

Merit System Protection Board Annual Report FY2017

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Angela Franco, *Vice Chair*
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**FY 2017
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, § 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 2017 were:

Charlotte Crutchfield	Chair
Angela Franco	Vice Chair
Michael J. Kator	Associate Member

**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,” § 404, *Duties of the Merit System Protection Board*; the Montgomery County Code, Article II, Merit System, Chapter 33; and the Montgomery County Personnel Regulations, § 35, Merit System Protection Board Appeals, Hearings, and Investigations. Below are excerpts from some of those provisions.

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. To initiate the appeal process, the employee must file in writing or by completing the Appeal Form on the Board's website. Montgomery County Personnel Regulations (MCPR), § 35-4. Under 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 file a prehearing submission, including 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 2017 the Board issued the following decisions on appeals concerning disciplinary actions.

SUSPENSION AND TERMINATION

CASE NOS. 15-12 & 15-13

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determinations of the Director of the Montgomery County, Maryland, Department of Health and Human Services (DHHS) to impose a ten (10) day suspension (Case No. 15-12), and then ultimately to terminate Appellant from County employment (Case No. 15-13).¹ On February 4, 2015, the Board issued an order consolidating the two cases. At the request of the Appellant and the County, the hearing was postponed so that the parties could conduct discovery, and then delayed again so that they could pursue mediation. After the parties notified the Board that settlement efforts had proven fruitless a hearing was conducted on November 30, 2015. This appeal was considered and decided by Board Chair Michael J. Kator and Vice Chair Charlotte Crutchfield.²

FINDINGS OF FACT

Appellant began her employment with DHHS on September 10, 2001, as a Community Service Aide II. November 30, 2015, Hearing Transcript (Tr.) 228. Appellant became a Merit System employee on June 2, 2002, and remained in that position with DHHS for seven years. As a result of a reduction in force, Appellant became an Income Assistance Program Specialist I with the DHHS Rental and Energy Assistance Program in April, 2009. Tr. 83. Appellant was promoted to the position of Income Assistance Program Specialist II on November 21, 2010. Tr. 230. At all times relevant to this case Appellant served as an Income Assistance Program Specialist II. In that capacity, Appellant was responsible for determining whether certain County residents who are in need of financial assistance and other support services were eligible to participate in various DHHS programs designed to assist families, children, older persons, and the disabled. County Exhibit (CX) 1.

As an Income Assistance Program Specialist II, Appellant interacted with applicants, their families and representatives, as well as other social services staff at DHHS. At certain times, Appellant might also be required to work with other State and Federal agencies, other counties, and community social services agencies. CX 1. Appellant's work routinely involved access to sensitive and confidential personal information in order to ascertain whether an agency client is

¹ Appellant's dismissal is based on charges that she failed to perform her duties in a competent or acceptable manner and insubordination. Notice of Disciplinary Action - Dismissal (Dismissal NODA), October 15, 2014, CX 17. Appellant's 10-day suspension was based on her alleged failure to perform her duties in a competent or acceptable manner. Notice of Disciplinary Action - Ten (10) Day Suspension (Suspension NODA), October 15, 2014, CX 5.

² Former Board Chair Raul E. Chavera, Jr., presided over the hearing of this case while still an active member of this Board, but did not participate in either the preparation or adoption of this opinion. Mr. Chavera's term expired on December 31, 2015. Board Member Angela Franco was appointed after the hearing and did not participate in the preparation or adoption of this opinion.

eligible for services. CX 1. Obtaining such personal and sensitive information involves reviewing documents provided by clients and may require client interviews, either in person or by telephone. CX 1.

The Income Assistance Program Specialist II class specification recognizes that “[d]ealing with distraught customers who may have limited English proficiency” is a key component of the job. CX 1. Furthermore, the Knowledge, Skills, and Abilities required of an Income Assistance Program Specialist II by the class specifications include “[s]kill in interpersonal relationships and human relations to work sensitively and positively with people of various backgrounds, socioeconomic situations, physical disabilities, and health or mental health concerns.” CX 1.

It is undisputed that Appellant’s clients were, almost by definition, extremely needy and often apprehensive. Appellant’s specific clients, *i.e.*, persons seeking Special Needs Housing emergency assistance, are at risk of being evicted and may have, or already have had, their utilities disconnected. Tr. 26. Because clients in those circumstances are unquestionably vulnerable, DHHS expects employees responsible for making potentially-life altering decisions to be empathetic and responsive. As the DHHS Director testified, for employees in Appellant’s position, “extremely responsive and sensitive customer service is an absolute requirement.” Tr. 26.

While serving as an Income Assistance Program Specialist II, Appellant received overall ratings of “Meets Expectations” and “Above Expectations” for customer service on her fiscal year 2012 and 2013 performance evaluations. Appellant’s Exhibit (AX) 2; CX 6. Conversely, prior to the 10-day suspension and dismissal that are on appeal in this case, Appellant was subject to at least two instances of progressive discipline, the latter of which involved poor customer service. On July 23, 2010, Appellant received a one (1) day suspension for inappropriate workplace conduct that included harassing behavior, disrupting the work of another County employee, and failing to truthfully answer work-related questions. CX 8. On July 17, 2014, Appellant received a three (3) day suspension for insubordination and failure to perform her duties in a competent or acceptable manner.³ CX 7; Tr. 27.

In early 2014, there were a number of client complaints about Appellant’s work performance and attitude. The client complaints concerned allegations that Appellant failed to promptly process applications for rental housing benefits, repeatedly asked for documents that had already been provided, was unresponsive, and treated the applicants with rudeness and disrespect. CX 2, 5, 7, 10, and 17; Tr. 71, 91, 95, and 106. Testimony indicated that there were no client complaints regarding other caseworkers in Appellant’s unit during the first half of 2014. Tr. 135.

The charges that Appellant failed to perform in a competent or acceptable manner contained in the July 17 discipline involved the cases of two clients that were not handled appropriately by Appellant in late January and early February 2014. CX 7. In both cases, the clients were greatly disturbed by Appellant’s behavior and complained to County officials, including the County Executive. CX 3; CX 4; CX 7. The July 17 suspension was also based on Appellant’s alleged aggressive and insubordinate behavior towards Ms. S, her immediate supervisor. CX 7.

³ The Statement of Charges issued on April 2, 2014, called for a five day suspension. As a result of an Alternative Dispute Resolution (ADR) conference on June 5, 2014, Appellant and the County agreed to reduce the discipline to a three day suspension. CX 7.

Appellant's immediate supervisor, Ms. S, testified that she was the supervisor of the Rental Assistance Program (RAP) unit when Appellant was hired in 2009. TR. 83-84. According to Ms. S, Appellant was provided with substantial training. Tr. 84-85. Appellant was thoroughly trained on the requirements of her job and was allowed to avail herself of any training offered by the County that she requested. TR. 85-90.

