager II position on July 31, 2014. County's Response at 1. The Program Manager II position is a professional-level position² whose primary responsibility is to manage the Police Department's asset forfeiture

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement, IRC15059, for Program Manager II – Asset Forfeiture, Grade 25; Attach. 2 – Affidavit of OHR HRS; Attach. 3 – Appellant's Application; Attach. 4 – OHR Equivalencies for Education and Experience; and Attach. 5 – Class Specification for Office Services Coordinator.

² The minimum qualifications for the Program Manager II position were:

program. *Id.* This involves the processing and management of monies, vehicles and real property seized through the course of different types of investigations. *Id.*; County's Response, Attach. 1. The duties of the position include managing process flows from field users, through the Police Department and the County Attorney's Office, in support of filing cases in Maryland District Court and Circuit Court. *Id.*

Fourteen individuals applied for the Program Manager II position. County's Response at 1. A Human Resources Specialist (HRS) on the OHR Recruitment and Selection team, reviewed all the applications to determine whether the candidates met the minimum qualifications for the position. County's Response at 1-2; County's Response, Attach. 2 at 1. The Program Manager II position required a Bachelor's degree³ and five years of professional experience. County's Response at 2-3; County's Response, Attach. 2 at 2. In assessing whether a candidate has sufficient professional experience,⁴ OHR does not credit work deemed to be technical, paraprofessional or clerical as professional work since it is not equivalent work. County's Response at 3; County's Response, Attach. 2 at 1; County's Response, Attach. 4. The determination of whether a position in the County is "professional", "paraprofessional", "technical" or "clerical" is made by OHR Classification Specialists by applying universal classification standards and the OHR Recruitment and Selection team is bound to follow these class specifications. County's Response at 2; County's Response, Attach. 2 at 1.

Appellant's resume reflected that she earned an Associate of Arts degree from the Maryland College of Art and Design, had taken a graphic design program in web design at Towson University and is currently enrolled in the Bachelor of Science program in Finance at the University of Maryland. County's Response, Attach. 3. However, as Appellant did not provide any details about the number of credit hours or courses she had taken, except for the

Experience: Thorough (5 years) professional experience in a program/specialization area directly related to financial/banking or grant/program management involving financials. Supervisory experience may be required depending upon the position assignment.

Education: Graduation from an accredited college or university with a Bachelor's degree.

Equivalency: An equivalent combination of education and experience may be substituted.

County's Response at 2-3; County's Response, Attach. 1.

³ A Bachelor's degree is equivalent to four years of college. County's Response at 3 n.1.

⁴ The County indicates that professional experience "involves work that is directly related to the management or general business operations of the County. Employees in professional classes exercise discretion and independent judgment with respect to matters of significance. Professional experience is generally needed in jobs that require Bachelor's and graduate degrees because the work requires advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." County's Response at 2; County's Response, Attach. 2 at 1.

Associate of Arts degree which she completed, Appellant could only be credited with two years of education. County's Response at 3-4; County's Response, Attach. 2 at 2. As the Job Vacancy Announcement indicated that an equivalent amount of experience could be substituted, Ms. A. reviewed Appellant's work experience⁵ to determine whether she could credit any of it towards meeting the minimum education. *Id.* According to Ms. A., even though the OSC position Ms. L. had served in at DOT was not considered professional, based on the related nature of the work, it was used to provide Ms. L. with the two years of educational equivalency she needed to satisfy the educational requirement of the Program Manager II position. *Id.*

Having found that Appellant satisfied the educational requirement, Ms. A. then reviewed Appellant's resume to determine if she had five years of professional experience in a program/specialization area directly related to financial/banking or grant/program management involving financials. *Id.* Appellant was given credit for two years of professional experience in her current position of Administrative Specialist II. *Id.* She also received credit for one year and four months in the Accounts Payable position in DOT. *Id.* As Appellant's experience as an OSC had been used to meet the educational requirement of the Program Manager II position,⁶ that only left Appellant's non-County work experience to be assessed. *Id.* According to Ms. A., Appellant did not receive any experience credit for her non-County work experience as there was no evidence in her resume that these jobs related to financial/banking or grant/program management involving financials. *Id.* Therefore, Ms. A. determined that Appellant was one year and eight months short of meeting the minimum qualification for professional experience. *Id.*

Prior to rating Appellant "Not Qualified" based on her failure to meet the minimum qualifications for the position of Program Manager II, the HRS asked a senior HRS on the OHR Recruitment and Selection Team to review Appellant's application. County's Response at 4; County's Response, Attach. 2 at 2. The senior HRS agreed with HRS's assessment that Appellant did not meet the minimum qualifications for the Program Manager II position. *Id.* Accordingly, on August 8, 2014, Appellant was notified by OHR that she did not meet the minimum qualifications of the position. County's Response, Attach. 2 at 1.

This appeal followed.

⁵ Appellant's resume reflected the following work experience: two years serving as an Administrative Specialist with the Police Department; sixteen months serving in an Accounts Payable position with the County's Department of Transportation (DOT); two years serving as an Office Services Coordinator (OSC) with DOT; six months serving as a Trainer at the County's Board of Elections; eleven months serving as a Visual Sales Manager for The Container Store in DC; fourteen months serving as a Visual Sales Manager for The Container Store in Rockville, MD; five months serving as an Assistant Store Manager at Linens N Things; four months serving as a Merchandising Manager at Linens N Things; and thirty-seven months serving as a Senior Activities Manager at IKEA. County's Response at 4; County's Response, Attach. 3.

⁶ According to the County, since the OSC is not a professional position, the two years of experience as an OSC could not have been used to meet the professional experience minimum requirement. County's Response at 4; County's Response, Attach. 2 at 3.

POSITIONS OF THE PARTIES

Appellant:

- Appellant contacted the HRS when she learned she was rated “Not Qualified” to discuss why this had happened. The HRS told her that screeners are not permitted to consider all the information included in an application.
- The HRS also told her that had she applied earlier in the posting period then OHR would have had a chance to request more information or a new application. However, this conflicts with the direction given in the online application system that indicates once a submission is made, an applicant cannot change, amend, add or delete to the existing submission regardless of whether the announcement is still open.
- The County indicates that universal classification standards are used by OHR to determine whether a position is professional. To follow the logic of the County’s position explaining how work experience is evaluated as being at the professional level, it appears employment history outside the County does not apply.
- Appellant disagrees with this practice. Her management and financial work in the retail industry most certainly fits the County’s criteria of applicable work experience. The level of decision making, independent judgment, responsibility, personnel management, and accountability that Appellant achieved in her work outside the County far exceeds what she has been able to achieve as an employee of the County.
- While OHR has deemed that Appellant does not have the qualifications required to perform the Program Manager II position, she successfully met the needs of that position for the months it remained vacant.

County:

- The vacancy announcement for the Program Manger II position indicates it is a professional-level position whose primary responsibility is to manage the Police Department’s asset forfeiture program.
- The minimum qualifications for the Program Manager II position were five years of professional experience in a program/specialization area directly related to financial/banking or grant/program management involving financials and a Bachelor’s degree. An equivalent combination of education and experience could be substituted.
- Non-professional experience may not be substituted for the required professional-level experience. Professional experience involves work that is directly related to the management or general business operations of the County. Employees in professional classes exercise discretion and independent judgment with respect to matters of significance.
- Appellant's resume indicated she had completed an Associate degree and was currently enrolled in a Bachelor of Science program in Finance at the University of Maryland. However, as Appellant failed to provide any details about the number of credit hours she had completed, she did not get any education credit for

- participation in the program.
- While Appellant’s two years of experience as an Office Services Coordinator is for classification purposes not professional experience, based on the related nature of the work she was credited with two years of educational equivalency.
 - The two years credit based on experience at OSC together with Appellant’s Associate’s degree combined to satisfy the educational requirement.
 - OHR considered all of Appellant’s work experience that appeared on her resume but she fell short of the minimum qualification of 5 years of professional level experience in a program/specialization area directly related to financial/banking or grant/program management involving financials.
 - Appellant was given credit for two years of professional experience in her current position of Administrative Specialist II and credit for one year and four months experience working in Accounts Payable.
 - Appellant received no experience credit for her non-County work experience as there was no evidence in her resume that these jobs related to financial/banking or grant/program management involving financial administration.
 - Thus, Appellant fell one year and eight months short of meeting the minimum qualification for experience.
 - Before rating Appellant “Not Qualified”, the HRS had a senior OHR HRS review Appellant’s application. The senior Specialist agreed with the HRS's assessment that Appellant did not meet the minimum qualifications for the Program Manager II position.
 - If Appellant had applied earlier in the posting cycle for the position, it is possible (depending on the date the recruiter started to review the applications), though unlikely, that the recruiter may have asked Appellant for additional information prior to the application closing date. It is not possible for OHR to contact every applicant to inform/question them about potential improvements to their application prior to the closing date.
 - Appellant cannot meet her burden of proof under the Personnel Regulations and County Code to show that the County’s decision on her application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAWS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly

with the Merit System Protection Board. . . .The Board may order such relief as is provided by law or regulation.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33.14, Hearing authority of Board, which states in applicable part,

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

...

- (3) Order priority consideration be given to employee found qualified before consideration is given to other candidates; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

6-2. Announcement of open jobs.

- (a) The OHR Director:

...

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;

6.4. Reference and background investigation requirements; Review of applications.

...

- (b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if:

- (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification; . . .

6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...
35-2. Right of appeal to MSPB.

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

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors?

ANALYSIS AND CONCLUSIONS

As the County correctly notes, Appellant bears the burden of proving to the Board that the County’s action with regard to Appellant’s application was arbitrary and capricious or otherwise improper. Montgomery County Code Section 33-9(c). Appellant failed to meet this burden.

The County asserts that the reason that Appellant was found not to meet the minimum qualifications for the position of Program Manager II is because of Appellant’s lack of professional experience. County’s Response at 3-4; County’s Response, Attach. 2. The job announcement for the Program Manager II makes clear that the incumbent of the position performs professional level work. County’s Response, Attach. 1. Moreover, as the Program

Manager II position is clearly a management position, *see* County's Response, Attach. 1, the Board finds that it was appropriately deemed a professional position.

As the County explained, professional level work involves work that is directly related to the management or general business operations of the County. County's Response at 2; County's Response, Attach. 2. Professional experience is gained in jobs that require bachelor degrees or higher because the work requires advanced knowledge in a field of science or learning. *Id.* Moreover, OHR's guidance on equivalencies for education and experience clearly states that only related professional level experience will be credited for professional positions; non-professional level experience may not be substituted for the required professional level experience. *Id.*; County's Response, Attach. 4.

In assessing Appellant's professional experience, OHR credited her with two years of professional experience for her current position as an Administrative Specialist II in the Police Crime Laboratory. County's Response at 3; County's Response, Attach. 2 at 2. She also received credit for the one year and four months that she spent working in Accounts Payable. County's Response at 2-3; County's Response, Attach. 2 at 2. She, however did not receive any professional experience credit for her time working as an Office Services Coordinator,⁷ although she was able to receive credit for work in that position towards the educational requirement. Therefore, based on her County employment, she had three years and four months of professional experience which was one year and eight months short of meeting the minimum qualification for experience. County's Response at 4; County's Response, Attach. 2 at 2.

While OHR did look at the various positions that Appellant held in the private sector to include Assistant Store Manager, Merchandising Manager, and Visual Sales Manager, it failed to credit any work in these positions as meeting the professional experience requirement. County's Response at 4; County's Response, Attach. 2 at 2. According to OHR, the reason why Appellant received no credit for these positions was because there was no evidence in her resume that these jobs related to financial/banking or grant/program management involving financials. *Id.* The Board has carefully reviewed the record of evidence in this case and does note that the Job Vacancy Announcement specifically indicated that an applicant needed: "Thorough (5 years) professional experience in a program/specialization area directly related to financial/banking or grant/program management involving financials." County's Response, Attach. 1 at 3. Accordingly, the Board concludes that the County was correct in not crediting Appellant for her private employment experience.

Appellant has taken issue with the County's position that had she applied sooner, perhaps the HRS could have contacted her to obtain more information to support her application, and

⁷ As the Class Specification for the OSC position only requires graduation from high school or a High School Certificate, County's Response, Attach. 5 at 4, the Board agrees with the County that the OSC position does not require advanced knowledge in a field of science or learning so as to equate to professional experience.

pointed out this is contrary to information that appears on the online application system.⁸ Appellant's Reply at 1-2. The Board would be remiss if it did not point out that it totally agrees with Appellant about the fact that it does not appear from the County's response to this appeal that it is following a uniform policy with regard to how it is reviewing applicants' submissions. As Appellant rightly points out, OHR needs to ensure "quality, transparency and consistency in their level of service." Appellant's Reply at 2. OHR should not have taken the position that if Appellant had submitted her resume sooner, perhaps OHR could have contacted Appellant for additional information. Such a suggestion totally contradicts the information OHR has published on its website indicating that once an application is submitted, "an applicant cannot change, amend, add or delete to the existing submission regardless of whether or not the announcement is still open." Job Application Process FAQs", FAQ # 23, available at <http://www.montgomerycountymd.gov/ohr/staffing/careerfaq.html#23>. The Board expects the County to follow uniform guidelines, as published on its website and in the Personnel Regulations, when assessing the qualifications of candidates for County positions.

ORDER

Based on the above analysis, the Board denies Appellant's appeal from Appellant's nonselection for the position of Program Manager II.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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
February 4, 2015

⁸ Specifically, on OHR's website is a section entitled "Job Application Process FAQs". See <http://www.montgomerycountymd.gov/ohr/staffing/careerfaq.html#23>. FAQ #23 deals with how an applicant may change his/her application and states:

You will be able to update your profile and upload a new resume, but once you submit an application for a particular position, you will not be able to go back and update or make changes to the submitted application. The online system does not allow an applicant to apply more than once to any vacancy announcement. Once the submission has been made, an applicant cannot change, amend, add or delete to the existing submission regardless of whether or not the announcement is still open. Please ensure that all information and documentation are included in your submission (i.e. cover letter, resume, preferred criteria, etc.) before you click "Finish". Changes that you make to your profile will be reflected for any new position that you apply for.

Id.

CASE NO. 15-06

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) to no longer consider Appellant for the position of Bus Operator in the Department of Transportation (DOT). The County filed its response (County's Response) to the appeal, which included six attachments.¹ Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Bus Operator in DOT on July 7, 2014. County's Response at 1. The vacancy announcement for the Bus Operator position indicated that all applicants who met the minimum qualifications for the position would be scheduled for a video/written examination. County's Response, Attach. 1 at 3. As a result of the video/written examination, the applicants would receive a rating of "Did Not Pass" or "Qualified". *Id.* Those rated "Qualified" would be placed on the Eligible List. *Id.*

The vacancy announcement indicated with regard to the video/written examination that "[s]cheduling notifications with times and details will be sent via your iRecruitment account prior to the test. Please login to your iRecruitment account periodically to check your status. . . ." County's Response, Attach. 1 at 1.

On August 4, 2014, Ms. P. posted to Appellant's iRecruitment account a notification, inviting Appellant to take the video/written examination and informing him of the location, date and time for the examination. County's Response at 2; County's Response, Attach. 2 & Attach. 4. On August 5, 2014, Ms. P. emailed Appellant, inviting him to take the video/written examination and again notifying him of the location, date and time for the examination. County's Response at 2; County's Response, Attach. 3 & Attach. 4. Two hundred and sixty-one applicants appeared for the video/written examination on August 26, 2014. County's Response at 2. However, Appellant failed to appear. *Id.* Accordingly, Appellant's application status was changed to "No Show". *Id.* On August 28, 2014, Appellant sent an email to OHR indicating he had not received a notice via iRecruitment regarding the examination schedule. *Id.*; County's

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for Bus Operator (IRC14870); Attach. 2 – Posting from Ms. P. to Appellant, dated 08/04/14, inviting him to take the video/written examination and notifying him of the location, date and time of the examination; Attach. 3 – Email from Ms. P. to Appellant, dated 08/05/14, inviting him to take the video/written examination and notifying him of the location, date and time of the examination; Attach. 4 – Affidavit of Ms. P., Human Resources Specialist III; Attach. 5 – Email from Appellant to OHR, dated 08/28/14, indicating Appellant had never received notification via iRecruitment about the examination schedule; and Attach. 6 – Email from Appellant to G.N., a Human Resources Specialist, dated 08/17/14, stating that he would not be appearing for any additional interviews, tests, or examinations.

Response, Attach. 5.

This appeal followed.

PROCEDURAL HISTORY

After reviewing Appellant's instant appeal, as well as his appeals in Cases 15-02, 15-04, 15-07, and 15-08, on October 21, 2014, the Board issued a Show Cause Order, giving Appellant until October 28, 2014 to respond and show good cause why the Board should not summarily dismiss this appeal, as well as the others cited above.² Show Cause Order; *see, e.g.*, MSPB Case 14-13 (2014); MSPB Case 14-48 (the Board does not have jurisdiction over claims of discrimination).

Appellant failed to respond to the Show Cause Order. Thereafter, on January 13, 2015, the County filed a Motion to Dismiss and Impose Sanctions. In its Motion to Dismiss, the County noted that Appellant failed to respond to the Board's Show Cause Order. Motion to Dismiss at 1, 2. The County also sought to have the Board impose sanctions on Appellant in all cases subject to the Board's Show Cause order as well as in MSPB Case Nos. 15-14 and 15-15, even though they were not the subjects of the Show Cause Order. Motion to Dismiss at 3.

On February 17, 2015, the Board issued a Final Decision in Appellant's MSPB Case No. 15-04. In that Final Decision, the Board granted the County's Motion to Dismiss. Final Decision at 7. However, the Board indicated that it was denying the County's Motion to Dismiss as to Cases 15-02, 15-06, 15-07, 15-08, 15-14, and 15-15. *Id.* n.5. It also denied the County's request for sanctions. *Id.*

POSITIONS OF THE PARTIES

Appellant:

- Appellant never received notification via iRecruitment regarding the examination schedule.
- The vacancy announcement never explained how to locate information about the examination schedule.
- The Board should void the entire application process for vacancy announcement IRC14870 based on the failure of the County to follow announced procedures.

County:

- The vacancy announcement for the Bus Operator position indicated that the

² As noted above, the Show Cause Order also included the instant case as well as Appellant's cases 15-02, 15-04, 15-07 and 15-08. Having reviewed the entire record in each of these cases, the Board decided to grant the County's Motion to Dismiss those issues it lacked jurisdiction over in 15-04, but to issue decisions addressing the merits of the other cases covered by the Show Cause Order. Final Decision, MSPB Case No. 15-04, at 2 n.2.

video/written examination scheduling details would be sent via the applicant's iRecruitment account and, therefore, applicants should log into their accounts periodically to check their status.

- Appellant's iRecruitment account shows that he received notice about the video/written examination on August 4, 2014.
- Appellant also was sent an email from Ms. P. on August 5, 2014, notifying him of the location, date and time for the video/written examination.
- Appellant never appeared for the video/written examination and, therefore, was dropped from consideration.
- In connection with another test Appellant needed to take for the position of Correctional Officer in August 2014, Appellant notified OHR that he would not be appearing for any additional interviews, tests, or examinations.
- Appellant cannot meet his burden of proof under the Personnel Regulations to show that the County's decision on his application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

6-2. Announcement of open jobs.

- (a) The OHR Director:

...

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements

for the position; . . .

...

6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.
- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.
 - (1) The competitive rating process may include:

(A) a written or oral examination; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

The Personnel Regulations require that the OHR Director include in the job vacancy announcement the rating process and rating criteria that will be used to create an eligible list. MCPR, 2001, § 6-5(b). The Board finds that OHR complied with this requirement with regard

to vacancy announcement IRC14870. The vacancy announcement clearly describes the rating process for applicants – a review of minimum qualifications, and then a video/written examination. County’s Response, Attach. 1 at 3. The announcement notes that the results of the video/written examination would be used to determine which of the candidates were “Qualified” and which “Did Not Pass”. *Id.* at 3. Those deemed “Qualified” would be placed on the Eligible List. *Id.*

The Personnel Regulations also provide that the competitive rating process may include the requirement for a written examination. MCPR, 2001, § 6-5(c)(1) (A).

The record of evidence in this case indicates that Appellant was notified by Ms. P. via his iRecruitment account on August 4, 2014 that the video/written examination was scheduled for August 26, 2014 and was also informed of the location and time of the examination. County’s Response at 2; County’s Response, Attach. 2 & Attach. 4. The record of evidence also indicates that on August 5, 2014 Ms. P. sent Appellant an email, inviting him to take the video/written examination and informing him of the location, date and time of the examination. County’s Response, Attach. 3 & Attach. 4. Appellant failed to show up for the video/written examination. County’s Response at 2. As the vacancy announcement explicitly stated that the video/written examination was a critical part of the rating process, County’s Response, Attach. 1 at 4, the Board finds that OHR was correct to drop Appellant from consideration for the Bus Operator position after he failed to show up for the video/written examination.³

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant’s burden of showing that the County’s decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.

ORDER

Based on the above analysis, the Board denies Appellant’s appeal from OHR’s determination not to further consider him for the position of Bus Operator with DOT.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, and Rule 7-202.

For the Board
March 18, 2015

³ Appellant was placed on notice by the vacancy announcement that the notification about the video/written examination would be sent via his iRecruitment account and it was his responsibility to periodically login to his iRecruitment account to check the status of his application. County’s Response, Attach. 1 at 1.

CASE NO. 15-07

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the County not to select him for the position of Principal Administrative Aide (PAA) in the Animal Services Division of the Police Department. The County filed its response (County's Response) to the appeal, which included three attachments.¹ Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of PAA in the Police Department on June 30, 2014. County's Response at 1. The vacancy announcement for the PAA position indicated that all applicants who met the minimum qualifications for the position would be reviewed and rated by subject matter experts based on the preferred criteria. County's Response, Attach. 1 at 3. Based on the results of this evaluation, applicants would be rated "Well Qualified" or "Qualified". *Id.* With regard to the preferred criteria,² the vacancy announcement indicated that an applicant's "[r]esume must include information specific to the preferred criteria listed below. Make sure that your resume references your knowledge, skills, and abilities as they relate to the preferred criteria. Ideally, the preferred criteria should be addressed in a separate section in your resume. . . ." County's Response, Attach. 1 at 2.

