
IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2003

No. 00141

MONTGOMERY COUNTY, MARYLAND,

Appellant

v.

GREGORY JAMSA, et al.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Hon. William J. Rowan, III, Judge)

BRIEF OF APPELLANT

Charles W. Thompson, Jr.
County Attorney

Sharon V. Burrell
Principal Counsel for Self-Insurance Appeals

Bernadette F. Lamson
Associate County Attorney

Executive Office Building
101 Monroe Street, Third Floor
Rockville, MD 20850
(240) 777-6700
Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	1
STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS	1
STATEMENT OF FACTS	2
ARGUMENT	4
I. THE MERIT BOARD CORRECTLY CONCLUDED THAT IT HAD NO AUTHORITY TO AWARD THE EMPLOYEES ATTORNEY’S FEES FOR THEIR APPEAL OF A BOARD DECISION	4
II. UNDER THE AMERICAN RULE MONTGOMERY COUNTY IS NOT OBLIGATED TO PAY THE EMPLOYEES’ ATTORNEY’S FEES FOR THEIR APPEAL OF A MERIT BOARD DECISION ..	14
CONCLUSION	15
APPENDIX	Apx. 1

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Adamson v. Correctional Medical Services</i> , 359 Md. 238, 753 A.2d 501 (2000)	11, 13
<i>Andre v. Montgomery County Personnel Board</i> , 37 Md. App. 48, 375 A.2d 1149 (1977)	13
<i>Board of Physician v. Banks</i> , 354 Md. 59, 729 A.2d 376 (1999)	12
<i>Brzowski v. Maryland Home Improvement Commission</i> , 114 Md. App. 615, 691 A.2d 699 (1997)	6
<i>Caffrey v. Department of Liquor Control</i> , 370 Md. 272, 805 A.2d 268 (2002)	14
<i>Campbell v. Lake Hallowell Homeowners Association</i> , 2003 Md. App. LEXIS 85 (June 30, 2003)	15
<i>Fikar v. Montgomery County</i> , 333 Md. 430, 635 A.2d 977 (1994)	6
<i>In re Douglas P.</i> , 333 Md. 387, 635 A.2d 427 (1994)	7
<i>Jamsa v. Montgomery County, Maryland</i> , No. 1547, September Term, 1998 (filed November 16, 1999)	2
<i>Kaczorowski v. Baltimore</i> , 309 Md. 505, 525 A.2d 628 (1987)	7
<i>Maryland Insurance Administration v. Maryland Individual Practice Association</i> , 129 Md. App. 348, 742 A.2d 22 (1999)	4
<i>Megonnell v. United States Auto. Ass’n</i> , 368 Md. 633, 796 A.2d 758 (2000)	14
<i>Montgomery County v. Buckman</i> , 333 Md. 516, 636 A.2d 448 (1994)	12
<i>Morris v. Prince George’s County</i> , 319 Md. 597, 573 A.2d 1346 (1990)	6
<u>Cases cont’d</u>	<u>Page</u>

<i>NCR Corp. v. Comptroller of Treasury, Income Tax Div.</i> , 313 Md. 118, 544 A.2d 764 (1988)	7
<i>State v. Pagano</i> , 341 Md. 129, 669 A.2d 1339 (1996)	6
<i>Talley v. Talley</i> , 317 Md. 428, 564 A.2d 777 (1989)	14
<i>Vest v. Giant Food Stores, Inc.</i> , 329 Md. 461, 620 A.2d 340 (1993)	13

Statutes

Montgomery County Charter

§ 401	4
§ 403	4
§ 404	4

Montgomery County Code (1994)

§ 33-7(a)	4
§ 33-14	passim
§ 33-15	passim

STATEMENT OF THE CASE

This case presents the question of whether Montgomery County must reimburse Gregory Jamsa and Wayne Fisher for legal expenses incurred when they sought judicial review of a Merit System Protection Board decision that their complaints were not grievable. The employees appealed the Board's decision and prevailed in this Court. On remand, although the Board ruled against the employees on the merits of their claims, it ordered the County to pay reasonable attorney's fees arising out of the administrative proceeding. The employees appealed to the Circuit Court for Montgomery County, contending that they were also entitled to attorney's fees arising out of their appeals to the lower court and to this Court. The circuit court agreed and remanded the case to the Board for further proceedings. The County noted this appeal.