Ms. S began receiving client complaints about Appellant in January 2014. The complaints were delivered in person, by letter, by telephone, and through email. Tr. 90-91, 96-101; CX 3 & 4. Ms. S testified that when she attempted to address the complaints with Appellant, Appellant became hostile and belligerent. Tr. 91. According to Ms. S, during these counseling meetings, Appellant would threaten to call her attorney, make telephone calls, and would refuse to acknowledge that the conversations with clients had occurred. Tr. 91.

Almost immediately after the client complaints began in January 2014, daily meetings between Appellant and Ms. S were held in an attempt to address the performance and communications issues raised by the client complaints. Tr. 103-04. Those meetings would sometimes include Ms. B, the Housing Stabilization and Special Needs Housing (HSSNH) Administrator. Ms. B is responsible for managing six different Special Needs Housing programs, including three regional offices, the County Rental Assistance Program, the Office of Rent and Energy Programs, as well as the Housing Initiative Program. Tr. 172-73. Ms. B is the supervisor of Ms. S and occupies the office next to her. Tr. 174.

According to Ms. S, Appellant's performance and behavior did not improve as a result of the counseling, serious client complaints were received every day, and Appellant continued to behave in a hostile and belligerent manner. Tr. 106. Further, Appellant denied the client complaints and accused Ms. S of removing documents. *Id.* Ms. S further testified that "I have never in my career as a manager received these type of complaints in the pattern and the volume and how severe they were and how upset the customers were and felt how badly they were treated." Tr. 108.

Ms. S participated in the formulation and verified the accuracy of the specifications in the Suspension NODA, the August 13, 2014, Statement of Charges – Dismissal, and the Dismissal NODA. Tr. 110; CX 5; CX 10; CX 17. The DHHS Director reviewed and approved both the Suspension NODA and the Dismissal NODA. Tr. 25-30.

The County also called Ms. B, and she testified that she had never seen a situation where the behavior of an employee had not improved after repeated attempts at counseling and intense supervision. Tr. 183-84. She also said the situation concerning Appellant was "unusual in terms of the volume, the consistency and the frequency with which the complaints were coming." Tr. 184. Ms. B testified that the nature, number, and consistency of the client complaints caused her to be inclined to believe that they were legitimate and true, and that belief was reinforced by the fact that Appellant had been disciplined previously for similar behavior. Tr. 177. Ms. B further said that to her knowledge there were no other caseworkers whose conduct resulted in the improper delay or denial of benefits to needy persons. Tr. 183. Finally, Ms. B testified that she had personally witnessed Appellant be "disrespectful" and "hostile" to her immediate supervisor. Tr. 194.

Appellant alleges that her supervisors retaliated against her after she met with and provided information to the Inspector General (IG) concerning the misbehavior of a coworker who was a friend of Appellant's immediate supervisor. Appellant provided no direct evidence that her supervisors were aware that she was responsible for the IG investigation prior to their initiation of disciplinary action against her in May 2014. *See* Tr. 247-51. She instead suggested that that must have been the case because "it was the buzz that it [the IG investigation] was because of me." Tr. 249. However, when specifically asked "To your knowledge, did . . . [your immediate supervisor] know you spoke with the IG about . . . [the coworker's] book?" she admitted, "They told me it was confidential. I don't know." Tr. 248. Appellant also conceded that she never talked to her immediate supervisor about her responsibility for initiating the IG complaint, was never asked about it, and her supervisor never said anything to her about being displeased with her over that issue. Tr. 250.⁴ Moreover, even though Appellant called two coworkers as witnesses, she did not adduce any testimony from them that they were aware of the "buzz" that Appellant was responsible for the IG investigation or that the immediate supervisor knew of Appellant's complaint to the IG.

There is credible testimony from Appellant's immediate supervisor that it was not until after the May 21, 2014, Suspension Statement of Charges was issued, CX 2, that Appellant's supervisors became aware that Appellant had given information to the IG concerning the allegedly improper use of County resources by the coworker writing a book. Tr. 161-62. The testimony of Appellant's supervisor was that she was unaware of Appellant's role in the IG investigation until the ADR meeting on June 5, 2014, concerning what ultimately became the July 17 three day suspension. Tr.161.

Although Appellant's September 8, 2014, response to the Statement of Charges – Dismissal states, "I have been denied training," (AX 3, p. 7, and CX 12, p. 8), the record evidence indicates that she attended nearly 100 training classes, including some focusing on customer service and management. CX 9. The record evidence amply demonstrates that Appellant was an experienced employee, had received extensive training, and understood the requirements and expectations of her job. Tr. 86-90, 139, 179; AX 2; CX 6.

Appellant called another caseworker in the Rental Assistance Program, Ms. G, to testify on her behalf. However, Ms. G testified that it was "challenging" working with Appellant, "Because when I was pulled to do other duties and she was assigned to my cases, when I came back my cases were given back to me instead of being done." Tr. 202. Ms. G further testified that Appellant was not a "team player," and had falsely accused her of telling a client to call a supervisor to have Appellant fired. Tr. 211. Finally, Ms. G testified that she had witnessed Appellant being rude and insubordinate to their immediate supervisor, including a situation where Appellant refused to process a case after being instructed to do so by her supervisor. Tr. 213.

⁴ In response to the question "Did . . . [your immediate supervisor] know of your involvement as it related to the investigation into . . . [your coworker]?", Tr. 252, Appellant gave an ambiguous answer suggesting that her supervisors had seen a notarized letter from a former coworker who had been an administrative assistant in the office. Appellant said "Only because of that document that we had notarized and it was written that she knew." Tr. 252. Apparently Appellant is referencing a February 8, 2014, notarized three page letter that is included as part of Appellant's Exhibit 7. While that letter does discuss various problems in the office, including a book being written at work and with County resources, it does not address the IG investigation or Appellant's role in making any complaints. While the letter's author asserts that both she and the Appellant were mistreated, she does not say that Appellant was the victim of retaliation for filing a complaint.

During the hearing, Appellant sought to introduce certain letters and other documents that had not been included with her prehearing submissions or on her exhibit list. The Board designated the documents as Appellant's Exhibit 7 and overruled the County's objection, subject to the parties agreeing on appropriate redactions. Tr. 198-99, 280. The record remained open and, subsequent to the hearing, the parties provided the redacted copies to the Board. Tr. 284. The County renewed its objection to the admission of all of the documents, arguing that Appellant had them in her possession for many months and failed to provide them to the County. *See* Email from Assistant County Attorney, December 1, 2015. The County indicated that it otherwise had no objection to some of the documents but continued to object to others as irrelevant, cumulative, or because the authors of the letters or statements were not called as witnesses. Appellant provided no explanation as to why these documents were not produced to the County before the day of the hearing or included as part of the Appellant's prehearing submission exhibit list. Nevertheless, in the interest of providing Appellant with a complete opportunity to present her defense, the Board admits the documents as Appellant's Exhibit 7.