OHR reviewed Appellant's application and found he met the minimum qualifications for the PAA position. County's Response at 1; County's Response, Attach. 2. Accordingly, his application was rated by two subject matter experts chosen by the Police Department using the preferred criteria listed in the job vacancy announcement. *Id.* He received a rating of "Qualified" as he failed to address the preferred criteria in his resume. County's Response at 2; County's Response, Attach. 4. Appellant received a rating of 0 points out of a possible 20 points with regard to preferred criteria #5 (experience working with animals) because there was nothing

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for Principal Administrative Aide (IRC11083); Attach. 2 – Affidavit of the Human Resources Specialist in the Office of Human Resources (OHR); and Attach. 3 – Appellant's resume.

² The preferred criteria for the PAA position were: 1) Experience providing customer service on the phone and in person; 2) Experience utilizing computers and software packages including Word, Excel and Access; 3) Experience in determining fees, handling money and issuing receipts; 4) Experience in performing financial reconciliations, record keeping and accounting functions; and 5) Experience working with animals. County's Response, Attach. 1 at 2-3.

in Appellant's resume that demonstrated he had experience working with animals.³ *Id.*

This appeal followed.

PROCEDURAL HISTORY

After reviewing Appellant's instant appeal, as well as his appeals in Cases 15-02, 15-04, 15-06, and 15-08, on October 21, 2014, the Board issued a Show Cause Order, giving Appellant until October 28, 2014 to respond and show good cause why the Board should not summarily dismiss this appeal, as well as the others cited above.⁴ Show Cause Order; *see, e.g.*, MSPB Case 14-13 (2014); MSPB Case 14-48 (the Board does not have jurisdiction over claims of discrimination).

Appellant failed to respond to the Show Cause Order. Thereafter, on January 13, 2015, the County filed a Motion to Dismiss and Impose Sanctions. In its Motion to Dismiss, the County noted that Appellant failed to respond to the Board's Show Cause Order. Motion to Dismiss at 1, 2. The County also sought to have the Board impose sanctions on Appellant in all cases subject to the Board's Show Cause order as well as in MSPB Case Nos. 15-14 and 15-15, even though they were not the subjects of the Show Cause Order. Motion to Dismiss at 3.

On February 17, 2015, the Board issued a Final Decision in Appellant's MSPB Case No. 15-04. In that Final Decision, the Board granted the County's Motion to Dismiss. Final Decision at 7. However, the Board indicated that it was denying the County's Motion to Dismiss

³ The County notes in its response that "the instant appeal is particularly egregious because it is a rerun of MSPB Case # 14-15 and [Appellant] totally disregarded what the MSPB said in the earlier case." County's Response at 3. In MSPB Case No. 14-15, Appellant applied for the PAA position with Animal Services in the Police Department in June 2013 and was found "Qualified". Final Decision, MSPB Case No. 14-15 (2014). The Board noted in its Final Decision that the preferred criteria for the position required experience working with animals and Appellant's resume did not reflect any experience working with animals. *Id.* According to the County, "Mr. F. did not learn from his prior mistakes but rather repeats them." County's Response at 3. The County indicates that it believes "it is a waste of the County's time and resources having to respond to this appeal. Accordingly, we are urging the Board to impose appropriate sanctions against Mr. F. for abusing the MSPB process." *Id.* The Board denies the County's request for sanctions and notes that the County Code specifically provides that any applicant for employment may file an appeal with the Board alleging the County's decision on his/her application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed. Montgomery County Code, § 33-9(c).

⁴ As noted above, the Show Cause Order also included the instant case as well as Appellant's cases 15-02, 15-04, 15-06 and 15-08. Having reviewed the entire record in each of these cases, the Board decided to grant the County's Motion to Dismiss those issues it lacked jurisdiction over in 15-04, but to issue decisions addressing the merits of the other cases covered by the Show Cause Order. Final Decision, MSPB Case No. 15-04, at 2 n.2.

as to Cases 15-02, 15-06, 15-07, 15-08, 15-14, and 15-15. *Id.* n.5. It also denied the County's request for sanctions. *Id.*

POSITIONS OF THE PARTIES

Appellant:

- Appellant believes he is exceptionally qualified for the PAA position.
- The subject matter experts used to rate Appellant's application are not prescribed by the Personnel Regulations.

County:

- When Appellant's application was reviewed using the preferred criteria listed in the Job Vacancy Announcement, Appellant was rated "Qualified" rather than "Well Qualified".
- The vacancy announcement for the PAA position indicated that Appellant's resume must include information specific to the preferred criteria.
- Appellant failed to address the preferred criteria in his resume.
- Appellant cannot meet Appellant's burden of proof under the Personnel Regulations and County Code to show that the County's decision on Appellant's application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

6-2. Announcement of open jobs.

- (a) The OHR Director:

...

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position; . . .

...

6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.
- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.

- (1) The competitive rating process may include:

...

- (C) an evaluation of an applicant's training, experience, and education; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

The Personnel Regulations require that the OHR Director include in the job vacancy announcement the rating process and rating criteria that will be used to create an eligible list. MCPR, 2001, § 6-5(b). The Board finds that OHR complied with this requirement with regard to vacancy announcement IRC11083. The vacancy announcement clearly describes the rating process for applicants – a review of minimum qualifications, and then an evaluation of the applications by subject matter experts using the preferred criteria listed in the announcement. County’s Response, Attach. 1 at 3. The announcement explicitly stated that Appellant must include information specific to the preferred criteria. County’s Response, Attach. 1 at 2. One of the preferred criteria was experience working with animals. *Id.* at 3. The Board has reviewed Appellant’s resume and notes that nowhere therein is there any information with regard to Appellant’s experience working with animals. County’s Response, Attach. 3. It is Appellant’s responsibility to ensure that his resume reflects his qualifications for the position he is seeking.

Appellant argues that the Personnel Regulations do not provide for subject matter experts to rate applications. Appellant’s Appeal. While the Personnel Regulations do not address subject matter experts, they require that the OHR Director include in the vacancy announcement a description of the competitive rating process. MCPR, 2001, § 6-5(b). The Board finds that the OHR Director complied with the Personnel Regulations when he indicated in the vacancy announcement that those applicants found to have met the minimum qualifications for the PAA position would be evaluated by subject matter experts based on the preferred criteria listed in the vacancy announcement.

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant’s burden of showing that the County’s decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.

ORDER

Based on the above analysis, the Board hereby denies Appellant’s appeal from Appellant’s nonselection for the position of Principal Administrative Aide.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, and Rule 7-202.

For the Board
March 18, 2015

CASE NO. 15-08

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for the position of Community Correctional Intern in Pre-Trial Services with the Department of Correction and Rehabilitation (DOCR). The County filed its response (County's Response) to the appeal, which included five attachments.¹ Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Community Correctional Intern in DOCR on June 2, 2014. County's Response at 1. A member of the Recruitment and Selection team in OHR, reviewed Appellant's application to determine whether he met the minimum qualifications listed in the vacancy announcement. *Id.*; County's Response, Attach. 2. The minimum qualifications for the Community Correctional Intern position were completion of two years of college in the social science/human services field and possession of a valid motor vehicle operator's license. County's Response at 2; County's Response, Attach. 1 at 3 & Attach. 2. The vacancy announcement noted that a human services-related major included criminal justice, social work, psychology, sociology, rehabilitation and counseling. County's Response, Attach. 1 at 4.

The Human Resources Specialist determined that Appellant failed to meet the educational minimum qualifications for the position. County's Response at 2; County's Response, Attach. 2. Although Appellant has an Associate Degree in Business Studies from Harrisburg Area Community College, his course work was primarily business-related. County's Response at 2; *see also* County's Response, Attach. 3 & Attach. 4. Appellant was informed of his rating of "Not Qualified". County's Response at 1.

This appeal followed.

PROCEDURAL HISTORY

After reviewing Appellant's instant appeal, as well as his appeals in Cases 15-02, 15-04, 15-06, and 15-07, on October 21, 2014, the Board issued a Show Cause Order, giving Appellant until October 28, 2014 to respond and show good cause why the Board should not summarily

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for Community Correctional Intern (IRC13743); Attach. 2 – Affidavit of the Human Resources Specialist III; Attach. 3 – Appellant's resume; Attach. 4 – Appellant's Application; and Attach. 5 – Email from Appellant to OHR, subject: Request for Paid Internship Opportunity, dated 08/27/14.

dismiss this appeal, as well as the others cited above.² Show Cause Order; *see, e.g.*, MSPB Case 14-13 (2014); MSPB Case 14-48 (the Board does not have jurisdiction over claims of discrimination).

Appellant failed to respond to the Show Cause Order. Thereafter, on January 13, 2015, the County filed a Motion to Dismiss and Impose Sanctions. In its Motion to Dismiss, the County noted that Appellant failed to respond to the Board's Show Cause Order. Motion to Dismiss at 1, 2. The County also sought to have the Board impose sanctions on Appellant in all cases subject to the Board's Show Cause order as well as in MSPB Case Nos. 15-14 and 15-15, even though they were not the subjects of the Show Cause Order. Motion to Dismiss at 3.

On February 17, 2015, the Board issued a Final Decision in Appellant's MSPB Case No. 15-04. In that Final Decision, the Board granted the County's Motion to Dismiss. Final Decision at 7. However, the Board indicated that it was denying the County's Motion to Dismiss as to Cases 15-02, 15-06, 15-07, 15-08, 15-14, and 15-15. *Id.* n.5. It also denied the County's request for sanctions. *Id.*

POSITIONS OF THE PARTIES

Appellant:

- Appellant has an associate degree supported by coursework in Human Relations in Business, Labor Relations, Philosophy (1 year), Psychology (1 year), Economics (Behavioral Science, 1 year), Business Ethics and Communications/Effective Speaking.
- Appellant also has ten years of experience in law enforcement-support positions.
- Appellant was qualified for the Community Correctional Intern position based on his education and experience.

County:

- Appellant failed to meet the educational minimum qualification for the position, i.e., completion of two years of college in the social science/human services field.
- While Appellant does have an Associate Degree, it is in Business Studies.
- The only conceivable reference to college study in the social science/human services field in Appellant's application is that he has six credits in Psychology and coursework in Speech communications.
- The vacancy announcement indicated that there was no experience equivalency for the education requirement.
- Appellant cannot meet Appellant's burden of proof under the Personnel Regulations and

² As noted above, the Show Cause Order also included the instant case as well as Appellant's cases 15-02, 15-04, 15-06 and 15-07. Having reviewed the entire record in each of these cases, the Board decided to grant the County's Motion to Dismiss those issues it lacked jurisdiction over in 15-04, but to issue decisions addressing the merits of the other cases covered by the Show Cause Order. Final Decision, MSPB Case No. 15-04, at 2 n.2.

County Code to show that the County’s decision on Appellant’s application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

6-2. Announcement of open jobs.

- (a) The OHR Director:

...

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position; . . .

...

6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.

- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.
- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.

(1) The competitive rating process may include:

...

- (C) an evaluation of an applicant’s training, experience, and education; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

The vacancy announcement explicitly states that the minimum qualifications for the Community Correctional Intern position was completion of two years of college in the social science/human services field. County’s Response, Attach. 1 at 3. It also clearly indicates that a human services-related major includes criminal justice, social work, psychology, sociology, rehabilitation or counseling. *Id.*

Appellant's resume indicates that his major was Business Studies and his primary courses included: Principles of Accounting; Principles of Microeconomics; Principles of Macroeconomics; Human Relations in Business; Principles of Management; Principles of Marketing; Information Systems and Computer Applications; Introduction to Business Software; Labor Relations; Business Ethics; and Business Law. County's Response, Attach. 3. In his application for the position, Appellant mentioned he had six credits in Psychology and coursework in Speech communications. County's Response at 2; County's Response, Attach. 4. Although Appellant claims in his appeal that he had one year of Psychology and one year of Philosophy, neither his resume nor application supports this assertion. See County's Response, Attach. 3 & Attach. 4. As the Board has previously informed Appellant, he is responsible for ensuring that his application reflects his qualifications for the position he is seeking. See, e.g., Final Decision, MSPB Case No. 14-15 (2014); Final Decision, MSPB Case No. 15-07 (2015).

Having reviewed the record of evidence in this case, the Board agrees with OHR's determination that Appellant lacked two years of college in the social science/human services field. Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.

ORDER

Based on the above analysis, the Board hereby denies Appellant's appeal from OHR's determination that he did not meet the minimum qualifications for the position of Community Correctional Intern.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, and Rule 7-202.

For the Board
March 18, 2015

CASE NO. 15-14

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for the position of Correctional Records Coordinator with the Department of Correction and Rehabilitation (DOCR). The County filed its response (County's Response) to the appeal, which included three

attachments.¹ Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Correctional Records Coordinator in DOCR on October 2, 2014. County's Response at 1. A member of the Recruitment and Selection team in OHR reviewed Appellant's application to determine whether he met the minimum qualifications listed in the vacancy announcement. *Id.*; County's Response, Attach. 2. The minimum qualifications for the Correctional Records Coordinator position were:

1. Two years of experience in community based correctional services or public service, such as law enforcement or related fields that deal with [a] variety of offenders, one year of which must have been in records management, e.g., files/records reference, retrieval and maintenance;
2. Graduation from high school or High School Certificate completion recognized in the State of Maryland; and
3. An equivalent combination of education and experience may be substituted.

County's Response at 2; County's Response, Attach. 1 at 2; Attach. 2.

Upon reviewing Appellant's application, OHR determined that he failed to meet the minimum experience requirements for the position, i.e., two years of experience in community based correctional services or public service, such as law enforcement or related fields that deal with offenders. County's Response at 2; County's Response, Attach. 2. Therefore, she rated him "Not Qualified". County's Response at 1.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant has served in public service roles for almost a decade; the vacancy announcement only required two years of public service experience.
- The duties of a Correctional Records Coordinator are indistinguishable from those of a Public Safety Communications Specialist. Appellant was a Public Safety Communications Specialist for over three years with the County.

County:

- Appellant failed to address the minimum qualifications in his application.

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for Correctional Records Coordinator (IRC15379); Attach. 2 – Affidavit of the Human Resources Specialist; and Attach. 3 – Appellant's resume.

- None of the job experiences listed in Appellant’s resume demonstrates any experience dealing with offenders.
- Appellant has no direct experience working with offenders.
- None of the information or arguments that Appellant made in his appeal was contained in his application for the Correctional Records Coordinator position.
- Appellant cannot meet Appellant’s burden of proof under the Personnel Regulations and County Code to show that the County’s decision on Appellant’s application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- It is a waste of the County’s time and resources having to respond to this appeal. Therefore, the Board should impose sanctions against Appellant for abusing the MSPB process.²

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

6-2. Announcement of open jobs.

- (a) The OHR Director:

² The County is aware that the Board has previously informed Appellant that it lacks jurisdiction over allegations of discrimination. *See, e.g.*, MSPB Case No. 14-40 (2014); MSPB Case No. 15-04 (2015). In support of its request for sanctions, the County notes that Appellant asserted in his appeal that “the County Despises Jews and seeks to remove Jews from the workforce.” County’s Response at 4. The Board notes that although Appellant did indicate this in his appeal, he specifically stated that “Appellant is NOT asking the Board to make a determination on this ongoing Racial or Ethnic Discrimination.” Appellant’s Appeal. Therefore, the Board rejects the County’s request for sanctions.

...

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position; . . .

...

6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.
- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.

- (1) The competitive rating process may include:

...

- (C) an evaluation of an applicant’s training, experience, and education; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

The vacancy announcement explicitly states that the minimum qualifications for the Correctional Records Coordinator were “[t]wo years of experience in community based correctional services or public service, such as law enforcement or related fields **that deal with [a] variety of offenders**”. County’s Response at 2; County’s Response, Attach. 1 at 2 (emphasis added). As the County noted, Appellant failed to address the minimum qualifications in his resume.³

Having reviewed the record of evidence in this case, the Board notes that nowhere in his resume did Appellant indicate that he had experience dealing with offenders. As that requirement was explicitly set forth in the vacancy announcement, County’s Response, Attach. 1, the Board sees no basis to question OHR’s determination that Appellant lacked two years of experience in community-based correctional services or public service, such as law enforcement or related fields *that deal with offenders*.⁴ Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant’s burden of showing

³ The Board notes that Appellant did address the preferred criteria in his resume. *See* County’s Response, Attach. 3.

⁴ The County argues that Appellant has included in his appeal evidence and argument that he had not previously submitted with his application. While the Board’s standard of review in nonselection cases is arbitrary and capricious, *see* MCPR 6-13 (“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”), the Board has not previously stated whether that review is conducted *de novo* or on the record. *Compare* MCPR 35-2(a) (employees have right to *de novo* hearing before the Board in disciplinary cases) *with* MCPR 35-2(b) (in review of grievance decisions, if the Board “does not grant a hearing, [it] must render a decision on the appeal based on the written record.”). MCPR 35-2(c), which pertains to review of nonselections, is silent on this issue.

Historically, the Board has not held hearings in nonselection cases although it is not precluded from doing so. Accordingly, the Board adopts the standard of MCPR 35-2(b) in nonselection cases. That is, unless the Board decides to hold a hearing, its decision will be based on the written record of the application process and, absent extraordinary circumstances, it will not consider evidence that was not presented with the application.

The foregoing notwithstanding, the Board has considered all the evidence and arguments put forth by Appellant, including that which the County contends was not contained within his employment application. Consideration of this evidence does not change the Board’s view that Appellant has failed to show that the CAO’s decision 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.

that the County's decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.

ORDER

Based on the above analysis, the Board hereby denies Appellant's appeal from OHR's determination that he did not meet the minimum qualifications for the position of Correctional Records Coordinator.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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, and Rule 7-202.

For the Board
March 24, 2015

CASE NO. 15-15

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Board of Elections (BOE) not to select him for the position of Election Aide II. The County filed its response (County's Response)¹ to the appeal, asserting that the Board lacks jurisdiction over the appeal as the position Appellant applied for was a part-time, temporary position. Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Election Aide II with the BOE. County's Response at 1. The vacancy announcement for the Election Aid II position indicated that it was a part-time, temporary position. County's Response, Attach. 1 at 1. There were 340 applicants and BOE filled 13 positions. County's Response at 1. Appellant was not one of the applicants hired. *Id.*

This appeal followed.

¹ The County's Response contained one attachment. The attachment was: Attachment (Attach.) 1 – Job Vacancy Announcement for Election Aide II (IRC13580).

POSITIONS OF THE PARTIES

Appellant:

- Appellant previously served as an Election Judge during the 2008 and 2012 election cycles in Montgomery County.
- The arbitrary and capricious denial of employment of Appellant is based on an ongoing pattern of practice by the County to obliterate Jews from the workforce and to exact retribution for filing a complaint of anti-Semitism in the workplace.

County:

- The Board lacks jurisdiction over this appeal because the County Code only provides that a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB.
- The position Appellant applied for was a part-time, temporary, non-merit position.
- Even if the Board had jurisdiction over the instant appeal, it should dismiss the appeal as Appellant asserts that his denial of employment is based on religious discrimination.
- In previous appeals involving Appellant, the Board has noted that alleged human rights violations made by Appellant must be dismissed as the Board lacks jurisdiction over them.
- Under the circumstances, it is a waste of time and resources for the County to have to respond to this appeal. Accordingly, the Board is urged to impose appropriate sanctions against Appellant for abusing the MSPB process.²

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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,³ may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and

² While the Board agrees with the County that it has previously informed the Appellant that it lacks jurisdiction over alleged human rights violations, *see, e.g.*, MSPB Case No. 14-40 (2014), MSPB Case No. 15-04 (2015), it denies the County’s request for sanctions.

³ Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, and December 11, 2012), Section 1, Definitions, which states in applicable part:

...

1-8. Career position: A full-time, part-time, or term merit system position.

...

1-39. Merit system position: A career position in the executive or legislative branch of the County government, the Office of the County Sheriff, or another position designated by County or State statute, except those excluded by Section 2-2 of these Regulations.

...

1-75. Temporary position: A non-career position classified and filled under merit system principles.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010 July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

6-13. 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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

ISSUE

Does the Board have jurisdiction over the Appellant's appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over Appeals Involving Non-Merit Positions.

The County Code vests the Board with authority to hear appeals from applicants or employee applicants for merit system positions. Montgomery County Code, § 33-9(c). The Personnel Regulations define a merit system position as a career position in the legislative or executive branch of the County. MCPR, 2001, § 1-39. A career position is defined as a full-time, part-time or term position. MCPR, 2001, § 1-8. A temporary position is defined as a non-career position. MCPR, 2001, § 1-75.

The vacancy announcement for the Election Aide II position indicated it was a temporary, part-time position. County's Response, Attach. 1 at 1. As the position was temporary, it was a non-career position and, therefore, not a merit system position. Accordingly, the Board finds it lacks jurisdiction over the instant appeal as it does not involve a merit system position.⁴

⁴ Although the Board's regulation refers to the right of an applicant to file a direct appeal to the Board over the denial of employment, it is clear from the express statutory language authorizing such an appeal to the Board that the appeal must involve a merit system position. A temporary position, such as the Election Aide II position, is not a merit system position so the Board cannot assert jurisdiction over the instant appeal.

The Board Lacks Jurisdiction Over Appeals That Allege Human Rights Violations.

In the alternative, the Board would dismiss the instant appeal as it lacks jurisdiction over appeals that allege human rights violations. The County Code provides that an applicant may challenge the Chief Administrative Officer's decision regarding an application for employment. However, as the Board has previously informed the Appellant, the Code is explicit that appeals alleging discrimination prohibited by Chapter 27 of the Code must be filed with the Human Rights Commission. Montgomery County Code, § 33-9(c); *see* MSPB Case No. 14-40 (2014); MSPB Case 15-04 (2015). Among the various forms of discrimination prohibited by Chapter 27 is discrimination based on religious creed. Montgomery County Code, § 27-1(a). It is abundantly clear from the record in this case, that Appellant is alleging that his nonselection was due to religious discrimination. Appellant's Appeal. Accordingly, the Board finds that it lacks jurisdiction over this appeal.