QUESTIONS PRESENTED

- I. DID THE MERIT BOARD CORRECTLY CONCLUDE THAT IT HAD NO AUTHORITY TO AWARD JAMSA AND FISHER ATTORNEY'S FEES FOR THEIR APPEAL OF A BOARD DECISION?
- II. UNDER THE AMERICAN RULE, IS MONTGOMERY COUNTY OBLIGATED TO PAY ATTORNEY'S FEES ARISING OUT OF THE EMPLOYEES' APPEAL OF A MERIT BOARD DECISION?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to this brief or in the record extract.

STATEMENT OF FACTS

Gregory Jamsa and Wayne Fisher are firefighters employed by Montgomery County. They filed grievances after their supervisors ordered them to cut the grass and perform other lawn maintenance activities at their workplace. (E. 2-3) The County determined that the complaints were not grievable through its administrative grievance procedure because they did not involve terms or conditions of employment. (E. 3) Jamsa and Fisher noted an appeal to the Merit System Protection Board, which initially found that the complaints were grievable and remanded the case to the County for further processing. (E. 4) The County requested reconsideration and the Board accepted additional submissions from the parties. The Board reversed its original ruling, finding that the subject matter of the employees' grievances was covered by a collective bargaining agreement and was not grievable. The employees filed a petition for judicial review. (E. 4-5)

The circuit court affirmed the Board's decision and the employees noted an appeal to this Court. In an unreported decision, this Court reversed the circuit court and remanded the case with instructions to remand the case to the Board for further proceedings consistent with its opinion. *Jamsa v. Montgomery County, Maryland*, No. 1547, September Term, 1998 (November 16, 1999). (E. 1) The Board in turn remanded the case to the County's Office of Human Resources for further processing under the County's administrative grievance procedure. After processing, the County's Chief

Administrative Officer (CAO) denied the grievances. The employees appealed again to the Merit Board. (E. 36)

After considering the submissions of the parties, the CAO's decision, and the exhibits, the Board concluded that the assignment of grass cutting work duties did not violate any law or regulation and was not improper. (E. 44) The employees asked the Board to reconsider its decision and to address their request for an award of reasonable attorney's fees. (E. 47) The Board upheld its decision on the merits, but granted the employees' request for attorney's fees and costs related to their prevailing on the issue of standing to bring their grievances under the County's administrative grievance procedure and directed that they submit a detailed request for attorney's fees. (E. 52-53) The employees timely submitted an itemized statement of services from their attorney along with his affidavit. (E. 55)

The Board separated the claims for attorney's fees incurred in the administrative proceedings from those incurred in the judicial proceedings and declined to award fees for the latter proceedings, finding it had no authority to order reimbursement when the employee is the party seeking judicial review. (E. 14-16) The employees filed a petition for judicial review. The circuit court reversed, ruling that the Board had the power to award attorney's fees for the judicial proceedings, and remanded the case to the Board. (E. 112-15, 117-18)

ARGUMENT

When reviewing administrative decisions, this Court's role is precisely the same as that of the circuit court — to apply the substantial evidence test to the agency's decision and to determine whether the agency's decision is legally correct. *Maryland Insurance Administration v. Maryland Individual Practice Association*, 129 Md. App. 348, 355, 742 A.2d 22, 25-26 (1999). In this case, the Merit Board correctly found that it had no authority to order the County to reimburse the employees for legal expenses incurred in the judicial proceedings. The circuit court erred in reversing the Board's decision.

I. THE MERIT BOARD CORRECTLY CONCLUDED THAT IT HAD NO AUTHORITY TO AWARD THE EMPLOYEES ATTORNEY'S FEES FOR THEIR APPEAL OF A BOARD DECISION.

The Board's authority is set forth in the County Charter and Code. The Charter directs the Montgomery County Council to enact legislation prescribing a merit system and establishes the Merit System Protection Board to oversee this system. Charter §§ 401, 403, 404. The Council implemented these charter sections through Chapter 33 of the County Code.

Under § 33-7(a), the Board "must protect the merit system" Section 33-14 is titled "Hearing authority of the board" and sets forth hearing requirements, authorizes the Board to request special counsel, and establishes the requirement of written decisions. In connection with hearings before it, the Board has the authority to award appropriate

relief including ordering the “County to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” § 33-14(c)(9). Section 33-14 contains no authority for the Board to award attorney’s fees incurred in court proceedings. Another Code provision, however, does award attorney’s fees to employees in such proceedings under certain circumstances.

County Code § 33-15(c) provides for payment of an employee’s legal expenses *if the County* appeals a Board order or decision:

When the chief administrative officer is the party seeking judicial review of a board order or decision in favor of a merit system employee, the county shall be responsible for the employee’s legal expenses, including attorneys’ fees which result from the judicial review and are determined by the county to be reasonable under the criteria set forth in subsection (c)(9) of section 33-14.