Attached to Appellant's Written Closing Argument was yet another document not included as part of the prehearing submissions and exhibit lists. The document is a copy of a Complaint Intake and Processing form of the County Office of the Inspector General (OIG). The complaint is designated as OIG-13-043 and is dated March 22, 2013. Although Appellant provided no explanation for why this document was not provided with the prehearing submission exhibit lists or introduced at the hearing, the Board will admit the document into evidence as Appellant's Exhibit 8. Although the Board has permitted the admission into evidence of Appellant Exhibits 7 and 8, it nonetheless admonishes Appellant's counsel for his failure to provide the documents to the County in a timely manner, comply with the Board's prehearing rules and procedures, and for engaging in what amounts to trial by ambush.

Appellant's Exhibit 8 reflects a telephone discussion in which Appellant submitted the following complaint:

Caller [Appellant] states that co-worker [redacted] is writing a book while at [redacted] desk at work (Special Needs Housing and Rental Assistance Program, 1335 Piccard Avenue, 4th floor), and that [redacted] frequently prints 500-page drafts of the book on the County printer. [Appellant] says she has had to wait to copy County business items while the book is being printed. [redacted] has been doing this for at least three years (often using computer [redacted] and the whole office is aware. [Appellant] reported this to [redacted] supervisor but [redacted] did nothing w/r/t [redacted], instead letting the office (36 people) know that [Appellant] had complained.⁵

POSITIONS OF THE PARTIES

County:

⁵ The document as submitted contained redactions which are indicated as "[redacted]". The Board has also chosen to redact Appellant's name and to substitute "[Appellant]" where her name was used.

- Appellant’s behavior toward multiple clients was rude, insensitive, and unprofessional.
- Appellant failed to process her cases properly and in a timely manner, which resulted in needy clients having rental housing benefits delayed.
- Appellant did not present testimony or evidence to refute the client complaints.
- Appellant was insubordinate to her supervisor by failing to obey a lawful order.
- Appellant was a seasoned employee with extensive training and was well aware of the proper way to treat clients and process eligibility cases.
- Appellant was subjected to progressive discipline.
- Mishandling of eligibility cases by Appellant caused harm to vulnerable clients.
- Dismissal was the necessary disciplinary action after attempts at counseling and progressive discipline failed to alter Appellant’s unacceptable behavior.
- There was no retaliatory action taken against Appellant in response to her complaint to the Inspector General as her supervisors were unaware of that complaint until after the last statements of charges had been issued.

Appellant:

- Annual performance evaluations for Appellant gave her overall ratings of “Meets Expectations” with ratings of “Above Expectations” for customer service.
- Appellant completed over 100 elective trainings, including a number on customer service and management.
- Appellant was a dedicated employee who often worked late hours.
- Appellant has devoted her career and personal life to helping other people.
- Appellant was never told she was underperforming.
- Management would not have approved so many elective trainings if they believed Appellant was not keeping up with her assigned duties.
- Appellant always had a positive relationship with her immediate supervisor.
- In February 2014, Appellant’s relationship with her immediate supervisor deteriorated.
- The relationship changed, and her immediate supervisor started to accuse Appellant of having an inordinate number of client complaints, only after the Inspector General came to the office to question everyone about a book being written during work hours and with office resources.
- Appellant’s immediate supervisor was friends with the employee being investigated and believed that Appellant had reported her to the Inspector General.
- The discipline against Appellant was the result of retaliation against her by her immediate supervisor for having reported the misconduct of the supervisor’s friend.
- The removal of a paper from her supervisor’s desk does not meet the legal standard for insubordination.

APPLICABLE LAW

Montgomery County Code, Chapter 2, Administration, Section 2-151, Inspector General, which provides, in part:

§ 2-151. Inspector General.

(1)(5) An employee of the County government . . . must not be retaliated against or penalized, or threatened with retaliation or penalty, for providing information to, cooperating with, or in any way assisting the Inspector General in connection with any activity of that Office under this Section.

Montgomery County Code, Chapter 33, Merit System Law, Section 33-10, Disclosure of illegal or improper actions in County government; protection for merit system employees against retaliation or coercion; appeals, which states in applicable part:

§ 33-10.

(a) *Disclosure of illegal or improper actions.*

- (1) Employees should report illegal or improper actions in County government.
- (2) Employees should first report illegal or improper actions to the individual responsible for corrective action. That person may be anyone from the employee's immediate supervisor to the County Executive, or for legislative branch employees, the County Council.

(b) *Protection for employees.*

(1) A *personnel action* is an act or omission by a supervisor which has a significant adverse impact on the employee, or a change in the employee's duties or responsibilities which is inconsistent with the employee's grade and salary. A personnel action does not include an act or omission by a supervisor that is not subject to review by the Merit Systems Protection Board under Section 33-12.

(2) A merit system employee must not be subjected to a personnel action in retaliation for:

- (A) refusing to obey an instruction involving an illegal or improper action; or
- (B) disclosing, to a Federal, State or County official or employee, information concerning illegal or improper action in County government with a reasonable good-faith belief that the information disclosed is accurate.

(3) This subsection does not protect a merit system employee if the:

- (A) employee's actions were frivolous, unreasonable, and without foundation, even though not brought in bad faith;
- (B) employee, without good cause, did not comply with applicable regulations concerning the making of such disclosures; or
- (C) employee was the subject of an otherwise proper personnel action that would have been taken regardless of the employee's disclosure of information concerning illegal or improper action in County government.

(c) *Appeal.* A merit system employee who alleges that he or she was subject to a retaliatory personnel action in violation of subsection (b) may appeal to the Merit System Protection Board under Section 33-12.

(d) *Decision.* The Board must issue a written decision, including necessary findings of fact and conclusions of law, and may order any remedy authorized by Section 33-14.

§ 33-17. Prohibited personnel practices; criminal penalty.

(g) A person must not threaten, promise, or take any action against a County employee to:

* * *

(2) retaliate against an employee for disclosing information to a Federal, State, or County official or employee concerning an illegal or improper action in County government that the employee has a good faith belief is accurate.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), Section 33, *Disciplinary Actions*, which states in applicable part:

§ 33-2. Policy on disciplinary actions.

(a) *Purpose of disciplinary actions.* A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(b) *Prompt discipline.*

(1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.

(2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

(c) *Progressive discipline.*

(1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:

(A) the severity of the employee's misconduct and its actual or possible consequences; or

(B) the employee's continuing misconduct or attendance violations over time.

(2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department

director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(d) **Consideration of other factors.** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

* * *

§ 33-5. Causes for disciplinary action.

The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

* * *

- (e) fails to perform duties in a competent or acceptable manner;
- (f) behaves insubordinately or fails to obey a lawful direction from a supervisor. . .