ORDER

Based on the above analysis, the Board dismisses Appellant's appeal from Appellant's nonselection for the position of Election Aide II based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
March 18, 2015

CASE NO. 15-16

FINAL DECISION AND ORDER

On December 1, 2014,¹ Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination by the Montgomery County Department of Corrections and Rehabilitation (DOCR) not to select Appellant for the position of Correction Officer I. The County filed its response (County's Response)² to the appeal, asserting that the Board lacks jurisdiction over the appeal as the Appellant has been rated "Well Qualified" for the position and is scheduled to begin the background process. Appellant did not file any reply to the County's Response. The appeal was considered and decided by the

¹ Appellant actually filed his appeal using the Board's on-line appeal form on Friday, November 28, 2014 at 12:36 a.m. As the Board's office is closed on Fridays, the first day of business for the Board after Appellant filed his appeal was December 1, 2014. Accordingly, that is the date of receipt of Appellant's appeal.

² The County's Response contained one attachment. The attachment was: Attachment (Attach.) 1 – Affidavit of the Human Resources Specialist.

Board.

FINDINGS OF FACT

On September 12, 2014, Appellant applied for the position of Correction Officer I (vacancy announcement IRC15323) with DOCR. County's Response at 1; County's Response, Attach. 1. At the outset, the 481 applications received for the position were reviewed a member of the Recruitment and Selection team. *Id.* The member determined that 433 applicants, including Appellant, satisfied the minimum qualifications for the position. *Id.*

As Appellant was deemed to have met the minimum qualifications of the position, he took the assessment test for the position on November 8, 2014. *Id.* Based on the results of this assessment test, Appellant was rated "Well Qualified" for the position. *Id.* Based on this rating, Appellant was scheduled for an appointment on December 18, 2014 to start the background process which includes an interview, background investigation, psychological assessment, and physical exam. *Id.* Candidates must pass the entire background process to be considered for the position. *Id.*

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant believes he was successful in the examination for the position.
- Appellant firmly believes that stale and outdated information about the Appellant's history will be used by the County to refuse processing his application any further.

County:

- The Board's regulations provide that an applicant may file an appeal directly with the MSPB over a denial of employment.
- At the time Appellant filed the instant appeal, he had not been denied employment. Rather, he had been rated "Well Qualified" for the position and scheduled to start the background process for the position.
- Therefore, as Appellant has not been denied employment, the Board lacks jurisdiction over the instant appeal.
- The Board has previously informed Appellant that his appeals were premature in that he had not yet been denied employment. Under the circumstances, it is a waste of time and resources for the County to have to respond to this appeal. Accordingly, the Board is urged to impose appropriate sanctions against Appellant for abusing the MSPB process.³

³ While the Board agrees with the County that it has previously informed the Appellant that it lacks jurisdiction over appeals where Appellant has not yet been denied employment, *see, e.g.,* MSPB Case No. 14-14 (2014), MSPB Case No. 14-41 (2014), it denies the County's request for sanctions.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

...

- 6-13. 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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Does the Board have jurisdiction over the Appellant’s appeal?

ANALYSIS AND CONCLUSIONS

The Board’s Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute.

The Board’s jurisdiction is not plenary but is rather limited to that which is granted it by

statute. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Has Jurisdiction Over A Denial Of Employment; However, At The Time Of The Filing Of This Appeal, Appellant Had Not Been Denied Employment.

The County Code provides that an applicant for a merit system position may challenge the Chief Administrative Officer’s (CAO’s) decision regarding an application for employment. Montgomery County Code, § 33-9(c). As the Board’s regulations indicate, Appellant may file an appeal with the Board over a denial of employment. MCPR, 2001, § 35-2(c). However, in the instant case, Appellant has been rated “Well Qualified” for the position of Correction Officer I and scheduled to start the background process. County’s Response at 1. Thus, based on OHR’s actions at the time this appeal was filed, there has been no final decision by the CAO and thus Appellant cannot be deemed to have denied employment in the position of Correction Officer I with DOCR. Accordingly, the Board concludes it lacks jurisdiction over the instant appeal and will dismiss it.⁴

ORDER

Based on the above analysis, the Board dismisses Appellant’s appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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
March 18, 2015

CASE NO. 15-20

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant’s appeal challenging the determination by the County not to select him for the position of Customer Service Representative Trainee in the Public Information

⁴ Appellant may file a new appeal with the Board should Appellant ultimately not be selected for the Correction Officer I position.

Office. The County filed its response (County's Response) to the appeal, which included three attachments.¹ Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Customer Service Representative Trainee in the Public Information Office (PIO) on April 5, 2014. County's Response at 1. The vacancy announcement for the Customer Service Representative Trainee position indicated that all applicants who met the minimum qualifications for the position would be reviewed and rated by subject matter experts based on the preferred criteria. County's Response, Attach. 1 at 3. Based on the results of this evaluation, applicants would be rated "Well Qualified" or "Qualified". *Id.*

OHR reviewed Appellant's application and found he met the minimum qualifications for the Customer Service Representative Trainee position. County's Response at 1; County's Response, Attach. 2. Accordingly, his application was rated by two subject matter experts chosen by the Public Information Office using the preferred criteria listed in the job vacancy announcement.² *Id.* He received a rating of "Qualified". According to the County, in rating the preferred criteria, the subject matter experts awarded a maximum of 20 points for each of the three preferred criteria. County's Response at 2; County's Response, Attach. 2. Thus, each applicant could receive a total consensus score of up to 60 points. *Id.* The cut-off for the "Well Qualified" rating was a total of 45 points or higher. *Id.* Appellant received a score of 35 points which placed him in the "Qualified" category. *Id.* Nine applicants were rated "Well Qualified" for the Customer Service Representative Trainee position. County's Response at 1-2; County's Response, Attach. 2. The Director of PIO selected two applicants from the highest rating category of "Well Qualified". County's Response at 1; County's Response, Attach. 2.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant previously worked at the County's Public Safety Communications Center.
- The Appellant is a certified Emergency Telecommunications Dispatcher.

¹ The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for Customer Service Representative Trainee (IRC14134); Attach. 2 – Affidavit of the Human Resources Specialist III in the Office of Human Resources (OHR); and Attach. 3 – Appellant's application.

² The preferred criteria for the Customer Service Representative Trainee position were: 1) Thorough knowledge of the services provided by Montgomery County Government and the local public and private human services agencies; 2) Knowledge of and the ability to apply the fundamentals of business communication; and 3) Experience using a Customer Service Management system or database. County's Response at 2; County's Response, Attach. 1 at 2-3.

- The County is retaliating against Appellant because of his whistleblowing.

County:

- When Appellant’s application was reviewed using the preferred criteria listed in the Job Vacancy Announcement, Appellant was rated “Qualified” rather than “Well Qualified”.
- While Appellant addressed the preferred criteria in his resume, the experience of those applicants rated “Well Qualified” exceeded that of Appellant.
- The Personnel Regulations provide that a department director can select any individual from the highest rating category. The highest rating category in this case was “Well Qualified” and the Director of PIO chose two individuals from this category.
- Appellant cannot meet Appellant’s burden of proof under the Personnel Regulations and County Code to show that the County’s decision on Appellant’s application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- Although Appellant constantly claims he is being denied employment by the County for complaining about workplace harassment and retaliation, he has failed to produce any evidence to support his claim.
- It is a waste of time and resources for the County to have to respond to this appeal. Accordingly, the Board should impose appropriate sanctions against Appellant for abusing the MSPB process.³

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, March 9, 2010, and July 23, 2013), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which states in applicable part:

³ The County Code provides as a matter of right a direct appeal by any applicant from denial of employment to a merit system position. Montgomery County Code, § 33-9(c). Accordingly, the Board denies the County’s request for sanctions.

7-1. Use of eligible list. If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

- (a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

The Personnel Regulations indicate that a department director must choose an applicant from the highest rated category. MCPR, 2001, § 7-1. In the instant case, the Director of PIO chose two individuals from the “Well Qualified” list. County’s Response at 1-2; County’s Response, Attach. 2. Appellant, along with 82 other applicants, was rated “Qualified”. County’s Response, Attach. 2. According to the Human Resources Specialist in charge of this recruitment, the experience of the applicants rated “Well Qualified” exceeded that of Appellant. *Id.* Based on the record of evidence before the Board, the Board sees no basis to question the determination by the County not to select Appellant for the position of Customer Service Representative Trainee.

Accordingly, the Board concludes that Appellant has failed to meet Appellant’s burden of showing that the County’s decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.

ORDER

Based on the above analysis, the Board hereby denies Appellant’s appeal from Appellant’s nonselection for the position of Customer Service Representative Trainee.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, and Rule 7-202.

For the Board
April 29, 2015

CASE NO. 15-21

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the County not to provide him with a noncompetitive appointment as an Urban District Public Service Aide with the Community Engagement Cluster. The County filed its response (County's Response)¹ to the appeal, asserting that the Board lacks jurisdiction over the appeal as Appellant was seeking a noncompetitive appointment. Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant requested a noncompetitive appointment as an Urban District Public Service Aide, pursuant to Section 6-14 of the Personnel Regulations, which provides for such appointments for individuals with severe disabilities. County's Response at 1. The County did not grant Appellant's request. *Id.*

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant has a licensed physician's certification of his disability.
- Appellant has applied for over sixty-six County positions and has not been successful.
- The County has denied Appellant employment based on Appellant's past whistleblowing and complaints of discrimination and reprisal.

County:

- The Board lacks jurisdiction over this appeal because Section 6-14(f) of the Personnel Regulations precludes an appeal over the denial of a noncompetitive appointment.

¹ The County's Response contained no attachments. County's Response at 1.

- The Board held in Case No. 14-13 that it lacked jurisdiction over a noncompetitive reappointment based on Section 7-4 of the Personnel Regulations. The same result should apply here.

APPLICABLE LAW AND REGULATIONS

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, *Recruitment and Application Rating Procedures*, which states in applicable part:

...

6-14. Noncompetitive Appointments of Persons with Severe Disabilities to County Merit Positions.

- (a) A department director may noncompetitively appoint a qualified person to a County merit position if the individual:
 - (1) has a severe developmental, physical, or psychiatric disability within the meaning of 5 C.F.R. 213.3102(u), the criteria for disability used by the Federal Office of Personnel Management for noncompetitive appointment to Federal merit system positions under its special hiring authority; and
 - (2) has been certified by the Maryland Department of Education Division of Rehabilitation Services or by an equivalent out-of-state vocational rehabilitation agency as meeting the definition of disability contained in (a) (1) above based upon medical evidence.
 - (3) meets the minimum qualifications for the position;
 - (4) is able to perform the essential duties of the job with or without reasonable accommodation;
 - (5) passes a background check, if required for the position; and
 - (6) passes a physical examination, if required for the position.

...

- (f) Noncompetitive appointment under this section is the prerogative of management and not a right or entitlement of a person with a severe disability. An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board.

ISSUE

Does the Board have jurisdiction over the Appellant's appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over Appeals Involving Noncompetitive Appointments.

Just as the Personnel Regulations provide that the Board lacks jurisdiction over noncompetitive reappointments, *see* MCPR, 2001, § 7-4(c); MSPB Case No. 14-13 (2014), they likewise divest the Board of jurisdiction over noncompetitive appointments. MCPR, 2001, § 6-14(f).

ORDER

Based on the above analysis, the Board dismisses Appellant's appeal from the County's determination not to grant Appellant's request for a noncompetitive appointment to the position of Urban District Public Service Aide based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
May 4, 2015

CASE NO. 15-23

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal¹ challenging the determination by the Office of Human Resources' (OHR's) Director to rescind a conditional offer of employment made to Appellant based on information contained in his credit report. The County filed its response (County's Response) to the appeal, which included ten attachments.² Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant works for Empirical Concepts, Inc., a government contractor. County's Response at 4; County's Response, Attach. 10. He serves as a Staff Accountant for Empirical Concepts' client, the U.S. Immigration and Customs Enforcement,³ preparing financial statements and assisting in audits. County's Response at 4; County's Response, Attach. 9

Appellant submitted his application for the Administrative Specialist II, Grade 21 position, with the Montgomery County Employee Retirement Plans (MCERP). County's Response at 1. The primary responsibility of MCERP is to administer the retirement benefit programs, including handling the processing and payment of retirement annuities, as well as the investment of the trust funds. *Id.* at 2-3; County's Response, Attach. 4, H. Affidavit. The incumbent of the Administrative Specialist II position in MCERP processes annuity payments

¹ In addition to his appeal, Appellant filed a letter with the Board (hereinafter Supplemental Appeal) and attached two documents (for ease of reference hereinafter designated Exhibit (Ex.) A and Ex. B). Ex. A is a document with three sections: Public Record (1); Collections (2); and Negative Accounts (1). Ex. B is a page from Appellant's background investigation, entitled SS Trace/Credit.

² The County's attachments were: Attachment (Attach.) 1 – Email from M.P. to Appellant, dated 12/19/14, extending a conditional offer of employment; Attach. 2 – Withdrawal of Conditional Offer of Employment Letter from OHR's Acting Director, dated 01/23/15; Attach. 3 – Job Vacancy Announcement for the Administrative Specialist II position (#IRC13740); Attach. 4 – Affidavit of L.H. (H. Affidavit); Attach. 5 – L.H.'s Check-list regarding General Office Overview for Appellant's interview; Attach. 6 – Letter from M.P. to Appellant, forwarding a copy of his background credit report completed by HireRight; Attach. 7 – Email from Appellant to M.P., dated 01/12/15, subject: Re: MCERP: IRC13740, Administrative Specialist II; Attach. 8 – HireRight Background Investigation of Appellant; Attach. 9 – Appellant's resume; and Attach. 10 – Earnings Statement for Appellant from Empirical Concepts, Inc., for the pay period ending 11/15/2014.

³ U.S. Immigration and Customs Enforcement is part of the Department of Homeland Security.

for retirees, prepares quarterly and annual financial reports, processes and tracks revenues and expenditures, and ensures the activities of the County's Retirement Plans are in compliance with governance requirements, and administrative policies and procedures. County's Response, Attach. 3 at 2.

During the selection process for the Administrative Specialist II, Appellant was interviewed twice, on November 10, 2014 and on December 12, 2014, by MCERP. County's Response at 2; County's Response, Attach. 4 at 1. During these interviews, MCERP Executive Director Ms. H. advised Appellant that because of the nature of MCERP's business, MCERP would be conducting a background investigation of the selected applicant, which would include a search of the applicant's criminal history, department of motor vehicles driving record and credit information. *Id.* Ms. H. explained to that MCERP would be conducting a credit history check through a consumer credit investigation company and if any negative elements were reported in the credit history check, they could disqualify Appellant for the position. *Id.*; County's Response, Attach. 5.

On December 19, 2014, M.P., a member of the Office of Human Resources' (OHR's) Recruitment and Selection Team extended Appellant a conditional offer of employment with MCERP, subject to completion of a successful background investigation and medical history review. County's Response at 1; County's Response, Attach. 1. Appellant signed a release authorizing the County to conduct a background investigation. County's Response, Attach. 6. On January 12, 2015, Mr. P. sent Appellant a copy of his background credit report prepared by HireRight, and informed Appellant that the County was contemplating taking action based in whole or part on the information contained in the report. County's Response at 2; County's Response, Attach. 6. Appellant was informed by Mr. P. that he had five business days to comment on any inaccuracies, incomplete information or to dispute any information reported. *Id.* Appellant was also afforded the opportunity to comment on any problems with the background report or provide anything additional he would like the County to consider regarding the credit report. *Id.* Appellant sent an email to Mr. P. stating: "I have no objections with the information obtained in the report and it is fine to proceed and make a decision based [on] the information you have." County's Response at 2; County's Response, Attach. 7.

Upon reviewing Appellant's background credit check, Ms. H. noted that there were collection problems,⁴ two judgements against Appellant,⁵ debt charged off as bad debt,⁶ and late

⁴ The credit report reflected two collection issues: LJ Ross and Access REC. County's Response at 3; County's Response, Attach. 8.

⁵ The credit report indicated judgments obtained by Potomac Receivables against Appellant on two occasions. County's Response at 3; County's Response, Attach. 8.

⁶ The credit report showed that Appellant's debt to Chase was charged off as bad debt. County's Response at 3; County's Response, Attach. 8.

payments.⁷ County's Response at 3; County's Response, Attach. 4. Ms. H. stated that the negative information in the background credit report, much of it occurring in the past four years, and especially the two recent court judgments against Appellant, gave her misgivings about Appellant's integrity and ability to be involved with financial transactions. *Id.* According to Ms. H., trust and integrity are of paramount importance in a position that handles financial transactions. *Id.*

Based upon Ms. H.'s concerns about Appellant's integrity and trust, she requested that the Acting Director of OHR rescind the conditional offer of employment made to Appellant. County's Response at 3-4; County's Response, Attach. 4. By letter dated January 23, 2015, the Acting OHR Director notified Appellant she was withdrawing the conditional offer of employment, based on the information contained in Appellant background credit report. County's Response at 1; County's Response, Attach. 2; Appellant's Supplemental Appeal.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant currently works in the U.S. Department of Homeland Security as a Staff Accountant, and has a government clearance for the position.
- In order to receive his government clearance, Appellant went through a thorough background investigation over a three-month period, which included a FBI fingerprint check, criminal background check, reference check, and credit history check.
- As Appellant passed the federal government's background investigation without any problems, Appellant had no reason to believe his prior credit issues would cause his offer to be rescinded.
- Appellant acknowledges that he made a couple of mistakes as a young man, but is currently righting these wrongs.

County:

- The vacancy announcement for the Administrative Specialist II indicates that the selected candidate would be required to successfully complete a medical history review and background investigation prior to appointment.
- When Appellant was extended a conditional offer of employment, the offer was conditioned on successful completion of a background investigation.
- Appellant was informed during the interview process that if there were any

⁷ The following late payments by Appellant were indicated in the report: DPT ED/NAVI, opened 9/08/08; NAVIENT, opened 7/23/07; DPT ED/NAVI, opened 9/23/09; AMS-SG/NCCU, opened 12/15/99; and US DEP ED, opened 12/31/10. County's Response at 3; County's Response, Attach. 8.

- negative elements reported in the credit background check these elements might be disqualifying.
- Appellant was given a copy of his background credit investigation and told that the County was contemplating taking action based on it. He was provided with five business days to comment on any inaccuracies, incomplete information, or dispute any information reported.
 - Appellant indicated he had no objection to the information contained in the background credit report and told the County it was fine to proceed and make a decision based on the report.
 - Trust and integrity are of paramount importance in a position that provides administrative support in an office that handles financial transactions.
 - Although Appellant asserts he made mistakes as a young man and has become a better person today, if one reviews Appellant’s background credit check, one of the collection actions against Appellant began in May 2013 and closed in May 2014, and the two court judgments against him were obtained in February 2013 and April 2013. Thus, significant negative credit history elements occurred in the last few years.
 - Appellant cannot meet his burden of proof under the Personnel Regulations and County Code to show that the County’s decision on his application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

APPLICABLE LAWS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

...

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

6.4. Reference and background investigation requirements; Review of applications.

- (a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.
- (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
- ...
- (b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if:
 - ...
 - (5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

...

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

ISSUE

Was the County justified in rescinding the conditional offer of employment made to Appellant?

ANALYSIS AND CONCLUSIONS

As the County correctly points out, Appellant has the burden of proving that the County's decision to rescind its conditional offer of employment was arbitrary, capricious or

based on other non-merit factors. Montgomery County Code, Section 33-9(c). The Board concludes that Appellant has failed to meet this burden.

The County has the right to establish the qualifications for a position and conduct a background investigation before selecting an applicant for a position. MCPR, 2001, § 6-4(a)(1). It is clear from the record of evidence in this case, that Appellant was informed during the interview process that, if selected, he would be subject to a background investigation to include a check of his credit history. County's Response at 2; County's Response, Attach. 4.

Appellant knew he was applying for a position that handles financial transactions. Thus, if Appellant was hired, he would have fiduciary responsibilities.⁸ As an employee with fiduciary responsibilities, Appellant would be held to a higher standard of conduct. Given the fact that at the time he applied, he had fiduciary responsibilities on behalf of the federal government and had undergone a federal background investigation for that position, Appellant should have recognized that any blemish on his credit record, even if it had eventually been resolved, could call into question his fitness for the County's position. Moreover, Ms. H. explicitly informed Appellant that any negative elements in the credit background check could serve to disqualify him from the position with MCERP. County's Response, Attach. 4.

The Board agrees with the County that the issue of trust is of paramount importance in a position in an office that handles financial transactions. County's Response at 3; County's Response, Attach. 4. Appellant raises several arguments to explain or diminish the significance of the issues revealed in the credit report. As noted above, however, he did not raise these arguments before the County when offered the opportunity to do so.⁹ In light of his failure to raise these points with the County before the decision to rescind the conditional offer was made, the Board cannot say that the County's decision was arbitrary, capricious, or otherwise unlawful based on the record before it at the time of its decision. Moreover, given the recentness of the two Circuit Court judgments against him, as well as one of the collection actions against him, the Board finds that the County was justified in rescinding its conditional offer of employment to Appellant. Accordingly, the Board finds that Appellant has failed to carry his burden of showing that the County's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

⁸ According to Black's Law Dictionary, a fiduciary "is a person holding the character of a trustee . . . in respect to the trust and confidence involved in it and the scrupulous good faith and candor it requires. . . ." *Black's Law Dictionary, available on line at <http://thelawdictionary.org/fiduciary/>.*

⁹ In MSPB Case No. 15-14 (2015), the appellant included in his appeal of his nonselection evidence and argument he had not previously submitted with his application. The Board determined in that case to address the issue of whether its review of a nonselection case is *de novo* or based on the written record in the application process. The Board held in Case No. 15-14 that, unless it determines to hold a hearing in a nonselection case, its decision will be based on the written record in the application process, and absent extraordinary circumstances, which are not present in the instant case, it will not consider evidence that was not submitted during the application process.