Under § 33-15(c), there is no requirement or authority for the County to pay legal expenses if an employee appeals. The circuit court, however, refused to consider § 33-15(c) and instead focused on § 33-14:

[T]he Court believes that the focus really is on the 33-14C, the language, “The Board shall have the authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following.” . . . To limit it solely to the administrative process in the Court’s view is not accomplishing the remedial objectives of the article, particularly if the employee has to resort to judicial process to reverse the administrative process. Thus, without even making any reference to 33-15C, the Court believes that under 33-14C-9 the Board does in fact have the authority to consider the fees that were generated as a part of the judicial process, and the reason for that is that that fully then accomplishes the remedial objectives of the article, because

were it otherwise, they could find against an employee, who then gets it all reversed in the judicial process, but the remedial objectives of the Board are never accomplished by an award of attorney's fees.

(E. 113-14) The circuit court erred in expanding the power of the Board and in failing to consider § 33-15(c).

The County Council adequately expressed its intent that the County must reimburse an employee for legal expenses only if it is the appealing party.

In the present case, the language and context of the County law readily demonstrate that the County must pay an employee's legal expenses incurred in appeals *only* when the County is the party seeking judicial review of a Board decision or order. Courts apply the general rules of statutory construction to determine the limits of an administrative agency's authority. *Brzowski v. Maryland Home Improvement Commission*, 114 Md. App. 615, 626, 691 A.2d 699, 704 (1997). The cardinal rule for interpreting a statute is "to ascertain and carry out the real legislative intent." *State v. Pagano*, 341 Md. 129, 133, 669 A.2d 1339, 1340 (1996). And "the beginning point . . . is the language of the statute itself." *Morris v. Prince George's County*, 319 Md. 597, 603, 573 A.2d 1346, 1349 (1990). If the language of the statute is plain and free from ambiguity, courts may not disregard the plain meaning of the words. *Fikar v. Montgomery County*, 333 Md. 430, 434-35, 635 A.2d 977, 979 (1994).

Determining the meaning apparent on the face of a statute, however, need not end the inquiry. "Although the words of a statute are the starting point for ascertaining the

legislative intent, they must not be read in a vacuum but should be considered in light of other manifestations of legislative intent.” *In re Douglas P.*, 333 Md. 387, 393, 635 A.2d 427, 430 (1994). Indeed, the meaning of the plainest words in a statute may be controlled by the context in which it appears. *Kaczorowski v. Baltimore*, 309 Md. 505, 514, 525 A.2d 628, 632 (1987).

The search for legislative intent, therefore, begins with, but is “not limited to[,] the words of the statute” *Kaczorowski*, 309 Md. at 514-515, 525 A.2d at 632. Maryland courts look at statutory language in context, and consider legislative history when it is available. *NCR Corp. v. Comptroller of Treasury, Income Tax Div.*, 313 Md. 118, 145-46, 544 A.2d 764, 777 (1988):

[A Court] may and often must consider other “external manifestations” or “persuasive evidence,” including a bill’s title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context in which [the Court] read[s] the particular language before [it] in a given case.

Kaczorowski, 309 Md. at 515, 525 A.2d at 632.

Applying the general principles of statutory construction that the statute be given its plain meaning and that it be read in context to effectuate the intent of the Legislature, the Board correctly interpreted §§ 33-14 and 33-15 as limiting its power to award the attorney’s fees in issue. The plain language of § 33-15, Judicial Review and

Enforcement, clearly and unambiguously controls the appellate process of a Board decision.

Subsection (a) provides that “[a]ny aggrieved merit system employee, or applicant, or the chief administrative officer may obtain judicial review of a merit system protection board order or decision from the circuit court for the county in the manner prescribed by [Title 7, Ch. 200 of the Maryland Rules].” Subsection (b) provides that the judicial review standards are set forth in the Maryland Administrative Procedure Act. And subsection (c) explicitly confirms that, during the appellate process, the employee may receive attorney’s fees *if the County appeals*. Inasmuch as § 33-15(c) does not purport to vest authority in the Board to grant attorney’s fees when an employee appeals a Board decision, the Board properly denied that portion of the employees’ request.

The placement of §§ 33-14(c)(9) and 33-15(c) within Chapter 33’s statutory scheme also supports this conclusion. The County Council titled § 33-14 as “Hearing Authority of Board,” and § 33-15 as “Judicial Review and Enforcement.” The Board’s authority to conduct its proceedings is addressed solely in § 33-14. Similarly, the County Council confined the rules relating to the appellate process to § 33-15. If the County Council had intended to vest the Board with authority to grant attorney’s fees when the employee appeals, it could have and would have done so explicitly and most logically in § 33-15, but it did not take this opportunity.