ISSUES

1. Whether the County can prove, by a preponderance of the evidence, the facts alleged in the DHHS Director's October 15, 2014, Notice of Disciplinary Action - Suspension and in her October 15, 2014, Notice of Disciplinary Action - Dismissal.
2. Whether, assuming that the County can prove some or all of the alleged facts in the Notice of Disciplinary Action - Suspension, the facts as proved support a finding that Appellant failed to perform her duties in a competent or acceptable manner.
3. Whether, assuming that the County can prove some or all of the alleged facts in the Notice of Disciplinary Action - Dismissal, the facts as proved support a finding that Appellant failed to perform her duties in a competent or acceptable manner or that she behaved insubordinately or failed to follow a lawful order from her supervisor.
4. Whether, assuming that the County can prove sufficient facts to support a finding that Appellant failed to perform her duties in a competent or acceptable manner as charged

in the Notice of Disciplinary Action - Suspension, the penalty of a 10-day suspension is appropriate.

5. Whether, assuming that the County can prove sufficient facts to support a finding that Appellant failed to perform her duties in a competent or acceptable manner or that she behaved insubordinately or failed to follow a lawful order from her supervisor as charged in the Notice of Disciplinary Action - Dismissal, the penalty of dismissal is appropriate.
6. Whether the disciplinary actions taken against Appellant were the product of retaliation against her for whistleblowing and, if so, whether that finding impacts the Board's findings on any of the above-identified issues.

ANALYSIS AND CONCLUSIONS

Appellant's dismissal is based on charges that she failed to perform her duties in a competent or acceptable manner and insubordination. Notice of Disciplinary Action - Dismissal (Dismissal NODA), October 15, 2014. CX 17. Appellant's 10-day suspension was based on her alleged failure to perform her duties in a competent or acceptable manner. Notice of Disciplinary Action - Ten (10) Day Suspension (Suspension NODA), October 15, 2014. CX 5.

Failure to Perform Duties in a Competent or Acceptable Manner

MCPR § 33-5(e) provides for discipline against an employee who fails to perform his or her duties in a competent and acceptable manner. This charge in the Dismissal NODA has six specifications involving agency clients who reported unacceptable delays in the processing of their benefits applications and mistreatment by Appellant. The same charge in the Suspension NODA contains three specifications based on client complaints, including a detailed allegation concerning Appellant's failure to appropriately process her assigned caseload of Rental Assistance Program (RAP) renewals.

Suspension NODA

The three specifications detailed in the Suspension NODA raised serious concerns as to Appellant's attitude toward clients and the quality of her case management. CX 5. The first specification involved an April 9, 2014, complaint by Rental Assistance Program client MG. Client MG told Appellant's supervisor that she was upset with Appellant because, although she had complied with Appellant's documentation requests, Appellant nevertheless continued to ask for documents already supplied. Because of the delays in processing her application, MG faced eviction from her residence for non-payment of rent.

According to the Suspension NODA, the first specification involved client MG. A meeting was held between client MG, Appellant, and Appellant's Immediate Supervisor, in which client MG became visibly upset with Appellant. The Immediate Supervisor requested that Appellant review the case to verify that all documentation necessary to complete the eligibility review had indeed been received, and Appellant confirmed that all documentation was in the file. Client MG

then left. Appellant and her supervisor then stayed in the room to review the case together.⁶ During that review, the Immediate Supervisor discovered that the bank statement documentation Appellant had been requesting of MG had been received by January 2014, and was already in the file. Appellant's supervisor instructed Appellant to move forward with processing the case, and if MG was eligible to receive benefits, the effective date should be retroactive to January 2014. Although Appellant and her supervisor had reviewed the file together and Appellant had been instructed to conduct the eligibility review, subsequent to the meeting Appellant sent an email to her supervisor questioning her about the documentation that they had already reviewed. In her testimony Appellant at first said that there were no bank statements in the file but then admitted that bank statements were in the file. Tr. 268. Appellant attempted to explain that while older bank statements were in the file "current" ones were not. *Id.* It may be true that by the April 9 meeting those statements were no longer current, but that fact hardly provides Appellant with comfort, as that circumstance is a result of her failure to process the case and determine MG's eligibility in a timely fashion. That is why Appellant's supervisor instructed her that, if MG met the eligibility standards, to approve benefits retroactively to January 2014, when MG had complied with her application obligations. Thus, we conclude that Appellant has conceded the material facts contained in this specification.

The second specification concerned another client complaint on April 9, 2014. Appellant's supervisor received a telephone message from and then spoke with client PP, who was seeking information on the status of her rental assistance renewal application which she said had been submitted more than two months before. PP said she had spoken with Appellant the prior week and that Appellant was hostile and unhelpful. PP said that she complied with Appellant's information requests and called Appellant's supervisor when she had not heard back from Appellant after a week. PP indicated that she wanted Appellant's supervisor to investigate her case as she was desperate for assistance. PP related unpleasant telephone conversations with Appellant wherein she told Appellant that she intended to complain to the County Executive and said that as a consequence of the delay, she was unable to pay her April rent and was charged a late fee of \$65. When asked by Appellant's supervisor, Appellant said that she did not remember the case. Appellant's supervisor found the case file in Appellant's file drawer.

The third specification involved an April 25, 2014 complaint by LP, the wife of client AP, that they had been attempting to obtain information about their case status and comply with any processing issues since February 2014. According to LP, Appellant said that agency computers were down for two or three weeks and therefore she could not be given a case status update. When LP called again about the status of her case, Appellant was unfriendly and unhelpful. LP stated that her husband was unemployed, and they had not received RAP assistance since February 2014, missing benefits for March, April, and May 2014. LP reported that as a result of the delay in RAP benefits, they were unable to pay their Washington Gas bill and service was disconnected.

The specifications against Appellant also included her overall failure to process her assigned caseload of Rental Assistance Program renewals in a timely manner. According to the Suspension NODA, on April 17, 2014, Appellant had 74 RAP renewals pending in her caseload, which the County characterized as "an exceptionally high amount." CX 5; Tr. 167. The three

⁶ Appellant did not deny meeting with her supervisor after the client left, testifying only that she did not remember. Tr. 268 ("I don't, I don't really recall, to be honest.").

individual case specifications and the high number of unprocessed RAP renewals both factored into the County's decision to impose discipline. CX 5; Tr. 67, 69 (DHHS Director testimony)

Appellant provided no evidence contradicting the facts presented by the County concerning the Suspension NODA, instead arguing that the charges were part of an effort to retaliate against Appellant for having reported a coworker and friend of Appellant's supervisor to the Inspector General's Office for improper use of County resources. We will address the retaliation claim below, however, there can be no doubt that Appellant's failure to process her caseload in a timely manner and her inconsiderate treatment of agency clients constitutes an unacceptable level of performance of her duties as an Income Assistance Program Specialist II. Accordingly, the Board finds the County proved the specifications contained in the Suspension NODA by a preponderance of the evidence.

Dismissal NODA

The Dismissal NODA has six specifications involving agency clients who reported unacceptable delays in the processing of their benefits applications and mistreatment by Appellant.