ORDER

Based on the above analysis, the Board denies Appellant's appeal of OHR's rescission of his conditional offer of employment.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
May 4, 2015

APPEAL PROCESS

GRIEVANCES

In accordance with § 34-10(a) of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011 and June 30, 2015), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. The appeal must be filed in writing or by completing the [Appeal Form](#) on the Board's website. The appeal must include a copy of the CAO's decision. MCPR § 35-4(d)(2).

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee with a copy of all information provided to the Board. After receipt of the County's response, the employee is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

During fiscal year 2015, the Board issued the following decisions on appeals concerning grievance decisions.

OVERPAYMENT OF RETIREMENT BENEFITS

CASE NO. 14-33¹

FINAL DECISION AND ORDER

Appellants are fourteen (14) retired employees of the Montgomery County Police Department. On November 27, 2013, Appellants filed an appeal with this Board challenging the determination of the Chief Administrative Officer (CAO)² to reduce their annuities and require them to repay overpayments made as a consequence of the County's erroneous computation of their annuities. For the reasons stated herein, the Board grants Appellants' appeal and reverses the CAO's decision.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

Appellants are all former employees of the Montgomery County Police Department. Appellants' Motion to Consolidate Appeals at 1. They all retired between July 1, 2010, and July 1, 2012, on service-connected disability and, by virtue of their time in service, were entitled to the minimum annuity under County Code Section 33-43 (minimum benefit). Appellants' Memorandum, Ex. A; County's Response at 1, 3. By letters dated December 18, 2012, each Appellant was notified by the Montgomery County Employee Retirement Plan (MCERP) that as a consequence of a "recently completed [] audit," it had "discovered that there was an error made impacting how your retirement benefit was calculated. Your benefit was incorrectly calculated using 66 2/3% of your average final earnings . . . when we should have used final earnings." Appellants' Memorandum, Ex. E; *see also* County's Response, Ex. H. These letters further advised each Appellant of the amount of the recalculated retirement benefit and the amount and schedule for collection of the overpaid benefits. *Id.*

By letter of June 21, 2013, Appellants, through counsel, sought review of these determinations by the CAO. County's Response, Ex. A; Appellants' Memorandum, Ex. A. On November 13, 2013, the CAO responded to that letter concurring with MCERP's determination

¹ In an Order Consolidating Appeals, dated 01/13/14, the Board granted the Appellants' Motion to Consolidate and designated the consolidated appeals as captioned above. The individual Appellants are: G.T., MSPB Case No. 14-20; T. S.-D., MSPB Case No. 14-21; C.S., MSPB Case No. 14-22; I.S., MSPB Case No. 14-24; R.M., MSPB Case No. 14-25; C.M., MSPB Case No. 14-26; R.H., MSPB Case No. 14-27; J.H., MSPB Case No. 14-28; Z.G., MSPB Case No. 14-29; S.G., MSPB Case No. 14-30; D.F., MSPB Case No. 14-31; M.D., MSPB Case No. 14-32; and R.C., MSPB Case No. 14-33.

² As set forth *infra*, Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue an interpretation of the County's retirement statute, subject to appeal to and final decision by the Board.

that Appellants' minimum benefit was based on "final earnings" rather than "average final earnings".³ *Id.* Thereafter, on November 27, 2013, Appellants filed their appeals with this Board. Appellants' Appeals.

On December 9, 2013, Appellants, through counsel, filed Appellants' Memorandum in Support of Appeal (Appellants' Memorandum), with five exhibits.⁴ The County filed its response to the appeal (County's Response), with twelve exhibits on January 6, 2014.⁵ On January 9, 2014, Appellants filed a Motion to Consolidate Appeals. By Order of January 13, 2014, the Board consolidated these appeals for consideration and decision. Appellants thereafter filed a Reply Memorandum (Appellant's Reply) on January 27, 2014.

³ As discussed *infra*, it is the County's contention that only a "normal retirement" is calculated using "average final earnings". A "minimum benefit" retirement, such as Appellants', is calculated using only "final earnings". County's Response at 3.

⁴ Appellants' exhibits were: Exhibit (Ex.) A – CAO's 11/13/13 decision letter, with four enclosures (Chart showing amount of overpayment to each Appellant; Calculation of Service-Connected Disability Retirement Benefits; History of Bill 1-08; and letter from Appellants' counsel to the CAO, asking for a decision under Section 33-56 of the County Code); Ex. B – Expedited Bill 1-08, with attachments (Legislative Request Report; Memorandum from County Executive to Council President regarding Technical Amendment to disability retirement law; memorandum from Legislative Attorney to County Council; copy of approved Expedited Bill 1-08); Ex. C – Article 57 of the Agreement between Fraternal Order of Police, Montgomery County Lodge #35, Inc. and Montgomery County Government For the Years July 1, 2007 through June 30, 2010; Ex. D – Article 36 of the Agreement between Fraternal Order of Police, Montgomery County Lodge #35, Inc. and Montgomery County Government For the Years July 1, 2012 through June 30, 2014; and Ex. E – Copies of letters from the County to each of the fourteen Appellants, all dated 12/18/12, notifying each of them of the overpayment of benefits, along with a revised retirement calculations and a spreadsheet reflecting the amount overpaid each month.

⁵ The County's exhibits were: Ex. A – CAO's 11/13/13 decision letter; Ex. B – Chart showing amount of overpayment to each Appellant; Ex. C – Copy of Montgomery County Code Section 33-43; Ex. D – County Council Bill No: 45-10; Ex. E – Copy of Montgomery County Code Section 33-35; Ex. F – Copy of Montgomery County Code Section 33-42; Ex. G – Copy of Montgomery County Code Section 33-53; Ex. H – Letter from County to Appellant T., dated 12/18/13, notifying him of the County error; Ex. I – Letter from the County to Appellants' counsel, explaining how to request a waiver of the overpayment of their pension benefits; Ex. J – Copy of Memorandum to County Council forwarding Expedited Bill 1-08, with attachments (Expedited Bill 1-08, Legislative Request Report, Memo from County Executive, Fiscal Impact Statement, and Approved Bill 1-08); Ex. K – Copy of enacted Expedited Bill No. 1-08; Ex. L – Affidavit of A.M., with three attached emails; and Ex. M – Section 57 of the Agreement between Fraternal Order of Police, Montgomery County Lodge #35, Inc. and Montgomery County Government For the Years July 1, 2007 through June 30, 2010.

On December 4, 2013, the Fraternal Order of Police (FOP) Lodge 35 filed a contractual grievance on behalf of 13 of the 14 Appellants,⁶ contending that MCERP's recomputation violated the applicable collective bargaining agreement. County's Transmittal of Arbitrator's Decision at 1. In light of the pendency of this grievance, Appellants sought a stay of proceedings before the Board. By Order of February 11, 2014, the Board granted Appellants' stay request and ordered that Board proceedings would be stayed until May 5, 2014. By subsequent Orders, the Board extended this stay until July 30, 2014.

On July 29, 2014, the Arbitrator considering the grievance issued his award, which the County transmitted to the Board on August 7, 2014. In his award, the Arbitrator concluded that the County had not violated the applicable collective bargaining agreement when it reduced Appellants' retirement benefits. County's Transmittal of Arbitrator's Decision, Ex. A. Having heard nothing further from Appellants after the issuance of the Arbitrator's order, on September 3, 2014, the Board issued a Show Cause Order, directing Appellants to show cause why the appeals should not be dismissed. On September 16, 2014, Appellants responded to this Order, arguing that the Arbitrator's award did not adjudicate the statutory construction issue raised in these appeals and that, accordingly, the Board must resolve that issue. Appellants' Response to Board's Show Cause Order at 1-2.

POSITIONS OF THE PARTIES

County:

- Each of the fourteen Appellants had their service connected disability retirement benefit calculated using 66 2/3 % of their average final earnings instead of their final earnings. This resulted in each of them being overpaid.
- Appellants' reliance on Section 33-42(b)(1) of the Code is misplaced as that section deals with the "normal retirement" formula for Group F members.
- Section 33-43(i) of the Code sets forth the calculation of a service-connected disability retirement benefit for Group F members. This section provides for a "minimum benefit". As the statutory language of Section 33-43(i) is plain and free from ambiguity, there is no need to look beyond the words of the statute.
- The arbitrator denied the FOP grievance, holding that the County did not violate the CBA when it calculated Appellants' retirement benefit using "final earnings" instead of "average final earnings".
- Appellants incorrectly argue that Article 57(M)(6) of the CBA and Bill 1-08 were meant to address both "normal retirement" and "minimum benefit" pensions. The arbitrator rejected this argument, holding that Article 57(M)(6) and Bill 1-08 were meant to only deal with "normal retirement" pension calculations.
- The legislative history of Bill 1-08 strongly supports the County's contention that the legislation only addressed "normal retirement benefits".

⁶ Appellant Z.G. was not included in the FOP's grievance, as he was not a member of the bargaining unit at the time of his retirement. See Appellants' Motion to Stay Appeals Pending Resolution of Pending Grievances at 3.

- Emails exchanged between the Office of Human Resources and the FOP, prior to the enactment of Bill 1-08, further support the County’s contention that Bill 1-08 only dealt with “average final earnings” in connection with a “normal retirement”.

Appellants:

- The key statutory provisions at issue are set forth in Section 33-43(i)(1) & (7), the latter of which was added by Bill 1-08. The plain language of these provisions support Appellants’ position.
- The language of Section 33-43(i)(7) indicates that if a greater benefit would result from calculation under Section 33-42(b)(1), then the pension shall be based on a member’s “average final earnings” if that results in a greater benefit than “final earnings”.
- The legislative history of Bill 1-08 overwhelmingly supports Appellants’ position that “average final earnings” should be used if larger than “final earnings”, even in cases where the disability retiree is only entitled to the minimum 66 2/3% benefit.
- The County’s reliance on emails between OHR and FOP is misplaced. They are not the complete set of communications between the parties, so it is impossible to draw any conclusions from them.
- Although the arbitrator rejected FOP’s contractual grievance on behalf of the Appellants, as the County itself recognizes, the question before the Board is one of statutory interpretation not the CBA’s interpretation.

APPLICABLE LAWS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-35, Definitions, which states in applicable part:

Final earnings: Except as otherwise provided, the regular earnings of a member on the last date of active service. Final earnings for a member who filed an application under Section 33-43 before May 19, 2010 that is approved after June 30, 2010 must be the member’s regular earnings on the last pay period in fiscal year 2010.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-42, Amount of pension at normal retirement date or early retirement date, which states in applicable part:

- (a) *Average final earnings.* . . . Average final earnings for each employee who became a member on or after July 1, 1978, shall be the average of regular annual earnings of the member for the thirty-six-month period immediately preceding retirement, or any consecutive thirty-six-month period, whichever is greater. Whenever such employee is on leave without pay status during part of the final thirty-six-month period of membership, average final earnings will be based on regular earnings for the last thirty-six (36) months during which the member was in full pay status, or any consecutive thirty-six-month period, whichever is greater. . . .

(b) *Amount of pension at normal retirement date.*

(1) Pension amount for an Optional Retirement Plan member.

...

(C) For a Group F member who is a member of the optional plan and retires on a normal retirement, the annual pension must equal 2.4% of average final earnings multiplied by years of credited service, up to a maximum of 36 years, including sick leave credits. Years of credited service of less than one full year must be prorated. The maximum benefit with the application of sick leave credits must not exceed 86.4% of average final earnings.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-43, Amount of pension at normal retirement date or early retirement date, which stated⁷ in applicable part:

...

(i) *Amount of pension at service-connected disability retirement.*

(1) The County must pay a member, other than a Group G member, who retires on service-connected disability retirement an annual pension calculated under Section 33-42(b)(1), subject to the following exceptions:

(A) the County must substitute final earnings for average final earnings; and

(B) the pension must be at least 66 2/3 percent of the member's final earnings.

...

(7) The County must pay a Group F member who retires on a service-connected disability retirement on or after June 26, 2002, an annual pension calculated under subsection (i)(1). However, if the greater benefit results from the calculation under Section 33-42(b)(1), the County must pay a Group F member a pension based on the member's average final earnings if that member's average final earnings result in a greater benefit than final earnings.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-56, Interpretations, which states in applicable part:

(a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the

⁷ Effective July 1, 2012, this section of the Code was amended. See Appellants' Memorandum, Ex. A, attachment Calculation of Service-Connected Disability Retirement Benefits; County's Response, Ex. A, same attachment.

retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.

- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

ISSUE⁸

Was the County correct in calculating Appellants' retirement benefits under County Code Section 33-43 using their "final earnings" rather than their "average final earnings"?

ANALYSIS AND CONCLUSIONS

The CAO's Interpretation Of The Retirement Statute Is Not Entitled To Deference.

The County Council has by law vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. *See, e.g., Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO's interpretation is predicated on an error of law, no deference is appropriate. *See Dep't of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602, 657 A.2d 372, 376 (1995); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

As discussed *infra*, based on the rules of statutory construction, the Board concludes that Appellants' construction of the retirement statute is correct.

The Language Of The Statute, Together With Its Legislative History, Support Appellants' Position.

This appeal focuses on the proper method for computing retirement benefits for "Group F" retirees (police officers) who retire on the basis of service-connected disability. Generally, Group F retirees receive their annuities based on their salary history and their years of credited service. *See* County Code Section 33-42(b)(1)(C). However, under County Code Section 33-43(i)(1)(B), a Group F retiree is entitled to a pension no less than 66 and 2/3 percent of his or her "final earnings." All the Appellants here are Group F retirees (police officers) whose pensions were computed under the minimum pension computation provisions of Section 33-43(i)(1)(B). County's Response at 3.

⁸ The issue in this case is a pure question of law. As this is a question of law, the Board considers this question *de novo*.

The language of Section 33-43(i)(1)(B) seems, at first blush, to be clear enough. Specifically, the statute provides that, notwithstanding the computation derived from Section 33-42(b)(1), “the pension must be at least 66 2/3 percent of the member’s final earnings.” But the complication, and the crux of the issue here, is not the language of Section 33-43(i)(1)(B), but instead the language of Section 33-43(i)(7):

The County must pay a Group F member who retires on a service-connected disability retirement . . . an annual pension calculated under subsection (i)(1) However, if a greater benefit results from the calculation under Section 33-42(b)(1), the County must pay a Group F member a pension based on the member’s average final earnings if that member’s average final earnings result in a greater benefit than final earnings.

Montgomery County Code Section 33-43(i)(7).

For reasons unimportant to this appeal, Appellants are all in the unusual position of having “average final earnings” that exceed their “final earnings.” Appellants’ Memorandum at 8. They contend that Section 33-43(i)(7) modifies the meaning of “final earnings” in Section 33-43(i)(1)(B) and entitles them to a pension calculated based upon their “average final earnings” as their “average final earnings result in a greater benefit than final earnings.” Appellant’s Reply at 3.

“The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature beginning with the plain language of the statute, and ordinary, popular understanding of the English language.” *Allen v. State*, 103 A.3d 700, 714 (Md. 2014) (citation omitted). Appellants assert that the plain language of the statute commands the use of the greater of “final earnings” or “average final earnings” in Section 33-43(i)(1)(B)’s computation. Specifically, Appellants argue that the language “if a greater benefit results from the calculation under Section 33-42(b)(1)” “should be understood as a reference to the use of ‘average final earnings’ in calculating the pension benefit under Section 33-42(b)(1).” Appellants’ Memorandum at 3. This conclusion is reinforced, Appellants maintain, because “Section 33-42(b)(1) sets forth a number of different formulas for calculating pension benefits depending on which ‘group’ an individual belongs to” among which the only commonality is “the use of ‘average final earnings,’ rather than ‘final earnings’.” Appellants’ Reply at 3.

For its part, the County too argues that the plain language of the statute supports its use of “final earnings” in the annuity calculation. It contends that Section 33-43(i)(1)(B) contemplates the calculation of the minimum pension based, explicitly, on “final earnings” and that Section 33-43(i)(7)’s provision for the greater benefit using either “average final earnings” or “final earnings” is applicable only for “normal” length-of-service derived pensions. County’s Response at 3.

Merely to recite the foregoing should be sufficient to dispel any suggestion that the plain language of the statute dictates any particular result. Indeed, the statute is patently ambiguous. The second sentence of Section 33-43(i)(7) creates a conditional exception to computational rules of Section 33-43(i)(1). That is, the statute contemplates that in certain circumstances, the

computation must be based on whichever of “final earnings” or “average final earnings” will generate the greatest retirement benefit. But when that condition is satisfied is anything but clear.

Specifically, in its second sentence the statute appears to condition entitlement to the use of the greater of “final earnings” or “average final earnings” on satisfaction of the condition “if a greater benefit results from the calculation under Section 33-42(b)(1).” In other words, the statute appears to say that if the computation made under Section 33-42(b)(1) is higher using “average final earnings” instead of “final earnings” then the County must use “average final earnings.”

This would be simple enough if this were all the statute said. But the second sentence of Section 33-43(i)(7) contains a *second* condition:

However, if a greater benefit results from the calculation under Section 33-42(b)(1), the County must pay a Group F member a pension based on the member’s average final earnings *if that member’s average final earnings result in a greater benefit than final earnings.*

(Emphasis added). Thus it appears that the statute conditions payment of the more generous retirement benefit on the satisfaction of two conditions: *if* “a greater benefit results from the calculation under Section 33-42(b)(1),” *and if* “that member’s average final earnings result in a greater benefit than final earnings” *then* “the County must pay a Group F member a pension based on the member’s average final earnings.” Presumably these are two separate and distinct conditions. But it is altogether unclear what meaning the first condition – “if a greater benefit results from the calculation under Section 33-42(b)(1)” – could have that is different from the second.⁹

To be sure, both the County’s and Appellants’ readings of the statute are concise and plausible. But each party has posited a construction that ignores or renders superfluous one or the other of the two conditions of Section 33-43(i)(7). That is, the County’s interpretation focuses solely on the first condition. It would grant Appellants the benefit of the greater of “average final earnings” or “final earnings” only if that resulted in a greater benefit under Section 33-42(b)(1)(C) without any consideration of the meaning or operation of the second condition. Because Appellants receive no benefits under Section 33-42(b)(1), the County concludes that the remainder of Section 33-43(i)(7) is inapposite.

Similarly, Appellants’ interpretation would ignore the first condition and treat the statute as if it did not contain the reference to Section 33-42(b)(1) at all. That is, Appellants would read the statute as if the second sentence read in its entirety “the County must pay a Group F member

⁹ It is tempting to read the first condition of Section 33-43(i)(7) as calling for a comparison between the benefit calculated under Section 33-42(b)(1) and that computed under Section 33-43(i)(1), which is referenced in the immediately preceding sentence. But the difficulty with that construction is that Section 33-43(i)(1) explicitly incorporates Section 33-42(b)(1), thereby making any comparison circular and meaningless.

a pension based on the member's average final earnings if that member's average final earnings result in a greater benefit than final earnings.”

Statutory text must be read “so that no word, clause, sentence or phrase is rendered superfluous or nugatory,” *Frey v. Comptroller of the Treasury*, 29 A. 3d 475, 517 (Md. 2011). Thus the Board cannot simply ignore some or all of the Council's enactment. Hewing to this admonition, the Board concludes that the Appellants have the better construction.

Specifically, the first condition of Section 33-43(i)(7) provides for the use of the greater of “final earnings” or “average final earnings” “if a greater benefit *results from* the calculation under Section 33-42(b)(1)” (emphasis added). In Appellants' case, undeniably a greater benefit would “result from” the calculation under Section 33-42(b)(1). That they do not *receive* pensions calculated under that Section is immaterial – nothing in Section 33-43(i)(1) suggests that it is only applicable to pensions *paid* under Section 33-42(b)(1). Rather, the statutory language focuses on “the calculation under Section 33-42(b)(1).” The County is fully capable of determining whether a greater benefit would “result from” that calculation even for retirees, like Appellants, whose pensions are paid under the minimum provisions of Section 33-43(i)(1).

This reading is reinforced by the legislative history of Section 33-43(i)(7). In his Memorandum to the County Council recommending enactment of Expedited Bill 1-08, the County Attorney stated that the legislation would

require[] the County to pay a Group F member who retires on a service-connected disability pension . . . a pension based on average final earnings if it results in a greater benefit than final earnings or the benefit the member would otherwise receive under Code §33-43.

County's Response, Ex. J at 1. Moreover, the Legislative Request Report that accompanied Bill 1-08 identifies as the goals and objectives of the bill as being

to address in the future for police officers the rare case where “average final earnings” are greater than “final earnings,” by amending the County Retirement Law to clarify that when calculating an annual pension for service connected disability retirements, “average final earnings” will be used if it results in a greater benefit than “final earnings”,

County's Response, Ex. J, Legislative Request Report attachment.

This purpose is echoed in the County Executive's memorandum transmitting the bill to the County Council:

The original intent for using “final earnings” in a service connected disability was to provide a higher benefit rather than using “average final earnings.” . . . The purpose of this bill is to . . . address in the future for police officers the rare care where “average final earnings” provide a greater benefit than “final earnings.”

County's Response, Ex. J, Memo from County Executive attachment.

These three sources all support Appellants' construction of Section 33-43(i)(7) . Most directly, the County Attorney's memorandum states that the Group F retiree should receive "a pension based on average final earnings if it results in a greater benefit than final earnings "or the benefit the member would otherwise receive *under Code §33-43*" (emphasis added). County's Response, Ex. J at 1. This language seems to expressly anticipate the situation here, where the Appellants receive their pensions under Section 33-43(i)(1)(B), not 33-42(b)(1)(C). Similarly, the Legislative Report states that the intent of the legislation is "to clarify," without limitation or reservation, "that when calculating an annual pension for service connected disability retirements, 'average final earnings' will be used if it results in a greater benefit than 'final earnings' ." County's Response, Ex. J, Legislative Request Report attachment. Finally, the County Executive explained that the "original intent" of using "final earnings" was to provide a higher benefit for service-connected disability retirees and, again without reservation, to "address in the future for police officers the rare case where 'average final earnings' provide a greater benefit than 'final earnings' ." County's Response, Ex. J, Memo from County Executive attachment.