The County Council enacted the current language in §§ 33-14(c)(9) and 33-15(c) by Council Bill No. 36-78. (E. 28) The Bill’s function paragraphs set forth the Board’s

and Chief Administrative Officer's duties concerning the County's merit system, authorize the Board to hear grievances, and provide for judicial review of Board decisions. (E. 28)

The union representing most County employees, Montgomery County Government Employees Organization ("MCGEO"), suggested and endorsed § 33-15(c) to reform the appellate process for Board decisions. MCGEO lobbied for this provision to level the economic resources of the County and grieving employees and to guarantee merit system rights:

An employee who "wins" a case before the County Government's [Board] only to have this decision be appealed by the County government to the courts must be prepared to spend two years' average gross County salary to defend him/herself, even when he/she may be without a job and unable to get one. This is the equivalent of no redress and no employee rights at all. The [Board] itself rightly asks: "Why have a [Board] at all to consider grievances?" The County Government, under a recent court ruling can not appeal the findings of its own instrumentality under the present County Charter and Code. The Bill [CB 37-78] will change all that, and will also abolish the Merit System unless an amendment similar to the one offered [§ 33-15(c)] is included.

(E. 27)

In a subsequent memorandum, the County Council's legislative counsel confirmed that § 33-15(c) requires the County to pay the employee's attorney's fees if it appeals a Board decision:

[The] Judicial review provision provides that all parties before the Board may obtain judicial review on the record, subject to the standards of administrative law with a proviso

that the County must provide for employee legal expenses if the CAO seeks judicial review of a Board decision in favor of the employee.

(E. 35) Accordingly, § 33-15(c) benefits the employee by ensuring the ability to defend against the County and enforce his/her merit system rights if the County appeals a Board decision.

Section 33-15(c)'s legislative history indicates that the County Council inserted this provision to enable a victorious employee to *defend* a Board decision that the County might appeal, without facing undue economic hardship. The County Council recognized the importance of the appellate process and how the integrity of the County's merit system included the right of an employee to defend that position throughout appellate review. The Council acknowledged the disparate financial circumstances between an employee and the County and the obvious unfairness should the County use the appeal process to discourage an employee's assertion of rights. Such a practice would discourage employees from vigorously pursuing their legitimate merit system rights against the County. The Council did not, however, seek to subsidize a broader and potentially frivolous class of appeals should the grievants be disappointed with the outcome of a case.

The legislative history fails to support or remotely suggest the Council's intent that the County would pay legal expenses when the employee appeals. For almost twenty-five years, the remedial language of the statute has not reflected any intent to expand the scope

of the Board's authority to order the County to pay an employee's legal expenses incurred in the judicial review of a Board decision or order.

***The Board correctly interpreted its powers
under the merit law.***

While ignoring the plain language of § 33-15, the circuit court based its decision on the remedial objectives of the merit law. It applied a liberal construction to § 33-14, ruling that the Board had the power to award attorney's fees incurred in forums outside of the administrative process. Applying that rationale, the County would be required to reimburse an employee for attorney's fees regardless of which party initiates the appeal and regardless of the appeal's merits. Given this construction, every case brought before the Board would be guaranteed a lengthy and fulsome appellate history, contrary to principles of economy of judicial resources.

The court's decision ignores the well-established legal principle that the scope of an administrative agency's authority must be specifically authorized by statute. *See Adamson v. Correctional Medical Services*, 359 Md. 238, 250, 753 A.2d 501, 507 (2000) (administrative agency's powers are limited by statute). Simply put, if the Council had intended to provide attorney's fees any time an employee notes an appeal, it would have done so affirmatively, rather than hope that years later a court would interpret Chapter 33 to achieve its unstated wish. The court substituted its own standard of what constitutes "fairness," despite the statute's expressed legislative purpose. Carried to its logical

conclusion, “fair treatment” and “remedial objectives” could be construed to mean anything.

The Court of Appeals rejected a similar attempt in *Montgomery County v. Buckman*, 333 Md. 516, 636 A.2d 448 (1994). In *Buckman*, the employee sought to increase the level of disability retirement benefits under County Code § 33-34 because the retirement law stated its purpose as providing “sufficient income to enjoy during the retirement years.” The Court of Appeals rejected the employee’s rationale and limited the employee’s benefit to what the statute expressly stated:

The Montgomery County Council . . . has expressed its intent as to what amount of benefits are sufficient to satisfy [the law’s] benevolent purposes. If employees are totally incapacitated for duty, the amount of disability retirement benefits that the County Council has deemed sufficient to satisfy the benevolent purpose . . . is at least 66 2/3 percent of their final earnings.