The first specification involved client JS, who contacted Appellant's supervisor on May 23, 2014, regarding an upsetting conversation she had with Appellant. JS said that she was trying to renew her RAP benefits and wanted to discuss how to address certain changes in her household. When JS explained to Appellant that her husband was incarcerated and she had a protective order against him, Appellant told her that she needed a statement from the courthouse confirming the incarceration as well as a notarized letter from the husband stating he wanted to be removed from RAP and from the lease. When JS pointed out that her husband was not on the lease and that obtaining a written statement from him would be problematic due to the protective order, Appellant became rude, condescending, and irritated. JS also said that Appellant acted as if she was trying to get off the phone as quickly as possible. JS further alleged that after she asked questions, Appellant would be silent until she asked, "Hello, are you there?"

The County charged that Appellant used poor judgment and was insensitive to the client's circumstances by requesting unnecessary documentation as the protective order was sufficient proof that the husband was no longer in the household.

The second specification concerned a June 2, 2014, incident in which client CW came to the office's lobby asking to speak to a supervisor because she was upset about how Appellant was handling her RAP case. Appellant's supervisor met with CW who told her that she had met with Appellant on Friday, May 30, 2014, to review Appellant's May 12, 2014, Request for Information letter. CW returned on June 2, 2014, with the requested documents, but while in the lobby, Appellant informed her that she would also need to provide W-2s. When CW told Appellant that she did not have the W-2s with her because they were not listed in the Request for Information, Appellant said, "You should know that, you have been on the program before." Appellant then told CW to "take a number" and wait in the lobby until it was her turn. According to CW, Appellant returned to the lobby multiple times to argue about the W-2s, even bringing a copy of the RAP application to show CW the list of required documents. Appellant did not offer to receive the

documents CW had brought, and CW reported that she finally asked for a different caseworker who was less argumentative and more helpful.

The third specification related to a written complaint by client JR to Appellant's supervisor about a rental assistance application that took nine months for Appellant to process and resulted in a May 8, 2014, benefits denial. The stated basis for denial was that JR lived in an unlicensed rental unit. On June 3, 2014, an Administrative Support Employee (ASE) had spoken to JR and then discussed the case with Appellant's supervisor. The ASE reported that JR was asking about the denial of her application because she was incredulous that the commercial property where she lived did not have a rental license. Both the ASE and Appellant's supervisor called the City of Rockville and confirmed that the rental property had a valid license. JR also complained that Appellant's treatment of her was unacceptable and frustrating. JR said that she had submitted the same paperwork several times and had receipts to prove that she had submitted the documents.

Appellant's supervisor reviewed the file, reminded Appellant that there was no requirement to check the rental licenses of commercial properties, and directed Appellant to process the case with an effective date of April 2014. On June 6, 2014, Appellant submitted the case to her supervisor but with an incorrect effective date.

The fourth specification concerned a June 6, 2014, follow up inquiry by client JS, discussed above. JS told Appellant's supervisor that she had moved and had provided the requested financial information to Appellant, but Appellant continued to ask for the same information already provided. JS further said that Appellant had told her that she would get back to her but had not for over a week. Appellant wrote to the client on May 28, 2014, requesting three bank statements, and a May 30, 2014, case note in the file indicated that Appellant advised JS that she was required to submit three bank statements. Appellant's supervisor reviewed the client's file and discovered that two of the requested bank account documents were received on May 16, 2014, while the information about a third requested closed account had been provided in June 2013.

On June 6, 2014, Appellant and her supervisor met to determine what documentation, if any, was still required. Appellant confirmed that all documents necessary to process the application of JS had been received. Appellant's supervisor then instructed Appellant to process the case as a priority with an effective date of April 2014.

Appellant went to the Housing Initiative Program (HIP) program manager to ask for assistance with the case. The HIP program manager discovered that the property did not have a valid rental license. Appellant's supervisor told Appellant to verify the status of the rental license, and Appellant reported back that she had called a friend who verified the license. When Appellant's supervisor asked who the friend was and where she worked Appellant was unable to provide that information. Appellant then submitted an incomplete file to her supervisor for approval, necessitating its return to Appellant so that she could complete the file by providing necessary items such as printed case notes and documentation regarding how the rental license was verified. When the file was again submitted on June 9, 2014, Appellant's supervisor saw that Appellant had written an inappropriate case note referencing the June 6, 2014, conversation she had with her supervisor about the client's bank accounts. In the case note, Appellant suggested,

apparently without basis, that her supervisor had somehow required the use of improper bank statements.

The fifth specification addressed a complaint by client PS that Appellant spoke to her in an abusive tone. Appellant's supervisor discussed the client concerns with Appellant on April 2, 2014, and Appellant denied the allegations. On April 3, 2014, Appellant was directed to contact the client and mail her an application concerning her new housing. Later that day, Appellant's supervisor received a voicemail from PS who was upset regarding a voicemail she received from Appellant. PS said Appellant was "nasty" and making the application process extremely difficult. Appellant's supervisor verified that Appellant had requested address information that had previously been documented in the file. Appellant's supervisor received another voice mail from PS and spoke with her on June 6, 2014. PS was still upset about Appellant's handling of her case and reported that she had submitted her application to transfer her benefits to a new address on May 2, 2014, provided the necessary rental information (*e.g.*, landlord certification, lease, and property rental license), but that Appellant had called and said that the landlord did not deserve to charge the amount of rent reflected in the application. PS was unsure what the amount of rent had to do her application and further said that Appellant took another call while on the phone with her and disconnected her. PS was unable to reach Appellant when she called back, left a message, but never received a return call from Appellant. Appellant's supervisor reviewed the case file and saw a May 12, 2014, letter Appellant sent to the landlord's agent requesting a notarized letter from the owner documenting who is eligible to receive the rent, despite the fact that the lease documents already contained that information. Moreover, although a Request for Information letter was sent to the landlord, no Request for Information letter was sent to the client even though certain current documentation was needed to complete the eligibility review.

The sixth specification involved an incident on May 16, 2014, in which Appellant interrupted a meeting between another RAP caseworker and the HIP program manager to tell them that she was forwarding a client call to the caseworker. Appellant said that their supervisor had referred the client to the caseworker and that the client was not in the RAP database. The caller was not a client and instead was a Housing Opportunity Commission (HOC) caseworker who was calling on behalf of client CW. The other caseworker located CW in the RAP database, reviewed the record, and discovered that Appellant's supervisor had referred the HOC caseworker to Appellant. The caseworker then told Appellant that she was transferring the call back to Appellant.

After this attempt to transfer her work to another caseworker, which caused unnecessary delay and confusion, Appellant entered the following note in the case file detailing the interaction between Appellant and the other caseworker: "All [caseworker] had to do was pull the file and tell her that Ms. W. needed to provide information and tell her what it was." The note was inappropriate for the official case file because it was unrelated to processing of the case and incorrectly suggested that the other caseworker had done something improper. On several previous occasions, Appellant had been advised to be cautious about case notes since they may be seen by clients, and the topic was discussed by Appellant's supervisor during a meeting with caseworkers that Appellant attended on May 1, 2014.