Notwithstanding these pronouncements on intent, the County argues that the legislation was not intended to reach "minimum benefit" retirements, but instead only "normal" retirements. County's Response at 6-7. In support of this argument, it purports to rely on excerpts from correspondence between the Office of Human Resources and the President of FOP Local 35. *Id.*; County's Response, Ex. L, attached emails. This reliance, however, is misplaced. While perhaps this correspondence is relevant to the amendment of the collective bargaining agreement, it does not reflect on the Council's intent in enacting Bill 1-08. Nor is there even any evidence that the Council was even aware of this correspondence.

ORDER

Accordingly, the Board hereby REVERSES the CAO's decision reducing Appellants' pension benefits and ORDERS the CAO to restore their pensions using their "average final earnings" to compute their pension benefits under Section 33-43(i)(1)(B) and pay them any monies recouped based on the erroneous decision of the CAO.

As Appellants have prevailed, the County must pay reasonable attorney fees and costs. Appellants must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have 10 days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code Section 33-14(c)(9).

For the Board
February 9, 2015

The Circuit Court for Montgomery County (Bair, J.) upheld the Board's decision on November 24, 2015. (Civil Action No. 401985-V).

CASE NO. 14-46

FINAL DECISION AND ORDER

Appellant originally appealed to the Merit System Protection Board (MSPB or Board) from the determination¹ of the Chief Administrative Officer (CAO) that Appellant must reimburse the County for pension overpayments resulting from an error in the annual cost of living adjustment (COLA) to her monthly retirement benefit that resulted in an overpayment of her retirement benefits from March 1, 1998 through December 1, 2012. After receiving evidence on the matter from both parties, *see* MSPB Case No. 14-06, the Board issued a Final Decision and Order, granting Appellant's appeal from the determination of the CAO that she was not eligible for a waiver of overpayment of her pension benefits and ordered the County to reimburse Appellant for any monies already deducted to recoup the overpayments until such time as the County has developed guidelines to determine if Appellant would be entitled to an adjustment or complete waiver of overpayment of her pension benefits. *Id.*

On or about March 7, 2014, Appellant filed a document "Further Appeal" with the Board, alleging that the County had failed to comply with the Board's Decision in MSPB Case No. 14-46, had denied Appellant's waiver request and provided Appellant with the right to file an appeal over the denial of the waiver to the Board. The Board accepted the appeal, gave it the case number referenced above and provided the parties with the opportunity to provide evidence in support of their positions. The appeal was considered and decided by the Board.²

FINDINGS OF FACT

As noted above, the Board issued a Final Decision on November 12, 2013, ordering the County to reimburse Appellant for any monies already deducted to recoup the overpayments until such time as the County developed waiver guidelines to determine if Appellant was entitled to an adjustment or complete waiver of overpayment of her pension benefits. MSPB Case No. 14-06. According to the County, due to the payment processing schedule, the County could not adjust Appellant's December 1, 2013 pension payment to accord with the Board's decision. *See* County Response to Show Cause Order, dated 11/24/14, at 1. The County subsequently developed waiver guidelines, in accordance with the Board's direction, and sent them to Appellant, by letter dated 12/02/13. *Id.*; *see also* County Memorandum, Response to Appeal of Appellant (hereinafter County Response to Further Appeal), dated 03/28/14, Exhibit (Ex.) A, Letter from County to Appellant, providing waiver guidelines.

¹ As set forth *infra*, Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue an interpretation of the County's retirement statute, subject to appeal to and final decision by the Board.

² As the Board considered and decided this matter before the appointment of Associate Member Charlotte Crutchfield, she did not take part in the vote on this Final Decision.

In the letter to Appellant, providing her with the waiver guidelines, Appellant was requested to provide the information³ required by the guidelines if she wanted a waiver to be granted to her based on financial hardship for all or a portion of the overpaid pension benefits. County Response to Further Appeal, Ex. A at 2. By letter to Appellant, dated 12/31/13, the County agreed that Appellant was requesting a waiver of the amount of pension benefits overpaid to her and granted Appellant an extension until January 6, 2014 to provide the necessary supporting documentation. County's Response to Further Appeal, Ex. B. The County noted that as Appellant had failed to meet its December deadline for providing the necessary documentation, it would process any adjustment, if necessary, for Appellant's February 1, 2014 annuity payment after having received the supporting documentation and determining if she qualified for a waiver. *Id.*

By letter, dated January 2, 2014, Appellant responded to the County and submitted information in support of her Request for Waiver due to financial and personal hardships. County's Response to Further Appeal, Ex. C. Appellant provided as enclosures to her letter, a copy of her monthly County Pension payment form, a copy of her Social Security Income Projection for 2014, and copies of documents supporting her prescription and medical costs. *Id.* Significantly, Appellant did not provide a copy of her Federal income tax return, although she did claim that her monthly pension income when combined with her Social Security income was "not enough to require filing individual Federal [i]ncome [t]axes." *Id.*

By letter, dated January 13, 2014, the County responded to Appellant's letter, requesting that she provide additional documentation in support of her financial hardship, to include *inter alia* a copy of her 2012 Federal income tax return. County's Response to Further Appeal, Ex. D at 2. By letter, dated 01/24/14, Appellant responded to the County's request for additional documentation, providing information regarding prescription and chiropractic expenses incurred by her. County's Response to Further Appeal, Ex. E. Significantly, Appellant did not provide a copy of her 2012 Federal income tax return. Ms. H., Executive Director for Montgomery County Retirement Plans, subsequently contacted Appellant to inform her that she needed to submit her 2012 Federal income tax return. County's Response to Further Appeal, Ex. F, Affidavit of Ms. H., at 2. According to Ms. H., Appellant told her she did not file a tax return. *Id.* When queried by Ms. H. as to whether Appellant had signed an income tax return, Appellant indicated she signed her husband's income tax return. *Id.* When Ms. H. asked her if it was a joint tax return, Appellant purportedly declined to answer. *Id.* Ms. H. indicated that thirty to forty-five minutes after her conversation with Appellant, Appellant's husband called and stated that he and his wife do file a joint income tax return but they would not submit the return. *Id.*

By letter dated February 21, 2014, the CAO issued a decision on Appellant's Request for Waiver of Overpayment, denying it based on Appellant's failure to provide a copy of her Federal income tax return for 2012, as requested by the County, to support her claim of financial

³ The waiver guidelines indicate that the Appellant, as the plan participant, bears the burden of proving financial hardship. "Evidence **must** include copies of tax returns and other details and supporting documents of income and expenses demonstrating a financial hardship." County's Response to Further Appeal, Ex. A at 1 (emphasis added).

hardship. County's Response to Further Appeal, Ex. G at 1. Appellant was provided with the right to appeal the waiver denial to the Board. *Id.* at 2.

This appeal followed.

POSITIONS OF THE PARTIES

County:

- In accordance with the Board's instructions to the County in MSPB Case No. 14-06, the County developed waiver guidelines and sent them to Appellant and invited Appellant to apply for a waiver under the guidelines.
- At the Appellant's request, the County agreed to extend the time for Appellant to submit her waiver request.
- Upon receipt of Appellant's request for a hardship waiver, the County requested additional information, to include a copy of Appellant's Federal income tax return, in order to make a determination on Appellant's waiver request.
- Appellant's husband indicated that he and his wife would not submit a copy of their Federal income tax return.
- Due to the failure of Appellant to submit her joint Federal income tax return, the CAO properly determined that she failed to meet her burden of proving she had a financial hardship which justified the granting of a waiver.
- Other governmental entities which allow for waiver of repayment of an overpayment in the event of financial hardship require detailed financial information.
- Because the County promptly developed waiver guidelines and provided them to Appellant, there was no need to provide any reimbursement to Appellant of funds being withheld from her pension payment to recoup for overpayments of her pension to her.

Appellant:

- The County has totally disregarded the Board's Final Decision and Order in MSPB Case No. 14-06. The recapture of withholdings from Appellant's pension payments never ceased despite the Board's Order.
- The Board was wrong in its conclusion that the County could issue new regulations under which it could decide whether Appellant was entitled to a waiver of overpayment. Such a strategy is unconstitutional.
- The Board, in deciding MSPB Case No. 14-06, treated Appellant disparately in comparison to the appellant in MSPB Case No. 14-05.⁴

⁴ The Board, although ruling *infra*, that this argument is untimely, has determined to address in this footnote the merits of the argument. The Board would note that in MSPB Case No. 14-05 the evidentiary record differed markedly from the record in Appellant's case. In that case, the Board found, based on the evidentiary record before it, that "Appellant has provided substantial evidence that she is eligible for a waiver of collection of overpayment." MSPB Case No. 14-05 at 6 (citing to Appellant's Reply). In stark contrast, the Board found in MSPB Case No. 14-06, based on the evidentiary record before it, that Appellant's "merely stating that there

- The County has failed to address Appellant’s contention that the Board’s direction to the County to adopt waiver guidelines and apply them to Appellant is unconstitutional.
- The County has also failed to address Appellant’s contention that the Board denied Appellant equal protection of the law when it decided Appellant’s case differently from MSPB Case No. 14-05.
- The County’s request for a copy of Appellant’s joint federal income tax return constituted an illegal invasion of her privacy.
- Appellant should receive repayment of all of her recaptured pension withholdings, plus her reasonable attorney’s fees.

APPLICABLE LAW AND REGULATION

Montgomery County Code, Chapter 2A, Administrative Procedures Act, Article I. Appeals from Administrative Agencies, Section 2A-10, Decisions, which states in applicable part,

...

- (f) Rehearing and reconsideration. Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten (10) days from a final decision. Thereafter, a rehearing or reconsideration may be approved only in the case of fraud, mistake or irregularity. . . . A request for reconsideration or rehearing shall not stay the operation of any order unless the hearing authority so states.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article III, Employees’ Retirement System, Division 4, Administration, Section 33-53, Protection against fraud, provides in applicable part:

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be charged with a misdemeanor, and may be punishable under the laws of the county and the state. Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will be paid. Any member or beneficiary who has received payment from the retirement system of any monies to which [sic] not entitled under the provisions of this act, shall be required to refund such monies to the system.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-56, Interpretations, which states in applicable part:

will be a hardship is not enough. Appellant must provide ‘substantial evidence that she is eligible for a waiver of collection of overpayment.’” (Footnote omitted). MSPB Case No 14-06 at 6 (citing to Appellant’s Reply).

- (b) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.
- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

ISSUES

1. Should the Board grant Appellant's requests to reconsider its Final Decision in MSPB Case No. 14-06?
2. Was the County justified in not ceasing to collect for overpayments after the Board issued its Final Decision in MSPB Case No. 14-06?
3. Was the CAO justified in denying Appellant's waiver request based on her failure to provide a copy of her joint tax return?

ANALYSIS AND CONCLUSIONS

Appellant's Requests For Reconsideration Of MSPB Case No. 14-06 Are Denied.

The Board views Appellant's various challenges to its Final Decision in MSPB Case No. 14-46 as requests for reconsideration. Based on the analysis *infra*, the Board denies Appellant's requests for reconsideration.

A. Appellant's Requests Are Untimely.

Pursuant to Section 2A-10(f) of the Administrative Procedures Act (Chapter 2A of the Montgomery County Code), any request for reconsideration is to be filed within ten days from a final decision. The Board has ten days from receipt of the request to grant or deny the request.

In the instant case, Appellant did not file her Request for Reconsideration seeking to challenge the Board's Final Decision based on constitutional grounds until April 22, 2014, some five months after the Board issued its Final Decision. *See* Appellant's Response to Memorandum of Montgomery County at 2 & Appellant's Response to Memorandum of

Montgomery County Attachment (Attach.) 1,⁵ Memorandum in Support of Appellant’s Response to Memorandum of Montgomery County at 2-3. Moreover, Appellant did not seek to challenge the Board’s Final Decision on the grounds of unequal protection of the law until a day after she filed her Request for Reconsideration based on constitutional grounds. *See* Appellant’s Supplementary Response to Memorandum of Montgomery County at 2-3. Clearly, under the County Code, the Requests for Reconsideration are not timely.

The Code does provide for a request for reconsideration without time limit in the case of fraud, mistake or irregularity. Accordingly, the Board will now consider whether the Appellant has demonstrated fraud, mistake or irregularity.

B. Appellant Has Failed To Demonstrate Fraud, Mistake, Or Irregularity.

As the Board has previously ruled, the standard for demonstrating “fraud, mistake, or irregularity” in Maryland is high. *See, e.g.*, MSPB Case No. 09-10 (2009). The Court of Appeals for Maryland has held that the terms “fraud, mistake, and irregularity,” a finding of any of which allows a court to revise a judgment once it has become final, are to be narrowly defined and strictly applied. *See Tandra S. v. Tyrone W.*, 336 Md. 303, 313-15, 648 A.2d 439 (1994). To vacate a final judgment, extrinsic fraud must be shown. *Id.* at 315. Fraud is extrinsic if it prevents an adversarial trial. *Hresko v. Hresko*, 83 Md. App. 228, 232, 574 A.2d 24 (1990). In the instant case, the Appellant was permitted to challenge the County’s presentation of evidence and prevailed in the matter. Accordingly, Appellant is unable to demonstrate extrinsic fraud.

A “mistake” is defined as a jurisdictional mistake where the court has no power to enter the judgment. *Tandra S.*, 336 Md. at 317 (citing *Hamilos v. Hamilos*, 297 Md. 99, 107, 465 A.2d 445 (1983)). In the instant case, Section 33-56(c) of the Montgomery County Code clearly vests the Board with jurisdiction over appeals from determinations of the CAO regarding retirement benefits. Thus, Appellant cannot establish “mistake”.

Finally, the term “irregularity” connotes irregularity of process or procedure. *Weitz v. MacKenzie*, 273 Md. 628, 631, 331 A.2d 291 (1975). Examples of irregularities that warrant the revision of a judgment include a failure of process or procedure by a clerk of the court, such as a failure to send a notice of default judgment, a failure to send a notice of an order dismissing an action or a failure to mail a notice to the proper address. *Thacker v. Hale*, 146 Md. App. 203, 219-20 (2002). Appellant has cited no irregularity of process or procedure in the instant case nor can she.

In sum, it is clear from the case law cited above that “fraud, mistake, and irregularity” go to whether the Board’s process was fair, not whether a legal or factual error has been made. Accordingly, the Board denies Appellant’s Requests for Reconsideration.

⁵ Although Appellant did not label the second document as an attachment, in Appellant’s Response to Memorandum of Montgomery County Appellant did make reference to the attached Memorandum. Appellant’s Response to Memorandum of Montgomery County at 2. Accordingly, for ease of reference, the Board has labeled the attached Memorandum as Attach. 1.

The County Was Not Justified When It Failed To Cease Collecting For Overpayments From Appellant's Pension Payments. However, The Board Finds That The County's Failure Is Moot.

The Board's Final Decision in MSPB Case No. 14-06 was received by the County Attorney's office on November 13, 2013, *see* County's Response to Show Cause Order, Ex. I.⁶ The County argues that due to the payment processing schedule, the County could not adjust Appellant's December 1, 2013 pension payment. County's Response to Show Cause Order at 1. Significantly, the County has presented no evidence to support this statement, only the argument of counsel. It is well established that statements made by a representative in a pleading are not evidence. MSPB Case No. 12-11 (2012); MSPB Case No. 08-13 (2008); *see, e.g., Joos v. Department of Treasury*, 79 M.S.P.R. 342, 348 (1998); *Leaton v. Department of Interior*, 65 M.S.P.R. 331, 337 (1994); *Perez v. Railroad Retirement Board*, 65 M.S.P.R. 287, 289 (1994); *Rickels v. Department of Treasury*, 42 M.S.P.R. 596, 603 (1989); *Vincent v. Department of Justice*, 32 M.S.P.R. 263, 268-69 (1987); *Enos v. USPS*, 8 M.S.P.R. 59, 63 (1981).

As the record of evidence clearly demonstrates that the County received the Board's Final Decision on November 13, 2013. Therefore, the Board does not understand why the County could not have processed an adjustment to Appellant's pension payment for December 1, 2013. Absent any probative evidence to support counsel's statement, the Board must reject the County's position that it could not timely make the adjustment.

The Board's Final Decision was crystal clear that the County was to reimburse Appellant "for any monies already deducted to recoup the overpayments until the County has developed waiver guidelines to determine if Appellant is entitled to an adjustment or complete waiver of overpayment of her pension benefits." MSPB Case No. 14 at 6. As the County did not make a determination on Appellant's application for a waiver until February 21, 2014, it was required pursuant to the Board's Final Decision and Order to pay Appellant any monies already recouped until the issuance of its waiver determination. This the County failed to do.⁷ Nevertheless, the Board finds that the County's failure is moot, given the Board's holding, *infra*, that Appellant is not entitled to a waiver pursuant to the County's waiver guidelines.

⁶ Although attached to the County's Response to Show Cause Order, the Board's Final Decision in MSPB Case 14-06, date stamped to show when it was received in the County Attorney's Office, was not labeled as an exhibit. For ease of reference, the Board has determined to list this document as Ex. I to the County's Response to Show Cause Order.

⁷ The Board would be remiss if it did not note its deep displeasure with the failure of the County to follow the Board's Final Decision and Order. If the County believed the Final Decision was wrong it could have requested the Board reconsider its decision. Likewise, if the County believed it needed additional time to implement the Board's decision, it could have petitioned the Board for a stay of its Order in MSPB Case No. 14-06. The County did neither; rather, it simply failed to comply with the Final Decision in MSPB Case No. 14-06. This is totally unacceptable.

The County's Denial Of Appellant's Waiver Request, Based On Her Refusal To Provide A Copy Of Her Joint Tax Return, Was Justified.

Appellant, in providing her waiver request, focused solely on her income and medical expenses. *See, e.g.*, County's Response to Further Appeal, Ex. C, Ex. E. Nowhere in her documentation in support of her waiver request does Appellant address her total household income, to include the income of her husband. Indeed, Appellant initially declined to admit that she files a joint Federal income tax return with her husband; instead, she claimed she did not have sufficient income to require filing an individual Federal income tax return. County's Response to Further Appeal, Ex. C. According to Appellant, the County's request for a copy of her Federal income tax return was an illegal invasion of her privacy. The Board disagrees.

The County has provided as an exhibit to its pleading, copies of various other governmental entity waiver policies. *See* County's Response to Further Appeal, Ex. H. As the County correctly points out, the various policies require detailed financial information. County's Response to Further Appeal at 2-3. The Board has reviewed these various policies⁸ and agrees with the County's characterization. For example, the Social Security Administration's (SSA's) Waiver of Overpayment Recovery policy indicates that in addition to completing the SSA's required Financial Statement, the individual seeking a waiver, may be asked to provide their most recent tax return. *See* County's Response to Further Appeal, Ex. H. The SSA's Waiver of Overpayment Recovery seeks information on assets that the waiver requester or any other member of his/her household own, as well as the income of all household members. *Id.* The OPM Waiver Policy seeks information on the waiver requestor's average monthly income and that of the requestor's spouse, as well as information on assets held. *Id.* Likewise, the State of Maryland, Department of Labor, Licensing and Regulations Policy seeks information on the total monthly income of all members of the household. *Id.* The Board finds that the County's request for Appellant to provide a copy of her Federal income tax return,⁹ which would reflect assets held by both her husband and herself, as well as their joint yearly income is reasonable.

In MSPB Case No. 14-06, the Board held that Appellant bore the burden of demonstrating by substantial evidence that she was eligible for a waiver of overpayment based on financial hardship. MSPB Case No. 14-06 at 6. The Board finds that Appellant, by refusing to provide the County with her Federal income tax return, failed to meet her burden of proof. Therefore, the Board upholds the CAO's determination that Appellant is not eligible for a waiver due to financial hardship.

⁸ The policies included in Ex. H to the County's Response to Further Appeal include the Pennsylvania Municipal Retirement Board Overpayment Policy, the State of Maryland's Department of Labor, Licensing and Regulation, Division of Unemployment Insurance Overpayment Policy, the U.S. Office of Personnel Management's (OPM's) Waiver Policy and the Social Security Administration's Waiver of Overpayment Policy. County's Response to Further Appeal, Ex. H.

⁹ The Board would note that other evidence of income, e.g., W-2s, 1099s, etc., as long as it depicted a complete picture of Appellant's and her husband's income for the year would have been acceptable but Appellant, who had the burden of proof, never proffered this evidence.

ORDER

For the foregoing reasons, the Board hereby denies this appeal from the CAO's determination not to grant Appellant a waiver of overpayment based on financial hardship.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
January 15, 2015

The Circuit Court for Montgomery County (Quirk, J.) upheld the Board's decision on November 18, 2015. (Civil Action No. 401164-V). The matter was still pending with the Court of Special Appeals as of the publication date of this Annual Report.

GRIEVANCE DECISIONS

CASE NO. 14-38

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant appeal from the determination of the Montgomery County, Department of Transportation (DOT or Department) to deny Appellant's grievance concerning his request to transfer to a bus driver position. The County filed its response (County's Response) to the appeal on February 25, 2014, which included one attachment.¹ Appellant filed a response (Appellant's Reply) with eleven exhibits.²

PROCEDURAL HISTORY

On April 29, 2005, Appellant, who had been employed by the County as a Ride-On Bus Driver, filed an appeal with the Board, seeking to overturn Appellant's dismissal.³ MSPB Case

¹ The County's Attachment included: Copy of February 7, 2014 Letter from the Director of OHR responding to the Appellant's grievance.