333 Md. at 454-55, 636 A.2d at 529.

Further, Maryland courts recognize that the interpretation of a statute by the administrative agency charged with enforcement is strongly persuasive in determining its meaning. See *Board of Physician v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1999) (“agency’s interpretation of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts”). This Court has applied this established common law principle of deference in upholding the Board’s interpretation of Chapter 33. See *Andre v. Montgomery County Personnel Board*, 37 Md. App. 48, 65, 375 A.2d 1149, 1158 (1977) (affirming Board decision that statute limited its remedial powers).

The Board properly found it had no authority to award attorneys' fees for the judicial appeals. It correctly understood that an administrative agency's powers are prescribed by statute:

[B]ecause they are established by legislative bodies, administrative agencies derive their power from enabling statutes that govern them. An administrative agency is a creature of statute which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute. . . . When it is doubtful that the General Assembly has vested powers in an agency to decide certain issues, the agency's ability to exercise that power will be circumscribed by the courts.

See also Vest v. Giant Food Stores, Inc., 329 Md. 461, 476, 620 A.2d 340, 347 (1993)

("An agency cannot bypass the statutory restrictions on its own authority or extend the provisions of its enabling statute beyond the clear import of that statute's language").

The Board's decision cited several cases to demonstrate that it has consistently limited attorney's fees in the appellate process to *County* filed appeals. (E. 15-16) This is a reasonable interpretation of § 33-15(c) and, as demonstrated above, supported by the statute's plain language, legislative history and the overall statutory scheme. The circuit court erred in overlooking the Board's long standing administrative practice of interpreting §§ 33-14 and 33-15 and in refusing to consider the statute as a whole.

II. UNDER THE AMERICAN RULE MONTGOMERY COUNTY IS NOT OBLIGATED TO PAY THE EMPLOYEES' ATTORNEY'S FEES FOR THEIR APPEAL OF A MERIT BOARD DECISION.

Maryland follows the American Rule for payment of attorney's fees, "which generally requires that each party be responsible for their counsel fees." *Megonnell v. United States Auto. Ass'n*, 368 Md. 633, 659, 796 A.2d 758, 774 (2000). The Rule applies regardless of the lawsuit's outcome. There are limited exceptions:

Exceptions to the "general rule . . ." are "quite rare," but do exist. . . . For example, counsel fees may be awarded when (1) "parties to a contract have an agreement to that effect"; (2) "there is a statute which allows the imposition of such fees"; (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party"; and (4) "a plaintiff is forced to defend against a malicious prosecution."

Caffrey v. Department of Liquor Control, 370 Md. 272, 293, 805 A.2d 268, 280 (2002) (citations omitted). Another exception is a successful action brought to enforce an insurer's obligations under the third party liability provisions of a policy. *Megonnell*, 368 Md. at 660, 796 A.2d at 774.

In this case, without any express statutory authority, the circuit court ruled that the Board possessed the power to grant the fees incurred for the judicial appeals. "The power to award attorney's fees, being contrary to the established practice in this country, may be expressly conferred but will not be presumed from general language." *Talley v. Talley*, 317 Md. 428, 438, 564 A.2d 777, 782 (1989). Recently, this Court affirmed the principle that an award of attorney's fees is improper unless authorized by statute or agreement. *See Campbell v. Lake Hallowell Homeowners Association*, 2003 Md. App. LEXIS 85 (June 30, 2003) (no basis to award attorney's fees where association declaration not properly amended). Inasmuch as no express statutory authority, agreement, or other

exception existed for the Board to award the legal expenses in issue, the circuit court erred in reversing the Board's decision.

CONCLUSION

The Board correctly concluded that it had no authority to order the County to reimburse Jamsa and Fisher for legal expenses incurred in the judicial review of their grievances. Additionally, no exception to the American Rule exists to warrant the County's reimbursement of the expenses incurred in the appeals. The County respectfully requests that this Court reverse the circuit court's decision to the contrary and affirm the Board's decision limiting the amount of attorney's fees that may be awarded in this case.

Respectfully submitted,

Charles W. Thompson, Jr.
County Attorney

Sharon V. Burrell
Principal Counsel for Self-Insurance
Appeals

Bernadette F. Lamson
Associate County Attorney

Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13 point type size.