As with the Suspension NODA, Appellant provided no evidence at the hearing contradicting the facts presented by the County concerning the Dismissal NODA, again arguing

that the charges were part of an effort to retaliate against Appellant for having reported a coworker and friend of Appellant's supervisor to the Inspector General's Office for improper use of County resources.⁷

While Appellant introduced no evidence at the hearing to refute the County's evidence concerning client complaints contained in both the Suspension and the Dismissal NODAs, she did submit a September 8, 2014, written response to the Statement of Charges – Dismissal. AX 3; CX 12. In her response, Appellant generally denies being discourteous to her clients and attributes their complaints to their anxiety and frustration over not receiving benefits. Appellant also claims that clients failed to provide required documentation or that when such documentation was provided, it was redirected to her immediate supervisor or misplaced in the DHHS office by someone other than Appellant. Tr. 239, 258. Appellant was unable to provide a specific time frame in which her mail was redirected, other than to claim that it was some time after the "book incident." Tr. 260. Appellant's supervisor emphatically denied intercepting Appellant's mail. Tr. 282.

We find that Appellant's claims of redirected or misplaced mail are uncorroborated and self-serving, and ultimately not credible on this point. We also find no reason to doubt the veracity of the clients complaining about their treatment by Appellant. There is no indication that Appellant's supervisor somehow solicited the complaints in an effort to create a basis for retaliation against Appellant, or that valid complaints against caseworkers are so common that Appellant was being treated differently from similarly situated colleagues. We find little credence in Appellant's denials. The only reasonable explanation for the number, nature, and severity of client complaints against Appellant during the first few months of 2014 is that Appellant actually was discourteous and unhelpful to her clients. Finally, the credibility of the assertions in Appellant's written response is further undermined by her claims about the lack of training she received, AX 3, pp. 3 and 7, and CX 12, pp. 4 and 8, when the record evidence clearly establishes that Appellant was a veteran employee with extensive training. Tr. 86-90, 139, 179; AX 2; CX 6; CX 9.

While it is true that Appellant received overall ratings of "Meets Expectations," and "Above Expectations" for customer service on her fiscal year 2012 and 2013 performance evaluations, AX 2, it is also true that in 2014 there were a number of client complaints about her attitude and performance. Investigation of those complaints brought to light specific problems with the quality of Appellant's customer service. Contrary to Appellant's contention that she was "never" told that her performance was in any way lacking, Tr. 236-37, Appellant was unmistakably on notice following a January 31, 2014, client complaint to the County Executive when her supervisor met with her to discuss the matter. CX 4, CX 7; Tr. 91-95.

The parties stipulated that if called as witnesses some of Appellant's clients would testify that she provided them with superior service. Tr. 6. Appellant also introduced certain letters and statements from clients and former coworkers to demonstrate that those persons believed that Appellant was a good employee who provided exemplary customer service. AX 7. While the stipulated testimony of these witnesses and these letters show that Appellant provided exemplary service on *some* occasions, they are not probative of the services Appellant provided with respect

⁷ The retaliation claim is addressed below.

to the charges in the NODAs. Indeed, to the contrary, this evidence shows that Appellant was capable of performing acceptable service and that her failure to do so as cataloged in the NODAs cannot be attributed to any lack of training.

Appellant argued that there were only a few clients out of hundreds that complained about Appellant. AX 3, p. 1; CX 12, p. 2. In response to questions about whether the number of complaints against Appellant was small relative to the size of Appellant's caseload, the DHHS Director noted that because the agency's clients are vulnerable and desperately in need of services, caseworkers wield enormous power over their lives. Tr. 64-65. It is logical to conclude that, in the face of the immense power imbalance between clients and caseworkers, clients are generally reluctant to make complaints that may put them at risk of retaliation by a caseworker. Moreover, even if the Board were to surmise that the absence of other complaints evinced adequate performance on the remainder of Appellant's caseload, this still would not inform the question whether Appellant's performance with respect to the charges detailed in the NODAs was inadequate.

Significantly, Appellant did not produce evidence to rebut the County's testimony that there were an unusually high number of client complaints which occurred even after Appellant had been counseled about her performance. Tr. 184, 187. Investigation by Appellant's supervisors revealed that those client complaints about Appellant's rude behavior and mishandling of their cases were legitimate and justified. Tr. 68. The Board concludes that the number of client complaints concerning Appellant was unusually high and merited discipline. When such serious performance issues occur after an employee has received counseling and significant amounts of training, it is entirely appropriate for the County to take disciplinary action up to and including dismissal. *See* MSPB Case Nos. 07-14 & 07-15 (2007) (Appellant's "persistent misconduct despite being disciplined" justifies discipline); MSPB Case No. 82-51 (1982) (Unusually high number of customer complaints after employee has been counseled, in combination with insubordination, justifies dismissal).

Appellant's failure to process her caseload in a timely manner and her inconsiderate treatment of at risk agency clients constitutes an unacceptable level of performance of her duties as an Income Assistance Program Specialist II. Accordingly, the Board finds the specifications contained in the Dismissal NODA of failure to perform in a competent or acceptable manner were proven by the County by a preponderance of the evidence.

Insubordination

The Dismissal NODA contained one specification concerning insubordination. On June 3, 2014, Appellant's supervisor instructed Appellant to approve client JR's eligibility for benefits with an effective date of April 2014. Despite that directive, Appellant used an effective date of May 2014, necessitating the return of the file to her for correction. Subsequently, on June 9, 2014, client JR asked that the effective date be reconsidered. Appellant's supervisor made the decision to revise the effective date to March 2014 and directed Appellant to implement the update. When Appellant's supervisor received the file from Appellant, it contained a note concerning the supervisory instructions. When Appellant's supervisor asked Appellant about the note, Appellant asked to see it and went to her supervisor's office where she started picking up documents from

the desk. Appellant's supervisor ordered Appellant not to remove papers off her desk. Appellant reviewed the RAP eligibility work sheet on which she had written the comment and stated that she did not intend for her supervisor to get that copy. Appellant then began arguing with her supervisor about the appropriate effective date and then began crossing off the date on the form. When Appellant's supervisor told Appellant that she would fix the worksheet, Appellant grabbed the worksheet from the file. Appellant's supervisor told Appellant to return the document, but she refused. Appellant left her supervisor's office with the document despite having again been ordered to return it to her supervisor. Appellant returned to her supervisor's office several minutes later and finally returned the document.

There is ample evidence in the record to support this specification. The testimony of Appellant's supervisor, that despite valid instructions to the contrary, Appellant altered documents by writing on them and removed documents from her supervisor's desk, was credible. Tr. 114-15. Significantly, Appellant did not challenge that testimony or the County's specification on the facts at the hearing. While in her September 8, 2014, written response to the Statement of Charges, Appellant seems to deny removing documents from her supervisor's desk, she does admit to altering the documents. AX 3; CX 12. Appellant also admits that she had inadvertently left a document in the file with her notes and that she left to go get the "correct" document.