² The Appellant's Exhibits were: Exhibit A - Copy of MSPB Case No. 10-01; Exhibit B – Copy of May 21, 2009 Email from UFCW Local 1994 MCGEO Union representative; Exhibit C – Copy of June 8, 2012 Letter from Appellant's Counsel to the Director of Montgomery County, Department of Transportation, requesting a review of Appellant's records; Exhibit D – Copy of November 8, 2012 Letter from Appellant's Counsel making a second request for copies of Appellant's records' Exhibit E – Copy of January 25, 2013 Response letter from Chief, Montgomery County, Department of Transportation to Appellant's Counsel regarding Appellant's request for record; Exhibit F – Copy of July 30, 2013 Letter to the Director, Montgomery County, Department of Transportation from Appellant's Counsel requesting a transfer for Appellant' Exhibit G – Copy of October 16, 2013 Letter to Director of OHR from Appellant's Counsel notifying the Director of Appellant's grievance; Exhibit H – Copy of February 7, 2014 Response Letter to Appellant from the Director of OHR regarding Appellant's grievance; Exhibit I-1 - Copy of November 4, 2013 Letter from the Director, Department of Transportation, responding to Appellant's request for transfer; Exhibit I-2- Copy of November 12, 2013 first class mail confirmation; Exhibit I-3 – Copy of November 20, 2013 Fax of the November 4, 2013 Letter from the Director, Department of Transportation responding to Appellant's request for transfer; Exhibit J – Copy of November 25, 2013 Letter from Appellant's Counsel to Chief Administrative Officer notifying of Appellant's grievance; and Exhibit K – Copy of Letter from Appellant.

³ As a Bus Driver, Appellant was part of the bargaining unit represented by the Municipal County and Government Employees Organization (MCGEO). At the time of Appellant's dismissal in 2005, Appellant had the right to challenge it through the negotiated grievance procedure or appeal it to the Board.

No. 10-01; County's Response at 2; Appellant's Reply at 2. The dismissal was based on an alleged violation of a Last Chance Settlement Agreement (Last Chance Agreement),⁴ which Appellant had entered into on February 23, 2004 with the County to resolve a previously proposed disciplinary action.⁵ *Id.* During the course of the appeal, Appellant was represented by counsel. MSPB Case No. 10-01; County's Response at 2; Appellant's Reply at 2. Subsequently, the parties settled the appeal pending before the Board on March 10, 2006, and Appellant's counsel submitted a Stipulation of Dismissal to the Board, MSPB Case No. 10-01. The Board then dismissed the appeal. *Id.*

As part of the 2006 Settlement Agreement, the parties agreed that the 2004 Last Chance Agreement would continue in full force and effect. MSPB Case No. 10-01. The parties also agreed that Appellant would not be permitted to drive the public in any County-owned vehicle. MSPB Case No. 10-01; County's Response at 2; Appellant's Reply at 3.

On January 10, 2009, Appellant requested to be returned to the position of bus operator, as Appellant's Last Chance Agreement was due to expire on February 23, 2009. MSPB Case No. 10-01; Appellant's Reply at 3. On April 21, 2009, the Chief, Department of Transportation (DOT), denied Appellant's request. *Id.* While acknowledging that the Last Chance Agreement had ended, the Chief cited to the Settlement Agreement to support the Chief's contention that DOT was restricted from permitting Appellant to drive the public in any County vehicle. *Id.*

On May 4, 2009, Appellant, through counsel, filed an administrative grievance with DOT and the Office of Human Resources (OHR), concerning Appellant's request to be returned to Appellant's Bus Driver position. MSPB Case No. 10-01; Appellant's Reply at 4. On May 5, 2009, the Director, OHR, wrote counsel indicating that the grievance was denied, as the Municipal County and Government Employees Organization (MCGEO) was the exclusive representative for filing a grievance on the matter. *Id.* Accordingly, Appellant would have to pursue Appellant's grievance through MCGEO. *Id.*

Counsel then wrote to MCGEO on May 20, 2009, requesting that it file a grievance on Appellant's behalf. MSPB Case No. 10-01; Appellant's Reply at 4. MCGEO responded on May 21, 2009, indicating that as Appellant had exercised Appellant's right to have Appellant's 2005 dismissal reviewed by the Board instead of the Union, the Union had no jurisdiction with regard to the 2006 Settlement Agreement. *Id.*

On June 10, 2009, Appellant's counsel wrote to the Director, DOT, indicating that based on MCGEO's response, Appellant's administrative grievance should be reinstated. MSPB Case No. 10-01; Appellant's Reply at 4. On June 26, 2009, the Director, OHR, responded to counsel, denying Appellant's request to reconsider the grievability of Appellant's grievance. *Id.* According to the Director, OHR, because Appellant was grieving Appellant's work assignment,

⁴ The Last Chance Agreement was for a period of five years. At the time Appellant entered into the Last Chance Agreement, Appellant was represented by MCGEO.

the Director, OHR, was asserting a violation of the terms and conditions of Appellant's employment which is covered by Appellant's collective bargaining agreement. *Id.*

Subsequently, the Appellant, through counsel, appealed his dismissal grievance to the Board. County's Response at 2. MSPB Case 10-01. On October 5, 2009, the Board issued a decision, holding that "the alleged grievance is grievable under the County's administrative grievance procedure and not the collective bargaining agreement and that the County is correct in its interpretation of the Settlement Agreement. Accordingly, the Board orders the County to continue to enforce the provision of the Settlement Agreement which bars Appellant from driving the public in any County owned or funded transportation vehicle and denied Appellant's grievance." *Id.*

Five years later, on June 13, 2013, Appellant's counsel wrote to Appellant's supervisor seeking reinstatement of the Appellant as a Bus Operator. Appellant's Reply, Exhibit 3. On July 30, 2013, Appellant's counsel forwarded the June 13, 2013 letter to the Director, DOT. Appellant's Reply, Exhibit F. On October 16, 2013, Appellant filed a grievance under the County's Grievance Procedure. County's Response at 1; Appellant's Reply, Exhibit G. On November 4, 2013, DOT responded to Appellant's July 30, 2013 letter. Appellant's Reply, Exhibit I-3.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant waited almost five (5) years to file this grievance.
- The Board's opinion in MSPB Case No. 10-01 is correct as to jurisdiction, but ineffective and incorrect as to the merits.
- The Board's decision should not endorse the County's intentional refusal to respond at all or to address the merits regarding reinstatement.
- Appellant should be reinstated to his position as a bus operator.
- As the Settlement Agreement was in connection with an appeal Appellant made to the Board, the Board should exercise jurisdiction and interpret the Settlement Agreement.
- Appellant was never allowed to confront any complainant with respect to any alleged misbehavior as a Bus Driver. Appellant understood the provision in the Settlement Agreement "the County will not permit Appellant to drive the public" to apply during the term of the Last Chance Agreement, not forever.

County:

- Appellant, as a Motor Pool Attendant, holds a position in the bargaining unit represented by MCGEO.
- Appellant's grievance relates to an assignment of work, as Appellant seeks to be transferred to bus driver position. As the grievance deals with an assignment of work, it is

- a subject covered by the collective bargaining agreement. Accordingly, Appellant may only challenge the assignment through the contract grievance procedure.
- To the extent that Appellant may be relying on the 2006 Settlement Agreement, that issue was decided by the Board in 2009 in MSPB Case No. 10-01.
 - While Appellant might disagree with the Board’s interpretation of the 2006 Settlement Agreement, he could have requested reconsideration by the Board or appealed the Board’s decision to the courts but did not do so.
 - More than four years has now passed since the Board’s earlier decision and nothing has changed.
 - There is no basis for the Board to permit Appellant to relitigate this issue.
 - The Board does not have jurisdiction over Appellant’s appeal because it involves issues covered by the MCGEO collective bargaining agreement.

APPLICABLE LAW AND REGULATION

Montgomery County Code, Chapter 2A, Administrative Procedures Act, Article I. Appeals from Administrative Agencies, Section 2A-10, Decisions, which states in applicable part,

- ...
- (f) *Rehearing and reconsideration.* Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten (10) days from a final decision. Thereafter, a rehearing or reconsideration may be approved only in the case of fraud, mistake or irregularity. . . . Any decision on a request for rehearing or reconsideration not granted within ten (10) days following receipt of the request therefor in accord with subsection (c) of this section shall be deemed denied.

Montgomery County Personnel Regulations (MCPR), 2001, Section 35, Merit System Protection Board Appeals (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), 34, which states in applicable part:

35-15. MSPB may enforce settlement agreements. If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.

ISSUE

Is Appellant barred from bringing this appeal under the doctrine of *res judicata*?

ANALYSIS AND CONCLUSIONS

The Doctrine of *Res Judicata* Precludes the Appellant’s Appeal

Appellant’s claims were either fully raised and argued before the Board in MSPB 10-01 or could have been raised in that appeal, and thus, are barred by the doctrine of *res judicata*. *Res judicata* restrains a party from litigating the same claim repeatedly and ensures that courts do not

spend time adjudicating matters that have been decided or could have been decided fully and fairly. Almost 130 years ago, the Supreme Court made this point in *Cromwell v. County of Sac*, 94 U.S. 351, 358 (1876):

The plea of [*res judicata*] applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Under Maryland law, the elements of *res judicata*, or claim preclusion, are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits. See *Colandrea v. Wilde Lake Comm. Ass'n.*, 361 Md. 371, 392, 761 A.2d 899, 910 (2000); *Blades v. Woods*, 338 Md. 475, 478–79, 659 A.2d 872, 873 (1995); *Gertz v. Anne Arundel County*, 339 Md. 261, 269, 661 A.2d 1157, 1161 (1995); *deLeon v. Slear*, 328 Md. 569, 580, 616 A.2d 380, 385; *Cicala v. Disability Review Bd.*, 288 Md. 254, 263, 418 A.2d 205, 211 (1980). “The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.” *MPC, Inc. v. Kenny*, 367 A.2d 486 (Md. 1977) (quoting *Alvey v. Alvey*, 171 A.2d 92, 94 (Md. 1961)); see also *Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 710 (1982) (“A party cannot escape the requirements of . . . *res judicata* by asserting its own failure to raise matters clearly within the scope of a proceeding.”).

In the instant case, none of the elements for the application of *res judicata* is in dispute. The first element of *res judicata*—that the second action features the same parties or their privies—is satisfied easily here. In MSPB Case No. 10-01, Appellant filed an appeal against the county seeking to overturn his dismissal and requesting that the Board interpret the 2006 Settlement Agreement. MSPB Case No. 10-01 (2010). In the present action, Appellant brought an appeal against the County.

The second and third elements of *res judicata*—that a party is raising the same claim in the current action and that there has been a final judgment on the merits—are met. In his current appeal, Appellant alleges the same challenges surrounding the County’s interpretation of his 2006 Settlement Agreement that he alleged in MSPB Case No. 10-01. Further, the Board issued a final decision in MSPB Case No. 10-01. Appellant contends that “the Board’s decision on the substantive merits is ineffective as mere *dicta* . . . Moreover, in purporting to decide the merits without even allowing the parties to brief or argue the issues of “administrative *res judicata*” . . . the MSPB denied due process to Mr. H.” Appellant’s Reply at 10.

Appellant’s contention is unpersuasive. As an initial matter, the Board’s “decision on the substantive merits” in MSPB No. 10-01 was not “*dicta*”; indeed, this assertion is a *non sequitur*. In MSPB 10-01, the Appellant argued that the 2006 Settlement Agreement did not preclude him from returning to duty as a Ride On bus driver but instead only operated as such a bar during the

five-year term of the Last Chance Agreement. This is the identical argument Appellant is presenting now. The Board considered and rejected this argument, holding specifically that “[w]hile it is true that the Settlement Agreement also contains a provision continuing the Last Chance Agreement, that provision is separate and apart from the provision that proscribes Appellant from driving the public in any County owned vehicle. “ Thus there can be no dispute that the issue raised by the Appellant here was actually decided on the merits by the Board in MSPB No. 10-01.

Nor can there be any dispute that the Board’s decision in MSPB No. 10-01 is final. If Appellant then believed that his contentions should have been more fully addressed, his recourse was to file a motion for a new hearing, petition for reconsideration or file an appeal with the Circuit Court. Montgomery County Code (Code), Section 2A-1-(f). Yet he did none of these. Accordingly, the Board’s decision in MSPB No. 10-01 became final.

Accordingly, as the requirements for *res judicata* under Maryland law have been established here, Appellant’s appeal must be dismissed.

ORDER

Based on the above, the Board hereby dismisses Appellant’s appeal as barred under the doctrine of *res judicata*.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
October 9, 2014

CASE NO. 15-10

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal from the determination of the Director, Department of Health and Human Services (DHHS) to issue Appellant a written reprimand. The County filed its response (County's Response) to the appeal, asserting that the Board lacks jurisdiction over the appeal. County's Response at 1. Appellant filed a reply to the County's Response (Appellant's Reply), alleging that the Board did have jurisdiction over his appeal. Appellant's Reply at 1. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant is an Income Assistance Program Specialist I in DHHS. Appellant's Appeal; County's Response at 1. Appellant is a part of the bargaining unit represented by the Municipal and County Government Employees Organization, United Food and Commercial Workers, Local 1994 (MCGEO). County's Response at 1; Notice of Disciplinary Action, dated 08/27/14, at 1. Appellant received a Notice of Disciplinary Action – Written Reprimand (NODA), based on his failure to obey a lawful direction from his supervisor.¹ NODA, dated 08/27/14, at 1.

This appeal followed.

POSITIONS OF THE PARTIES

County:

- The Board's jurisdiction is not plenary but is rather limited to that which is granted by statute.
- Appellant is a member of a bargaining unit represented by MCGEO.
- As a bargaining unit member, Appellant is bound by the terms of the MCGEO contract with the County.
- Section 28.5 of the MCGEO contract provides that an employee may appeal any disciplinary action except an oral admonishment and written reprimand.
- As a written reprimand is not appealable under the MCGEO contract, the Board

¹ The County's Response states that Appellant's appeal is untimely as he received the written reprimand on July 31, 2014. *See* County's Response at 1. Significantly, the County has provided no proof to support this allegation. While this date corresponds to the date Appellant indicated he received the written reprimand in his appeal, *see* Appellant's Appeal at 1, it does not correspond to the date of the NODA Appellant filed with the Board. *See* NODA, dated 08/27/14. As the Board finds it lacks jurisdiction over this appeal, as discussed *infra*, there is no need to deal with the County's assertion that the appeal was untimely filed.

- lacks jurisdiction.
- Even if Appellant was not a bargaining unit employee, pursuant to the Personnel Regulations, Appellant does not have a right to file an appeal directly with the MSPB over a written reprimand.
- Appellant’s appeal appears to be untimely, as he is required under the Personnel Regulations to file an appeal within 10 working days after receiving a notice of disciplinary action. Appellant received the written reprimand on July 31, 2014 and did not appeal it until early September.

Appellant:

- Even though the NODA was dated August 27, 2014, Appellant did not receive it until September 9, 2014.
- Section 33-12 of the Personnel Regulations² permits a merit employee who is the subject of a disciplinary action other than a removal, demotion or suspension to file an appeal with the Board, but the Board does not have to hold a hearing.

APPLICABLE LAW, REGULATIONS, AND CONTRACTUAL PROVISIONS

Montgomery County Charter, Section 404, Duties of the Merit System Protection Board, which states in applicable part,

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, Disciplinary Actions, which states in applicable part:

. . .

33-9. Right of an employee to appeal a disciplinary action.

(a) ***Grievance rights.***

- (1) With the exception of an oral admonishment, an unrepresented (non-bargaining unit) employee may file a grievance under Section 34 of these Regulations over any disciplinary action and the penalty associated with the disciplinary action, such as the length of the suspension, the amount of leave or compensatory time taken

² Although Appellant cites to Section 33-12 of the Personnel Regulations, the Board would note that the current Personnel Regulations do not contain any such section. See Montgomery County Personnel Regulations, 2001, Section 33 *available at* <http://www.montgomerycountymd.gov/ohr/labor/regulation.html>.

from the employee, or the salary reduction associated with a demotion or within-grade salary reduction.

- (2) A bargaining unit employee may file a grievance over a disciplinary action by using the grievance procedure in the appropriate collective bargaining agreement.

(b) ***Right to appeal a disciplinary action to the MSPB.***

- (1) ***Right to file a direct appeal to the MSPB.*** An employee with merit system status may appeal a demotion, suspension, or dismissal by filing an appeal directly with the MSPB under Section 35 of these Regulations. An employee who files a direct appeal must not also file a grievance on the same disciplinary action.

- (2) ***Right to appeal a grievance decision to the MSPB.*** An employee, other than a probationary employee or temporary employee, may appeal a decision on a grievance over a disciplinary action to the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, an February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

...

35-2. Right of appeal to MSPB.

- (a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status or a Local Fire and Rescue Department employee 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.
- (b) An employee with merit system status or a Local Fire and Rescue Department employee may file an appeal with the MSPB over 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 the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994 and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016 (MCGEO CBA), Section 10, *Grievances*, which states in applicable part:

...

10.3 Discipline Grievances

Oral admonishments and written reprimands are not subject to review under this procedure. Any employee initiating a grievance under this procedure regarding suspension, demotion, termination, or removal waives any right to have that action reviewed by the Montgomery County Merit System Protection Board.

Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994 and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016, Section 28, *Disciplinary Actions*, which states in applicable part:

...

28.5 An employee may appeal any disciplinary actions, with the exception of oral admonishments and written reprimands, in accordance with this Agreement.

ISSUE

Does the Board have jurisdiction over the instant appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g., 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 were 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 jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over A Written Reprimand Given To A Bargaining Unit Member.

The Montgomery County Charter and the Personnel Regulations provide that any merit system employee who is removed, demoted or suspended has the right to appeal the matter to the Board and have a hearing. Montgomery County Charter, Section 404; MCP, 2001, § 33-9(b)(1). However, Appellant only received a written reprimand. Appellant's Appeal; County's

Response at 1. There is no statutory right of appeal with regard to a written reprimand.

The Personnel Regulations do provide that a non-bargaining unit employee may file a grievance over any disciplinary action. MCPR, 2001, § 33-9(a)(1). The Personnel Regulations also provide that a non-bargaining unit employee may appeal a decision on a grievance over a disciplinary action to the MSPB. MCPR, 2001, § 33-9(b)(2). However, these regulatory provisions do not apply to Appellant as he is a member of the bargaining unit represented by MCGEO. County's Response at 1; Notice of Disciplinary Action, dated 08/27/14, at 1.

With regard to bargaining unit members, the Personnel Regulations provide that they may file a grievance over a disciplinary action by using the grievance procedure in the appropriate collective bargaining agreement. MCPR, 2001, § 33-9(a)(2). Under the MCGEO contract, a bargaining unit employee may not grieve or appeal a written reprimand. MCGEO CBA, § 10.3; § 28.5. A grievance is a prerequisite to the filing of an appeal under MCPR § 35-2(b) (a merit system employee may appeal to the Board "after receiving an adverse final decision on a grievance from the CAO.") It is undisputed that, as Appellant never filed a grievance over this written reprimand, there is no "adverse final decision" of the CAO for the Board to review. Therefore, the Board lacks jurisdiction to hear the instant appeal.

ORDER

Based on the above analysis, the Board dismisses the instant appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, and Rule 7-202.

For the Board
March 24, 2015

CASE NO. 15-11

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal from the determination of the Director, Office of Human Resources (OHR) that after the completion of an individual position classification study regarding Appellant's position, Appellant's position should remain classified as an Office Services Coordinator (OSC), grade 16, in the Office of Human Rights (Human Rights). Appellant filed his appeal on September 19, 2014. Appellant's Appeal. Subsequently, on September 24, 2014, the Board received a submission from Appellant (Supplemental Appeal),

with fourteen exhibits.¹ The County filed its response (County's Response) to the appeal, asserting that the Board lacks jurisdiction over the appeal.² County's Response at 1. Appellant filed a reply to the County's Response (Appellant's Reply), alleging that the Board did have jurisdiction over his appeal. Appellant's Reply at 1. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant is an OSC in Human Rights. Appellant's Appeal; County's Response at 1. In June 2013, Appellant requested an individual position classification study under Section 9-4(b) of the Personnel Regulations. County's Response at 1; Appellant's Supplemental Appeal at 1. OHR acknowledged receipt of Appellant's request and arranged for an outside contractor to perform the study. Appellant's Supplemental Appeal, Ex. C; County's Response at 1.

On July 9, 2014, the OHR Director sent a copy of the contractor's findings and recommendations about Appellant's position to him. County's Response at 1; Appellant's Supplemental Appeal, Ex. H. The contractor, Mr. P., initially recommended that Appellant's position be reclassified from OSC, grade 16, to Executive Administrative Aide, grade 17. County's Response at 1; Appellant's Supplemental Appeal, Ex. H & Ex. I. Appellant and his supervisor, J.S., Human Rights Director, were provided with the opportunity to consider the study and provide comments before a final position classification decision was made. County's Response at 1; Appellant's Supplemental Appeal, Ex. H. While Appellant agreed with the contractor's findings, Appellant's Supplemental Appeal, Ex. J, Appellant's supervisor provided comments back to the contractor that led the contractor to change his recommendation. Appellant's Supplemental Appeal, Ex. N. Based on Appellant's supervisor's comments, the contractor determined that Appellant's position classification should remain as an OSC, grade

¹ Appellant's exhibits were: Exhibit (Ex.) A – Memorandum from J.A., subject: Individual Classification Studies-June 2013 Box, dated 05/01/13; Ex. B – Appellant's Position Description Summary, dated 07/01/13; Ex. C – Email from OHR Classification, subject: June 2013 Box Individual Classification Study re: Appellant; Ex. D – List of Managerial and Program/Admin Specialist duties Appellant is performing; Ex. E – Email between Mr. P. and Appellant, dated 05/29/14, confirming their meeting; Ex. F – Email from Appellant to Mr. P., dated 07/07/14, providing additional information to Mr. P.; Ex. G – Email from L.G. to J.S., subject: Recommendation for the position held by Appellant, dated 07/09/14, forwarding Mr. P.'s Classification Study; Ex. H – Memorandum from J.A., subject: Individual Position Study: Appellant, dated 07/09/14; Ex. I – Mr. P.'s Classification Study, dated 07/07/14, recommending reclassification of Appellant's position; Ex. J – Email from Appellant to J.A., dated 07/24/14, agreeing with the recommendation of the Classification Study; Ex. K – Email from Appellant to L.G., dated 07/30/14, forwarding as an attachment a document excluding Appellant from the bargaining unit; Ex. L – Memorandum from J.A. to J.S., subject: Bargaining Unit Exclusion, dated 08/12/11; Ex. M – Email from J.S. to Appellant, dated 09/05/14, forwarding a memorandum from Mr. A.; and Exhibit N – Memorandum from J.A., subject: Individual Position Study Final Decision – Appellant, dated 09/05/14.

² The County's Response contained no exhibits. County's Response at 1.

16. *Id.* By a memorandum, dated September 5, 2014, Appellant was notified that his position classification would remain the same. *Id.*

This appeal followed.

POSITIONS OF THE PARTIES

County:

- The Board’s jurisdiction is not plenary but is rather limited to that which is granted by statute.
- The Personnel Regulations provide for direct review by the MSPB of an individual position study final decision only in cases where the decision downgrades a position.
- While Appellant might arguably be able to file a grievance under the Personnel Regulations, alleging a violation of due process (failure to follow established procedure), he has not done so.³
- The issue in this appeal is not whether the OHR Director’s individual position study final decision is grievable, but whether Appellant has a right to file a direct appeal with the Board.
- For the foregoing reasons, the County submits that the Board does not have jurisdiction.

Appellant:

- Section 34-6(b) of the Personnel Regulations provides an avenue for an employee to appeal against OHR’s decision that an issue is not grievable.
- This section of the Personnel Regulations gives the Board authority to review a matter that was not reviewed as a grievance. This section also gives the MSPB broad authority to review a matter submitted even against a challenge that the matter is not a grievance decision.

APPLICABLE REGULATIONS

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, April 27, 2004, July 12, 2005, June 27, 2006, December 11, 2007, October 21, 2008, and July 12, 2011), Section 9, *Classification*, which states in applicable part,

...

9-6. Administrative review.

³ The County states that since an OHR Classification team staff member informed Appellant that the OHR Director’s individual position study final decision was not grievable, if Appellant should file a grievance alleging denial of due process, OHR would not challenge the grievance as being untimely.

- (a) ***Review of proposed classification action.*** Before the CAO or OHR Director makes a classification decision on an individual position or an occupational class, the OHR Director must give the position incumbent and supervisor an opportunity to provide written comments.
- (b) ***Review of a classification decision to downgrade.***
 - (1) The OHR Director must notify each affected employee of the employee's right to request administrative review of a classification decision that downgrades the employee's position or class.
 - (2) An employee who objects to a classification decision that downgrades the employee's position or class may file a request for an administrative review with the OHR Director. The employee must file the request and any additional information within 10 working days after receiving the OHR Director's notice of the downgrade and must provide a copy to the employee's immediate supervisor and department director.

9-7. Appeal of CAO's classification decision.

- (a) An employee may appeal the CAO's classification decision to downgrade a position or class to the MSPB only if there is a violation of the procedures described in Section 9-6 of these Regulations.
- (b) An employee may not file a grievance or appeal over position classification decisions, except as stated in (a) above or for an alleged violation of due process.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, and July 12, 2011), Section 34, Grievances, which states in applicable part,

...

34-6. Matters that are not grievable.

- (a) The following matters are not grievable:
 - (1) a position classification; . . .

...

- (b) An employee may appeal a decision that a matter is not grievable to the MSPB. An employee who wishes to appeal must file the appeal within 10 working days after the employee receives the OHR Director's decision.

...

34-9. Grievance procedure.

...

(b) *Technical and procedural review of grievances.*

- (1) An employee must submit a written grievance on the OHR-approved grievance form (Appendix Q) and must provide the information requested on the form.

...

- (5) The OHR Director must review the grievance and decide if the grievance:

- (A) presents an issue that is grievable under Section 34-4;
- (B) was timely filed; and
- (C) otherwise complies with this section.

ISSUE

Does the Board have jurisdiction over the instant appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g., 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 were 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 jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

Appellant Only Has The Right To Directly Appeal To The Board If His Position Is Downgraded.

The Personnel Regulations provide for a direct appeal to the MSPB if Appellant's position was downgraded. MCPR, 2001, § 9-7(a). A downgrade of Appellant's position did not happen. Therefore, Appellant lacks the ability to directly file an appeal challenging his individual position study.

Appellant argues that pursuant to Section 34(b) of the Personnel Regulations, he may appeal OHR's decision that an issue is not grievable. While that is correct, Appellant first must file a grievance through the grievance process set forth in the Personnel Regulations. As there is no evidence before the Board that Appellant has done so, the Board finds that Section 34(b) of the Personnel Regulations is of no avail.

Accordingly, the Board finds that it lacks jurisdiction to hear the instant appeal.

ORDER

Based on the above analysis, the Board dismisses the instant appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, and Rule 7-202.

For the Board
March 24, 2015

CASE NO. 15-26

FINAL DECISION AND ORDER

On March 5, 2015, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board) from the determination of Montgomery County, Maryland, Fire and Rescue Service (FRS) Chief to dismiss Appellant, effective February 27, 2015. The County filed a Motion to Dismiss¹ the appeal, asserting that because Appellant had participated in the Alternative Dispute Resolution (ADR) process set forth in Article 10.14 of the Municipal and County Government Employees Organization (MCGEO) Collective Bargaining Agreement

¹ Along with its Motion to Dismiss, the County filed Attachment (Attach.) 1, entitled "Montgomery County Government Office of Human Resources Employee Acknowledgment for Participation in the ADR Process" (hereinafter ADR Acknowledgment Form).

(CBA or contract), Appellant waived Appellant's right to appeal to the Board. Appellant did not respond to the County's Motion to Dismiss.

FINDINGS OF FACT

Appellant was an Information Technology Specialist II with FRS. Appellant's Appeal. Appellant was a member of the bargaining unit covered by the CBA between MCGEO and the Montgomery County Government. County's Motion to Dismiss at 1. Appellant was placed on a work improvement plan in April 2014 and subsequently was terminated from his position with the County effective February 27, 2015. Appellant's Appeal. Prior to his termination, Appellant participated in an ADR Settlement Conference on February 5, 2015. County's Motion to Dismiss, Attach. 1 at 2. In order to participate in the ADR Settlement Conference, Appellant signed an Acknowledgement Form, indicating he was voluntarily participating and was waiving his right to file an appeal concerning the subject matter of the ADR Settlement Conference. *Id.* at 1.

POSITIONS OF THE PARTIES

County:

- The evidence demonstrates that Appellant participated in the ADR Settlement Conference. By doing so, Appellant waived Appellant's right to appeal to the MSPB regarding this matter.

Appellant:

- Although Appellant and Appellant's Union Representative accepted the recommendation of the ADR Committee, FRS did not accept the recommendation and terminated Appellant. Management singled Appellant out with the intention of ultimately terminating him.

APPLICABLE CONTRACTUAL PROVISIONS

Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, July 1, 2013 through June 30, 2016, Article 10, Grievances, which states in applicable part:

...

10.12 Alternative Dispute Resolution Processes

The Union and the Employer share a joint interest in resolving disputes arising from the implementation of discipline and other terms and conditions of employment. In order to minimize these disputes and improve the efficiency of governmental operations, the parties agree to utilize the following processes.

(a) Pre-discipline Settlement Conferences

- (1) After a statement of charges (includes intent to terminate actions based on unsatisfactory performance) is issued but before the notice of disciplinary action is issued, the parties may voluntarily agree to a pre-disciplinary settlement conference.
...
- (5) The Committee reviews the recommended level of discipline and the facts of the case and makes a non-binding recommendation. Each side is permitted to make a brief presentation before the Committee. Presentation and format shall be established by the Committee.
- (6) If parties agree with the recommendation of the Committee, Notice of Discipline is issued with no grievance. If Union disagrees with the committee's recommendation, it is free to grieve the Notice of Disciplinary Action. If County disagrees, it may go forward with the notice as originally proposed.
- (7) The settlement conference option will be considered a part of the informal resolution process of the contract grievance procedure, in using this process an employee waives any right to file with MSPB on suspensions, demotions and dismissal actions.

ISSUE

Does the Board have jurisdiction over the instant appeal?

ANALYSIS AND CONCLUSIONS

The right of a merit employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal action is granted by the Montgomery County Charter. Montgomery County Charter, Section 404. The Charter also provides that employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system to the extent those provisions are made subject to collective bargaining. Montgomery County Charter, Section 401.

The MCGEO CBA allows an employee who is facing discipline, including termination based on unsatisfactory performance, to participate in a Pre-Discipline Settlement Conference. CBA, § 10.12(a)(1). The CBA also provides that the settlement conference option is part of the informal resolution process of the contract grievance procedure and in using the process an employee waives the right to file with the MSPB on a dismissal action. CBA, § 10.12(a)(7).

It is well established law that in order to effectuate an enforceable waiver of a statutory right, the waiver must be the result of an informed, intentional abandonment of a known right, free of any coercion or duress. *See McCall v. United States Postal Service*, 839 F.2d 664, 668 (Fed. Cir. 1988) (citing *Ferby v. United States Postal Service*, 26 M.S.P.R. 451, 455-56 (1985)). The ADR Acknowledgement Form, which Appellant signed, agreeing to participate in the ADR Settlement Conference, specifically stated, in applicable part:

...

4. I understand that my participation in the ADR process is voluntary. I further understand that by participating in this process, irrespective of the outcome, I will waive any right I might have to file an appeal with the Merit System Protection Board (MSPB) concerning the subject matter of this process.

...

6. I understand that once the Union commences to discuss alternative discipline with the Department or OHR, or if the ADR committee begins hearing testimony from the Department, from you or the Union, the ADR process is deemed to have started.

- Yes – I wish to participate in the ADR process and I understand that in doing so, I am waiving my right to file an appeal with the MSPB.**
- No – I do not wish to participate in the ADR process.**

County's Motion to Dismiss, Attach. 1 at 1 (emphasis in the original).

In the instant case, the Board finds that the ADR Acknowledgement Form clearly put Appellant on notice that his mere participation in the ADR process would waive his right to appeal to the Board² no matter what the outcome of the Pre-Discipline Settlement Conference. County's Motion to Dismiss, Attach. 1 at 1. Therefore, the Board finds that Appellant's participation in the Pre-Discipline Settlement Conference served to waive his right to appeal his termination to the Board.

² The Board notes that in a previous case it held that it had jurisdiction over a case even though the appellant had signed an ADR Form, as that form was less than clear in informing an employee that mere participation in an ADR Settlement Conference would waive the employee's right to appeal to the Board over the subject matter of the Conference. *See* MSPB Case No. 08-14 (2009). The Board informed the County that it needed to revise its ADR Form so that an employee, prior to participating in a Settlement Conference, would sign a specific acknowledgement that the employee was waiving the employee's right to appeal to the Board by participating in the Settlement Conference. *Id.* at n.9. The Board finds that the County has corrected its ADR Acknowledgement Form to conform to the Board's instructions.

ORDER

Based on the above, the Board dismisses Appellant's appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 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
May 20, 2015

DISMISSAL OF APPEALS

The County's Administrative Procedures Act (APA), Montgomery County Code Section 2A-8(j), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal. Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if, among other reasons, the appeal is untimely, the appellant fails to prosecute the appeal or comply with appeal procedures, the Board lacks jurisdiction, the appeal is or becomes moot, the appellant failed to exhaust administrative remedies, there is no actual (*i.e.*, justiciable) controversy, or the appellant fails to comply with a Board order or rule.

During fiscal year 2015, the Board issued the following dismissal decisions.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 14-41

FINAL DECISION AND ORDER ON DISMISSAL FOR LACK OF JURISDICTION

On February 7, 2014, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) alleging that the Office of Human Resources (OHR or Department), unlawfully failed to select Appellant for the position of Urban District Public Service Aide (UDPSA) with the Community Engagement Cluster (CEC). On March 27, 2014, the County notified the Board that Appellant was rated “Qualified” for the UDPSA position and placed on the Eligible List. To date, no selection for this position has been made. The County moved to dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACT

On February 7, 2014, Appellant applied for the position of UDPSA, IRC13539, with CEC. *See* County’s Response at 1. One hundred and eleven (111) individuals applied for the Grade 10 position. *Id.*

The job vacancy announcement stated that this recruitment would establish an eligible list to fill current and future UDPSA vacancies in CEC. County’s Response Attachment (Attach.) 2 at 2. At the outset the applications were reviewed by a member of the Recruitment and Selection Team in OHR, with respect to satisfying the minimum qualifications listed in the Vacancy Announcement. *Id.* One hundred and seven (107) applicants, including Appellant, met the minimum qualifications and were rated Qualified after review and moved to the Eligible List. *Id.*

Appellant requested a hiring preference (priority consideration) for a person with a disability. Appellant’s Appeal at 1; County’s Response at 1. Appellant provided OHR with two doctors’ notes that stated that he had a disability. County’s Response at 1. The OHR representative notified Appellant that he was required to provide a certification of a developmental disability, severe physical disability, or a psychiatric disability from the Maryland Department of Education Division of Rehabilitation (DORS) or an equivalent out-of-state vocational rehabilitation agency. County’s Response Attach. 2. On March 11, 2014, OHR notified Appellant that he was not eligible for a hiring preference because he had failed to provide a certification from DORS or an equivalent out-of-state vocational rehabilitation agency within the requisite 14-day time period. *Id.* Attach. 3. On March 8, 2014 Appellant filed this appeal with the Board. Appellant’s Appeal at 1. In his statement of appeal, Appellant states that he received the Department’s notice of denial on March 7, 2014. *Id.*

APPLICABLE LAW AND REGULATION

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **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 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

Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7. Pre-hearing procedures, which states in applicable part,

- (d) **Motions.** Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, motions for continuance, motions to amend a charging document or other submissions to the hearing authority, motions to compel discovery and motions to quash subpoenas shall be made promptly; however, nothing herein shall preclude the hearing authority, on its own motion, from reaching a determination on any preliminary matter as the interests of justice may require without a hearing.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, and December 11, 2012), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

- 6-13. 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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 20, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

35-2. Right of appeal to MSPB.

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

ISSUE

Does the Board have jurisdiction over the Appellant's appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Has Jurisdiction Over A Denial Of Employment; Based On OHR's Notification, Appellant Has Not Yet Been Denied Employment.

The Code provides that an applicant may challenge the Chief Administrative Officer's (CAO's) decision regarding an application for employment. As the Board's regulations make clear, basically an applicant may challenge any denial of employment. In the instant case, Appellant has been deemed "Qualified" for the position and placed on the Eligible List for the UDPSA position. OHR has indicated that the position has not been filled yet.

Thus, based on OHR's actions, Appellant can not be deemed to have been denied employment in the position of UDPSA. Accordingly, the Board concludes that it lacks jurisdiction over Appellant's appeal.¹ Therefore, it will dismiss Appellant's appeal.²

¹ In MSPB Case No. 10-10 the Board accepted jurisdiction over an appeal of an applicant who had initially been notified that he has been deemed "Qualified." This notice also informed the applicant that because he had not been rated "Well Qualified," "it was unlikely [he] would receive further consideration for the position." There is no indication in the record of this appeal that Appellant has received a similar notice or that he would be denied further consideration by OHR. Accordingly, there is no evidence here that "OHR effectively informed Appellant that [he] had been denied employment."

² As the Board held in an earlier appeal filed by this Appellant, the Board lacks jurisdiction to consider claims of non-selection where, in fact, no selection has been made yet. MSPB Case No. 14-14 (2014). (citing Mont. County Code Sec. 33-9(c); MCPR 35-2 (c)). Accordingly, this contention and any similar contentions Appellant might make in future appeals must be summarily dismissed.

ORDER

On the basis of the above, the Board hereby dismisses Appellant’s appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
July 1, 2014

CASE NO. 14-44

SUMMARY DISMISSAL FOR LACK OF JURISDICTION

On May 1, 2014, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) alleging that the Montgomery County Office of Human Resources (OHR or Department) unlawfully failed to select Appellant for the position of Customer Service Representative Trainee (CSRT) in the Public Information Office (PIO). On May 14, 2014, the County notified the Board that Appellant was rated “Qualified” for the CSRT position and placed on the Eligible List. No selection has yet been made for this position. The County moved to dismiss the appeal for lack of jurisdiction.

As the Board held in an earlier appeal filed by this Appellant, “the Board lacks jurisdiction to consider claims of nonselection where, in fact, no selection has been made yet.” MSPB Case No. 14-41 (citing MSPB Case No. 14-14 and Mont. County Code Sec. 33-9(c); MCPR 35-2 (c)).

In MSPB Case No. 14-41, the Board further stated that “any similar contentions Appellant might make in future appeals must be summarily dismissed.” Because Appellant has again sought to challenge a nonselection where he is eligible for selection and no final selection has been made yet, his appeal is summarily dismissed for lack of jurisdiction.¹

ORDER

On the basis of the above, the Board hereby dismisses Appellant’s appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and

¹ Appellant may file a new appeal with the Board should Appellant ultimately not be selected for the Customer Service Representative Trainee position.

MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
August 18, 2014

CASE NOS. 14-47 and 14-48

SUMMARY DISMISSAL FOR LACK OF JURISDICTION

On June 14, 2014 and June 17, 2014, Appellant, filed appeals with the Montgomery County Merit System Protection Board (Board or MSPB) alleging that the Montgomery County Office of Human Resources (OHR or Department) unlawfully failed to select Appellant for the position of Customer Service Representative Trainee (CSRT) in the Public Information Office (PIO) and alleging discriminatory measures by OHR to keep him unemployed. The County filed its responses (County's Response) to appeals on June 25, 2014. Appellant was provided the opportunity to file a reply to the County's response but did not do so

As the Board held in an earlier appeal filed by this Appellant, "the Board lacks jurisdiction to consider appeals that allege human rights violations." MSPB Case No. 14-40 (citing Mont. County Code Sec. 33-9(c); MCPR, 2001 App. B, Section 33-9(c)).¹ Because Appellant has again sought to appeal alleged discriminatory treatment before this Board, his appeal is summarily dismissed for lack of jurisdiction.

ORDER

On the basis of the above, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
October 15, 2014

¹ As the Board held in an earlier appeal filed by this Appellant, the Board lacks jurisdiction to consider appeals that allege human rights violations. MSPB Case No. 14-13 (2014). (citing Mont. County Code Sec. 33-9(c); MCPR, 2001 App. B, Sec. 33-9(c)). Accordingly, this contention and any similar contentions Appellant might make in future appeals must be summarily dismissed.

CASE NO. 15-17

FINAL DECISION AND ORDER

On December 8, 2014,¹ Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination by the Sheriff's Office not to select Appellant for the position of Principal Administrative Aide (PAA). The County filed its response (County's Response)² to the appeal, asserting that the Board lacks jurisdiction over the appeal as the determination not to select Appellant was made by the Montgomery County Sheriff, an elected Maryland State Officer, rather than the Chief Administrative Officer (CAO) for the County. Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

On February 23, 2014, Appellant applied for the PAA position (vacancy announcement IRC13615) with the Sheriff's Office. County's Response at 1; County's Response, Attach. 1. At the outset, the applications received for the position were reviewed by Ms. A., a member of the Recruitment and Selection team. *Id.* Ms. A. determined that over 400 applicants, including Appellant, satisfied the minimum qualifications for the position. *Id.*

Having met the minimum qualifications of the position, Appellant's application was rated by two subject matter experts chosen by the Sheriff's Office using the preferred criteria listed in the job vacancy announcement. *Id.* Nine applicants, including Appellant, were rated "Well Qualified" for the position by the subject matter experts. *Id.*

The Sheriff's Office interviewed six candidates for the position, including Appellant. *Id.* Appellant was not selected for the position as other applicants interviewed scored higher in the interview process. County's Response at 1; County's Response, Attach. 1. In addition, Appellant failed to submit the required background investigation packet to the Sheriff's Office. *Id.*

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

¹ Appellant actually filed his appeal using the Board's on-line appeal form on Sunday, December 7, 2014. As the Board's office is closed on Sundays, the first day of business for the Board after Appellant filed his appeal was December 8, 2014. Accordingly, that is the date of receipt of Appellant's appeal.

² The County's Response contained one attachment. The attachment was: Attachment (Attach.) 1 – Affidavit of Ms. A., Human Resources Specialist.

- While Appellant was provided with a background packet, he was provided with no instructions regarding what to do with it.
- Given Appellant’s experience, it is clear to him that he was the most qualified person for this position.
- The County has denied him access to over sixty competitive positions.
- Prior to Appellant’s departure from County employment in 2008, he received a commendation from Commander J. of the Montgomery County Police.
- Appellant believes there is anti-Semitism in the County and asserts he was constructively discharged after complaining about workplace harassment and discrimination.³

County:

- The Board lacks jurisdiction over this appeal because the County Code only provides that a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB over a denial of employment based on the decision of the CAO.
- Rather, Appellant was denied appointment by the Sheriff, who is an elected Maryland State Constitutional Officer in the Judicial Branch of the Maryland State Government.
- By State law, it is only after appointment by the Sheriff that the Sheriff’s Office employees are covered by the Montgomery County merit system and laws.
- Even if the Board has jurisdiction over the instant appeal, Appellant cannot meet Appellant’s burden of proof under the Personnel Regulations and County Code to show that the County’s decision on Appellant’s application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.
- The Board has previously informed Appellant that his claims of anti-Semitism are within the exclusive jurisdiction of the Office of Human Rights. Accordingly, the Board should dismiss the instant appeal.

APPLICABLE LAWS AND REGULATIONS

Maryland Code Annotated, Courts and Judicial Proceedings, Title 2, Court Personnel, Section 309(q), *Montgomery County*, which states in applicable part,

...

- (3) (i) The Sheriff may appoint 2 full-time assistant sheriffs and the number of deputies provided in the county budget.
- (ii) The Sheriff shall also appoint the other clerical and administrative

³ While the Board has determined it lacks jurisdiction over the instant appeal as discussed *infra*, the Board would be remiss if it did not remind Appellant that it has previously ruled that it does not have the authority to adjudicate claims of discrimination on the basis of religion. *See, e.g.*, MSPB Case No. 14-40 (2014); MSPB Case 15-04 (2015).

employees provided in the county budget, all of whom shall be paid by the county.