As far as picking up papers from Ms. [S]'s desk, I never took anything from her desk. I did cross off the dates as Ms. [S] suggested, and I was leery that my documentation on the notes would be used against me and I was only protecting myself . . . I wanted to go and bring the correct eligibility sheet to satisfy Ms. [S]. This was copy [*sic*] for my records that was mistakenly placed in the client's folder.

AX 3; CX 12. The description of the incident by Appellant's supervisor is more consistent and credible. It is more likely that Appellant removed the document in order to substitute the "correct" version, and by her statement "I never took anything from her desk," she meant that by returning the document shortly after, it could not be considered taken. Appellant may have been flustered at discovering that she had inadvertently left a document in the file that contained personal notes which Appellant hoped would "protect" her and that she did not wish her supervisor to see, but having done so, it was improper for her to remove that document against orders.

In assessing the credibility of the witnesses on the issue of insubordination, the Board also finds that Appellant's own witness, Ms. G, supported the County's testimony. Ms. G testified that Appellant was rude and insubordinate to her supervisor and failed to carry out assigned functions such as appropriately processing cases assigned to her when a coworker was temporarily unavailable. Tr. 202, 211, 213. It is, of course, hornbook law that a party is normally bound by the testimony of its own witness. "As a general rule, a party who produces a witness vouches that he or she is worthy of credit and is bound by the uncontradicted testimony of such witness." 10 M.L.E. Evidence § 201.⁸ As Appellant did not seek to impeach the coworker she called as a witness on her behalf or to have her identified as a hostile witness, we conclude that Appellant's coworker is credible and that Appellant is bound by her testimony that Appellant was both rude and

⁸ Appellant testified that sometimes when she was out of the office her coworkers neglected to process her cases. Tr. 236. However, Appellant did not dispute the testimony of her own witness that Appellant failed to process the cases of coworkers when they were out, but yet still expected her coworkers to process her cases when she was out. Tr. 212.

insubordinate to her supervisor and failed to carry out assigned job duties. *See General Motors Corp. v. Lahocki*, 286 Md. 714 (1980); *Rinard v. Nationwide Mut. Ins. Co.*, 269 Md. 1, 6 (1973). The credibility of Appellant's supervisor and Ms. G on this issue is further buttressed by the testimony of the Housing Stabilization and Special Needs Housing Administrator, who also witnessed Appellant's insubordinate and disrespectful behavior towards the Immediate Supervisor. Tr. 194-95.

Appellant does not argue that the supervisory instructions reflected in the specifications were in any way improper or illegal, Montgomery County Code, § 33-10(b)(2)(A), nor would such an argument be supported by the record. The instructions at issue were entirely reasonable and proper. Several credible witnesses, including one called by Appellant, testified that Appellant displayed insubordinate and disrespectful behavior towards her supervisor. Accordingly, we find that the County has proven by a preponderance of the evidence that Appellant was insubordinate and failed to obey a lawful supervisory direction. Appellant's refusal to comply with direct orders from her supervisor was conduct which justified disciplinary action.

Retaliation

Appellant's primary defense to the suspension and dismissal charges against her is to allege that the discipline is the result of retaliation by her immediate supervisor because Appellant reported the misconduct of a coworker and friend of the supervisor.

Appellant's Written Closing Argument references the State whistleblower law and case authority under that statute. State Personnel & Pensions Article, Md. Code Ann., (SPP) § 5-305. While by its very terms that State statute is inapplicable to County employees, SPP § 5-301, the Board may look to court decisions interpreting that law for guidance. The Board will also look to the decisions of Maryland and Federal courts that explore the principles of retaliation in other contexts, such as equal employment opportunity law.

Appellant's Written Closing Argument asserts that Appellant made a disclosure to the IG that constituted a good faith disclosure of abuse of government resources that was protected by the State whistleblower law. While the State whistleblower law is inapplicable to a County employee, the County does have its own whistleblower laws which provide similar protections to County employees. Montgomery County Code, § 2-151(l)(5); § 33-10(b); and § 33-17(g). Those laws protect County employees from retaliation for good faith disclosure of what the employee reasonably believes are illegal or improper actions in County government. An employee is not protected if "the subject of an otherwise proper personnel action that would have been taken regardless of the employee's disclosure of information concerning illegal or improper action in County government." § 33-10(b)(3)(C).

As discussed above, subsequent to the hearing in this matter, Appellant submitted with her Written Closing Argument a document that apparently indicates that she filed a whistleblower complaint with the County Inspector General. The allegations in that document, Appellant's Exhibit 8, and those contained in her testimony (*see, e.g.*, Tr. 241), appear to constitute disclosures of alleged illegal or improper actions. The record does not contain evidence suggesting that the disclosures were "frivolous, unreasonable, and without foundation." Thus, the disclosures appear

to be the type subject to protection from retaliation under the provisions of County law cited above. The issue, then, is whether there was retaliation for the protected disclosures or whether Appellant was the subject of otherwise proper personnel actions that would have been taken whether or not she made a protected disclosure.

Appellant's Written Closing Argument argues that once an employee has made a protected disclosure and the employer offers evidence of a non-retaliatory reason for the challenged personnel action, the employee must be afforded an opportunity to present rebuttal evidence that the employer's asserted reason is pre-textual, citing the Maryland Court of Special Appeals' opinion in *Heller v. Department of Natural Resources*, 161 Md. App. 299 (2005). Appellant further relies on that opinion to argue that the employee's evidence of pretext is often circumstantial. Appellant fails to note, however, that the decision upon which she relies was overruled by the Court of Appeals. *Department of Natural Resources v. Heller*, 391 Md. 148 (2006).

In *Heller* the Court of Appeals held that an employee must "prove a causal connection between the disclosure and the personnel action." 391 Md. at 170. "A whistleblower action by the employee intended to overturn a personnel action also will succeed only if the employee shows by a preponderance of the evidence that the protected disclosure was a 'contributing factor' in the decision to take the personnel action." 391 Md. at 171.

Appellant has not proven any causal connection between her protected disclosure and the discipline. There is a paucity of evidence to support Appellant's assertion that her supervisors retaliated against her for meeting with and providing information to the IG. Appellant produced no evidence that her supervisors even knew that Appellant was a whistleblower prior to June 2014. Indeed, Appellant testified that her complaint was treated by the OIG as confidential. Tr. 248, 277. Further, Appellant's supervisors testified that their disciplinary decisions were based entirely on the severity of the client complaints and Appellant's behavior. Tr. 60, 162. There is credible testimony that it was not until after the May 21, 2014, 10-day Suspension Statement of Charges was issued that Appellant's supervisors became aware that Appellant gave information to the IG. Tr. 161-62; CX 2.