- (4) (i) The Sheriff shall fix the compensation of, and may discharge the deputy sheriffs, and other employees appointed, subject to budget limitations, the Montgomery County merit system law, personnel regulations, or applicable collective bargaining agreement. The Sheriff shall fix the compensation of the assistant sheriffs subject to budget limitations.
- (ii) Except for the assistant sheriffs, personnel appointed by the Sheriff shall be considered for all purposes as Montgomery County merit system employees and subject to the Montgomery County merit system law, personnel regulations, and applicable collective bargaining agreement. . . .

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

. . .

- (c) **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 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 non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

. . .

- 6-13. 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.

ISSUE

Does the Board have jurisdiction over the Appellant's appeal?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Has Jurisdiction Over A Denial Of Employment By The CAO; However, It Lacks Jurisdiction Over A Denial Of Employment By The Sheriff.

The County Code provides that an applicant may challenge the CAO's decision regarding an application for employment. Montgomery County Code, § 33-9(c). However, as the County points out, the determination not to select Appellant for the PAA position was made by the Sheriff, not the CAO. County's Response at 2. The Sheriff, pursuant to State law, has the authority to appoint all administrative employees in his office. MD. Code Ann., Courts and Judicial Proceedings, § 2-309(q)(3)(ii).

In denial of employment cases, the County Council has given the MSPB authority to review only final decisions of the CAO. *See* Montgomery County Code § 33-9(c) ("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 . . .") (emphasis added); *see also* MSPB Case No. 09-08 (2009) (Board lacks jurisdiction as the position the appellant was denied was not a merit system position). After appointment by the Sheriff, personnel of the Sheriff's Office are subject to Montgomery County's merit system law. MD. Code Ann., Courts and Judicial Proceedings, § 2-309(q)(4)(ii). However, there is no statute that authorizes the MSPB to review selection decisions of the Sheriff. Therefore, as the County merit system law does not apply until after an administrative staff appointment is made in the Sheriff's Office, the Board lacks authority to review the Sheriff's employment decisions.

Accordingly, the Board concludes that it lacks jurisdiction over Appellant's appeal. Therefore, it will dismiss Appellant's appeal.

ORDER

Based on the above analysis, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
March 18, 2015

DISMISSAL FOR FAILURE TO PROSECUTE

CASE NO. 15-19

DISMISSAL OF APPEAL FOR FAILURE TO PROSECUTE

On December 22, 2014, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge his termination from employment with the County's Office of Emergency Management and Homeland Security. The Board acknowledged receipt of the appeal and ordered the parties to file Prehearing Submissions. The Board also scheduled a Prehearing Conference for March 10, 2015.

Appellant did not file his Prehearing Submission as ordered by the Board on February 2, 2015. Therefore, the Board's staff contacted Appellant to ascertain whether he would be appearing for the Prehearing Conference on March 10, 2015 and he indicated he would not.

Accordingly, pursuant to Section 35-7(b) of the Montgomery County Personnel Regulations, the Board issued a Show Cause Order in this case, which ordered Appellant to show good cause as to why the Board should not dismiss his appeal based on failure to prosecute. The Board set a deadline of April 21, 2015, for Appellant's submission. Appellant failed to respond to the Board's Show Cause Order.

It is well settled that the sanction of dismissal may be imposed if a party fails to prosecute or defend an appeal. *Talbot v. Dep't of Interior*, 83 M.S.P.R. 325 (1999); *Disney v. OPM*, 16 M.S.P.R. 416 (1983) (affirming dismissal for lack of prosecution when the appellant failed to attend the hearing and failed to respond to an order requiring him to show cause for why he did not attend the hearing); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667 (1981). Accordingly, based on the record in this case, the Board finds it is appropriate to dismiss the instant appeal due to Appellant's failure to prosecute his case.

ORDER

On the basis of the above analysis, the Board hereby dismisses Appellant's appeal.

For the Board
May 12, 2015

MOTIONS

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-7(c), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to dismiss a party and substitute another, motions to quash subpoenas, motions *in limine* (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions may be filed at any time during a proceeding. The opposing party is given ten (10) calendar days to respond. MCPR § 35-11(a)(4). The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning or end of the hearing, rule on the motion.

During fiscal year 2015 the Board issued the following decisions on motions.

CASE NO. 14-42

DECISION ON THE COUNTY'S MOTION TO DISMISS

On April 9, 2014, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the Kensington Volunteer Fire Department's (KVFD) elimination of his administrative employee position.¹ The Board noted the appeal and sent it to the County and the President of KVFD for a response. On April 17, 2014, Appellant notified the Board that the County should not be a party to this matter. The County filed a Motion to Dismiss, noting that Appellant was an employee of the KVFD, and as such was not a Montgomery County merit system employee. In support of this proposition, the County filed an affidavit from the County's Office of Human Resources' (OHR's) Director, attesting to the fact that Appellant is not a County employee. *See* County Motion to Dismiss, Exhibit (Ex.) 1. Subsequently, on May 7, 2014, KVFD through its counsel, filed a Motion to Dismiss and in the alternative, Motions for a More Definite Statement and to Postpone Appellee's Prehearing Statement.

KVFD has filed nothing in opposition to the County's Motion to Dismiss. Accordingly, based on the record of evidence in this case, the Board has determined to grant the County's Motion to Dismiss.

ORDER

On the basis of the above, the Board hereby dismisses the County as a party to this case.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, *Judicial review and enforcement*, and MCPR, Section 35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
October 6, 2014

¹ The instant appeal was addressed to the County and the Kensington Volunteer Fire Department (KVFD).

CASE NO. 15-18

ORDER DISMISSING APPEAL WITHOUT PREJUDICE TO REFILE

On December 15, 2014, Appellant, through counsel, requested the Merit System Protection Board (MSPB or Board) temporarily stay his appeal. In support of his request, Appellant indicated that on October 9, 2014, Appellant was found guilty of one count of misdemeanor reckless endangerment. Appellant's Motion for Temporary Stay in Appeal Process at 1. Appellant was sentenced to five years imprisonment but the judge suspended all but nine months, with three years of probation, once Appellant is released. Motion for Modification of Sentence to be Held *Sub Curia*. Appellant has filed a criminal appeal of his conviction and seeks a stay until his criminal appeal is litigated. Appellant's Motion for Temporary Stay in Appeal Process at 1.

The County has filed a response to Appellant's Motion for Temporary Stay, opposing it. County's Response at 1. The County states that it could take multiple years to complete the adjudication of the criminal appeal. *Id.* The County contends that Appellant may participate in his MSPB case by telephone or video conference. *Id.*

The Board notes that Appellant's dismissal from his position was based on his criminal conviction. *See* Notice of Disciplinary Action – Dismissal, dated 12/03/14. Appellant's counsel claims that he is confident that Appellant's conviction will be reversed by the Circuit Court. *See* Appellant's Response to Statement of Charges.

The Board finds that given the circumstances of this case, the best course of action is to dismiss the instant appeal without prejudice, pending the adjudication of Appellant's appeal by the Circuit Court. Appellant will have fifteen (15) days from the date the Circuit Court's decision on his criminal appeal becomes final to refile his appeal with the Board.

ORDER

Accordingly, the Board hereby dismisses Appellant's appeal without prejudice to refiling. Appellant must refile his appeal **within 15 days** from the date the **Circuit Court's decision** on his criminal appeal becomes **final**.

For the Board
February 9, 2015

SHOW CAUSE ORDERS

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to the grievance procedure, MCPR § 34-9(a)(3) (as amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, § 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a Show Cause Order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the Personnel Regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a Show Cause Order to determine whether the appeal is in fact timely.

Finally, the Board may issue a Show Cause Order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

During fiscal year 2015, the Board issued the following Show Cause Orders.

CASE NO. 14-33¹

SHOW CAUSE ORDER

On November 27, 2013, Appellants, 14 Retired Employees of Montgomery County Police Department (FOP), filed appeals with the Merit System Protection Board (MSPB or Board), challenging the County's calculation of their service connected disability benefits under §33-43(i)(1) of the Montgomery County Code. On December 4, 2013, Appellants filed a contract grievance against the County alleging that in calculating these benefit calculations, the County also violated Article 57(M)(6) of the parties' collective bargaining agreement (CBA).

On December 9, 2013, Appellants filed a Motion to Stay Pending Resolution of the Pending Grievance. On January 6, 2014, the County filed an Opposition to the Appellant's Motion to Stay Appeals Pending Resolution of Pending Grievance. On February 11, 2014, the Board stayed the matter until May 5, 2014.

On May 1, 2014, Appellants' filed an unopposed Motion to Extend the Stay until June 23, 2014. On May 21, 2014, the Board granted Appellants' request for an extended stay until June 23, 2014. On June 18, 2014, Appellants' filed a Joint Motion to Extend Stay of Appeal until July 30, 2014. On June 23, 2014, the Board granted Appellants' request for an extended stay until July 30, 2014.

On August 7, 2014, the County filed the transmittal of the Arbitrator's final decision (Decision) of Appellants' grievance concluding on Page 33 of the Decision that "the County did not violate Article 57(M)(6) of the parties' CBA when it refused to use the higher of 'average final earnings' and 'final earnings' when calculating 'minimum benefit' pension for the Grievants."

As of the date of this Show Cause Order, the Board has received no further communication from Appellants' counsel. Accordingly, Appellants' have until **COB September 16, 2014** to show good cause as to why the Board should not dismiss the instant appeal. Appellants must file an original and three copies of any response to this Order with the Board, with a copy served on the County Attorney's office. The County shall file any response **on or before September 30, 2014**. Thereafter, the Board will issue a written decision on the matter.

For the Board
September 3, 2014

¹ In an Order Consolidating Appeals dated January 13, 2014, the Board consolidated the individual appeals of Appellants and designated and consolidated appeal as captioned here.

CASE NOS. 15-02; 15-04; 15-06; 15-07 and 15-08

SHOW CAUSE ORDER

Montgomery County Code (2004), as amended, Section 33-9(c), provides that an applicant for employment must show that the County's decision on an application was "arbitrary and capricious, illegal, [or] based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors." Since August 2013, Appellant has filed nineteen (19) appeals, asserting the same claims, with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination of the Montgomery County Office Human Resources (OHR) not to select Appellant for various positions throughout the County.

As the Board held in earlier appeals filed by this Appellant, "the Board lacks jurisdiction to consider appeals that allege human rights violations." MSPB Case No. 14-40 (citing Mont. County Code Sec. 33-9(c)). In addition, the Board noted in MSPB Case No. 14-40 that, "this contention and any similar contentions Appellant might make in future appeals must be summarily dismissed.

In the instant appeals, Appellant again has asserted the same claims. Accordingly, the Board hereby orders Appellant to provide a statement showing such good cause as exists for why the Board should not summarily dismiss these matters. Any such statement shall be filed **on or before October 28, 2014**, with a copy served on County. County shall have the right to file any response **on or before November 4, 2014**. **All submissions in response to this Order shall be filed by mail only. Emails will not be accepted.** Thereafter, the Board will issue a written decision in all listed matters.

For the Board
October 21, 2014

CASE NOS. 14-06 and 14-46

SHOW CAUSE ORDER

On August 4, 2013, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the determination of the Chief Administrative Officer (CAO) that Appellant must reimburse the County for pension overpayments resulting from an error in the annual cost of living adjustment (COLA) to her monthly retirement benefit that resulted in an overpayment of her retirement benefits from March 1, 1998 through December 1, 2012. On November 12, 2013, the Board granted Appellant's appeal from the determination of the CAO that she was not eligible for a waiver of overpayment pension benefits that was caused by County error and ordered the County to reimburse Appellant for any monies already deducted to recoup the overpayments until such time as the County has developed waiver guidelines to determine if Appellant is entitled to an adjustment or complete waiver of overpayment of her pension benefits. See MSPB Case No. 14-06. To

date, the County has failed to reimburse Appellant for all monies deducted to recoup the overpayments. MSPB Case No. 14-46.

Accordingly, the Board hereby orders the County to provide such evidence as it may have that it has complied with the Board's November 12, 2013 Order. Additionally, if the County has not ceased all recoupment activity pertaining to the Appellant and reimbursed her as required by that Order, the County is further hereby ORDERED to provide a statement of such good cause as exists why the Board should not sanction the County for its failure to comply with the Board's November 12, 2013 Order by entering judgment in favor of the Appellant and ordering the County to reimburse Appellant for all monies recouped and to cease any further collection activities. Any such statement shall be filed **on or before November 24, 2014**, with a copy served on Appellant. Appellant shall have the right to file any response **on or before December 8, 2014**.

For the Board
November 13, 2014

CASE NO. 15-19

SHOW CAUSE ORDER

On December 22, 2014, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge his termination from employment with the County's Office of Emergency Management and Homeland Security. The Board acknowledged receipt of the appeal and ordered the parties to file Prehearing Submissions. The Board also scheduled a Prehearing Conference for March 10, 2015.

Appellant did not file his Prehearing Submission as ordered by the Board on February 2, 2015. Therefore, the Board's staff contacted Appellant to ascertain whether he would be appearing for the Prehearing Conference on March 10, 2015 and he indicated he would not.

Accordingly, pursuant to Section 35-7(b) of the Montgomery County Personnel Regulations, the Board hereby orders Appellant to show good cause as to why the Board should not dismiss his appeal based on failure to prosecute. Appellant's submission is due **by COB April 21, 2015**. The County's Reply is **due by April 28, 2015**.

For the Board
April 6, 2015

ATTORNEY FEE REQUESTS

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In *Montgomery County v. Jamsa*, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance to respond. The Board then issues a decision based on the written record.

During fiscal year 2015, the Board issued the following attorney fee decision.

ATTORNEY'S FEES DECISION

CASE NO. 14-17

DECISION ON ATTORNEY FEE REQUEST

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's request for reimbursement of itemized attorney fees and costs related to the above-referenced case. Appellant has submitted a request for \$6,387.50 in fees. *See* Appellant's Request for Attorney Fees¹ (Appellant's Request). The County responded (County's Response), objecting to the total amount of attorney fees sought as well as the number of hours claimed, arguing that the hours should be reduced by half based on the degree of success obtained in this case. County's Response at 1. Appellant's Counsel did not submit a response to the County's May 14, 2014 response.

POSITIONS OF THE PARTIES

The County objects to Appellant's request for attorney's fees. County's Response at 1. The County notes that the Board has repeatedly awarded attorney fees on the success of an Appellant's appeal. *Id.* (citing to MSPB Case No. 00-13 (2000); MSPB Case No. 02-07 (2002); MSPB Case No. 03-05 (2003); MSPB Case No. 05-05 (2005); MSPB Case No. 13-04 (2013)).

The County asserts that "the Department of Corrections and Rehabilitation (DOCR) dismissed Appellant." *Id.* Further, "by decision and Order dated April 30, 2014, the Board reinstated Appellant and imposed a demotion." *Id.* Based on this, the County submitted a Motion for Reconsideration (MFR) dated May 12, 2014.² *Id.*

The County argues that "if the Board grants the County's MFR and dismisses Appellant, the County should not be required to pay Appellant's attorney fees." County's Response at 1. Further, in the alternative, "if the Board denies the County's MFR, Appellant's attorney fees should be reduced by fifty percent since Appellant was only partially successful in his appeal." *Id.*

Appellant's counsel did not submit a response to the County's May 14, 2014 response.

APPROPRIATE REIMBURSEMENT FORMULA

Montgomery County Code, Section 33-14, *Hearing Authority of the Board*, in providing the Board with remedial authority, empowers the Board in subsection (c) to "[o]rder the County to reimburse or pay all or part of the employee's reasonable attorney's fees" (emphasis added).

¹ Appellant's Request for Attorney Fees consists of a cover letter and a Statement for Professional Services rendered (Statement).

² By Decision dated May 27, 2014, the Board denied the County's Motion for Reconsideration.

See also Montgomery County, Maryland v. Jamsa, 153 Md. App. 346, 355, 836 A.2d 745, 750 (2003) (the court, in discussing Section 33-14(c)(9), which authorizes the Board to pay “all or part” of an employee’s reasonable attorney’s fees, noted that “[t]he County Council did not mandate that the Board award attorney’s fees; it authorized the Board to do so.”).

In determining what constitutes a reasonable fee, the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code § 33-14(c)(9).

In the case of *Manor Country Club v. Betty Flaa*, 387 Md. 297 (2005), the Court of Appeals for Maryland considered an attorney’s fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The Board notes that the provisions of §27-7(k)(1) then in effect are identical to § 33-14(c)(9), as set forth *supra*, which is controlling for the Board. The Court of Appeals in *Flaa* noted that the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974),³ *vacated in part, Blanchard v. Bergeron*, 489 U.S. 87 (1989), were “in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)” for determining an appropriate attorney’s fees award.”⁴ 387 Md. at 313.

In *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242 (2008), the Court of Appeals cited to both *Hensley* and *Flaa* for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney fees. 942 A.2d at 1252. As the County correctly notes, the Board historically has considered the degree of success in making an attorney fee award. County’s Response at 2 (citing to MSPB Case No. 00-13 (2000)). *Friolo* also indicated that the Court of Appeals applied a lodestar type of analysis to calculate a fee award. *Monmouth Meadows v. Hamilton*, 416 Md. 325, 334-35 (2010).

³ *Johnson* dealt with an award of a reasonable attorney’s fee pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964. *Johnson* set forth twelve factors to be considered in determining the amount of an attorney’s fee award. *See* 488 F.2d at 717-19.

⁴ The Maryland Court of Appeals in *Flaa* noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See* 387 Md. at 313.

ANALYSIS AND CONCLUSIONS

In determining a reasonable fee award, the Board follows the guidance of its statute and the guidance of the Court of Appeals, which applies lodestar calculations in assessing a reasonable fee.

The Appropriate Hourly Rate

It is well established that the Board looks to the D. Md. Local Rules⁵ for guidance in determining an appropriate hourly rate, as well as considering the nature and complexity of the case. *See* MSPB Case No. 13-07 (2013); 13-04 (2013); 13-02 (2013); 11-03 (2011); 11-04(2011); 10-19 (2010); 07-17; 06-03 (2010). Based on these considerations, the Board finds that the rate of \$175 an hour is reasonable given Appellant's counsel's demonstrated skill and efficiency in his litigation at the hearing in this matter.

The Amount Of Hours Billed

One factor the Board must consider in awarding attorney fees is the time and labor required – i.e., the number of hours reasonably expended. Montgomery County Code § 33-14(c)(9)(a). The Board notes that the County did not make any arguments against the reasonableness of the hours sought in this matter. In reviewing the hours billed, the Board finds the requested number of hours reasonable. Further, the Board finds that the time spent was adequately documented and reasonably necessary to achieve the outcome sought.

The County did seek to reduce the hours by fifty percent based on the fact that the Appellant did not completely prevail in his appeal. County's Response at 1. The County notes that the Board reinstated Appellant, but he still received a demotion. *Id.* Therefore, the County is seeking to implement the fifty percent deduction by reducing the number of hours by fifty percent and multiplying the remaining hours by the approved hourly rate. *Id.* While it is true that the Board did demote the Appellant, this consideration is more appropriately addressed under the results obtained/degree of success factor discussed *infra*. Accordingly, the Board denies the County's request and declines to reduce the number of billable hours sought by Appellant's counsel.

The Degree Of Success Achieved

As the County correctly notes, under Board precedent where an appellant only partially prevails, the Board only awards a portion of the fee sought. County's Response at 1. The Board's practice is in accord with Supreme Court and Maryland Court of Appeals precedent. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the most critical factor in determining the proper amount of an award of attorney's fees is the degree of success obtained); *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242, 1252 (2008) (citing to *Hensley* for the proposition that the degree of success is a crucial factoring determining a fee award); *Manor Club v. Flaa*, 387 Md.

⁵ The Board notes that the D. Md. Local Rules, Appendix B are available at <http://www.mdd.uscourts.gov/localrules/localrules.html>.

297, 305 (2005) (upholding an award of shifted attorneys' fees where the degree of success in pursuing the claims was a consideration).

The County argues that the Appellant did not completely prevail in his appeal. County's Response at 1. Although the Board reinstated Appellant, he still received a demotion. *Id.* Therefore, the Board should reduce Appellant's attorney's fees by fifty percent based on the fact that the Appellant did not completely prevail in his appeal. *Id.* The Board finds there is no merit to the County's argument.

In MSPB Case No. 13-04 (2013), the Board affirmed that, under our precedent, "where an Appellant only partially prevails . . . the Board only awards a portion of the fee sought." In this case, however, it is not appropriate to characterize the demotion as only partial relief. The Appellant has succeeded in overturning his removal, and in its place receiving a lesser penalty; he has therefore achieved the overwhelming majority of the relief he has sought. He may not be in the same job, or at the same pay, but nonetheless he has maintained his employment relationship with the County and thus the opportunity to continue his employment and advance his career. Therefore, while the relief obtained is less than complete, for purposes of determining whether attorney fees should be reduced on account of obtaining only 'limited success,' it is not meaningfully so. Accordingly, that the Appellant's success was "limited" to retaining his employment in a lesser position provides no basis for a reduction in the amount of fees sought here.

Having considered all arguments with regard to the degree of success, the Board finds that the Appellant had a high degree of success. Based upon the degree of success and in light of Appellant's modest fee request, the Board is of the opinion that an award of the full amount of fees requested is fair and reasonable for the litigation of Appellant's appeal.

ORDER

Based on the above, the Board hereby orders the following:

1. The County shall reimburse Appellant's counsel for 36.5 hours at the rate of \$175 an hour – i.e., \$6,387.50; and
2. Appellant's counsel's request for costs of \$0 is granted. Thus, a total of \$6,387.50 in fees and costs is awarded.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, Section 33-15, Judicial review and enforcement, and Montgomery County Personnel Regulations, Section 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
September 4, 2014