Indeed, Appellant's counsel has acknowledged that the treatment Appellant claims is retaliatory was actually occurring well prior to the IG investigation. In an April 27, 2014, letter from Appellant's attorney regarding the alleged harassment Appellant says she suffered, counsel asserts that she "has been experiencing this harsh behavior and belittlement of her character and work for several years." CX 16. This letter belies any suggestion by Appellant that the allegedly unfair supervisory treatment was related to her IG complaint. Significantly, the letter does not even mention the IG investigation, let alone a causal relationship between Appellant's participation in that investigation and how she was treated by her supervisors.

Moreover, the IG complaint submitted by Appellant shows that in March of 2013, nearly a year before Appellant says her relationship with her immediate supervisor soured, Appellant told the IG that she had at some time earlier complained to her supervisor about her supervisor's friend and coworker's improper use of County time and resources. AX 8. Yet there are no allegations that her supervisor retaliated in any way against Appellant for reporting the alleged misconduct to her supervisor. Indeed, at least four months after Appellant raised the issue with her supervisor,

she was given an acceptable performance evaluation. CX 6. Appellant has not explained why, if her immediate supervisor bore retaliatory animus against her for making a disclosure about her friend, she did not manifest at least some of that vengefulness during the year prior to February 2014.

Even had Appellant produced evidence sufficient to infer that management was aware of her role in the IG investigation, that mere knowledge, without more, is insufficient to prove retaliation. *See Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 515-16 (2016) (Employee must produce evidence beyond mere speculation that the employer's reason for termination was a pretext to hide a retaliatory motive); *Gibson v. Old Town Trolley Tours*, 160 F.3d 177, 182 (4th Cir.1998) (While "[k]nowledge is necessary to establish causation . . . it is not sufficient," retaliation may not be inferred "from evidence that does no more than suggest it as a possibility.").

Appellant offered speculation and surmise but no evidence to support her allegation of retaliation and thus failed to demonstrate she was disciplined based on her participation in an investigation by the Inspector General. Appellant's bare assertions of retaliation are insufficient to prove that the disciplinary actions were taken against her because of alleged protected activity. *Id.* *See also*, MSPB Case No. 09-04 (2008); *Cirella v. Department of Treasury*, 108 M.S.P.R. 474 (2008), *aff'd*, 296 F. App'x 63 (Fed. Cir. 2008) (Employee alleging retaliation must show a genuine nexus between the alleged retaliation and the adverse employment action; bare allegations unsupported by evidence are insufficient); *Dobruck v. Department of Veterans Affairs*, 102 M.S.P.R. 578 (2006). It is not enough for Appellant to simply allege that disciplinary action occurred after her complaint to the IG. *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998) ("*Post hoc ergo propter hoc* is not enough to support a finding of retaliation"); *Sanders v. FMAS Corp.*, 180 F. Supp. 2d 698, 706-07 (D. Md. 2001) (Employee must produce evidence establishing causal connection between filing of complaint and termination; showing that employer knew of the complaint and that the discipline postdated the complaint is insufficient to prove retaliation).

On the critical question of causation, there has simply been a failure of proof. Appellant was free to challenge the testimony of her supervisors about their motives for the disciplinary actions and to introduce evidence demonstrating that the disciplinary decisions were based on Appellant's protected disclosures. Appellant had ample opportunity to adduce evidence that her supervisors were motivated to discipline her based upon Appellant's disclosure of wrongdoing, and Appellant failed to do so. Appellant produced no direct evidence of retaliatory motive or intent, other than to point to the timing of the IG investigation vis-à-vis the complaints from clients and the imposition of discipline. *See, e.g.*, Tr. 243-44, 263. Appellant failed to produce any evidence impeaching her supervisors' assertions that the customer complaints and Appellant's inadequate work and insubordination were the sole bases for the decision to discipline her.

Furthermore, the County's evidence that Appellant was subject to progressive discipline concerning her conduct, and that her performance and behavior did not improve, undercuts any allegation of retaliation. MSPB Case Nos. 07-14 & 07-15 (2007) ("persistent misconduct despite being disciplined" indicates that discipline was not due to retaliation). Even assuming Appellant had established a causal connection, the County has produced evidence of legitimate reasons for

the alleged retaliatory action. The County has disciplined Appellant because of her failure to perform her job in a competent and acceptable manner and was insubordinate. Appellant has produced no evidence establishing that these proffered reasons are pre-textual and that the County's decision to discipline her was actually motivated by illegal considerations. Appellant's retaliatory discharge claim is unsupported by the record evidence.

The Board thus finds insufficient proof of retaliation and concludes that Appellant failed to demonstrate that the discipline imposed was based on retaliatory motive.

Appropriate Discipline

Having determined the County proved by a preponderance of the evidence that Appellant failed to perform her duties in a competent and acceptable manner, engaged in rude and insubordinate conduct, and that the reasons for disciplinary action were not a pretext for retaliation, the Board will address whether the penalties imposed were appropriate. The Board is well aware that a ten day suspension is a grave matter and that dismissal is the ultimate penalty. Nevertheless, Appellant's conduct is extremely serious. Appellant was demeaning towards powerless clients and failed to process their urgently needed renewal assistance applications in a timely manner. Moreover, despite frequent counseling and a remarkable amount of training, Appellant has failed to improve her performance and has refused to accept responsibility for her behavior.

Appellant's performance and behavior is unacceptable for an Income Assistance Program Specialist II dealing on a daily basis with distraught clients in great need of the benefits necessary to provide them with basic necessities such as shelter and utilities.⁹ Therefore, in the absence of credible evidence of retaliation and because of the severity of Appellant's poor job performance and insubordinate behavior, and the undisputed consequences of such job related shortcomings on some of the County's most vulnerable citizens, the Board finds that the ten day suspension and the penalty of dismissal are appropriate.

ORDER

Based upon the foregoing analysis, the Board hereby **DENIES** both of Appellant's appeals.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may, within 30 days, file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
July 20, 2016

⁹ Discourtesy towards citizens seeking services has been found to justify disciplinary action government employees. See *Luna v. SSA*, 85 MSPR 301, 308 (2000); *Holland v. Department of Defense*, 83 MSPR 317, 323 (1999); *Lednar v. SSA*, 82 MSPR 364, 371-72 (1999); *Anderson v. DHHS*, 25 MSPR 193, 194-95 (1984). See also *McStravick v. Department of Revenue*, 470 So. 2d 518, 519, cert. denied 475 So. 2d 1095 (La. 1985) (Insubordination and unnecessary prolongation of matters citizens may have pending before an agency are grounds for dismissal).

DISMISSAL

CASE NO. 16-08

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 the former Fire Chief (FC) of the Department of Fire and Rescue Services (DFRS or Department) to dismiss him from employment effective December 11, 2014. County Exhibit (CX) 10, Notice of Disciplinary Action (NODA), dated December 3, 2014. The NODA charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) and the DFRS Code of Conduct arising out of Appellant's October 9, 2014, conviction on a charge of reckless endangerment after a jury trial in the Circuit Court for Baltimore City.¹

On December 15, 2014, Appellant requested that the Board temporarily stay his appeal. The basis for Appellant's request was that although he had been found guilty of one count of misdemeanor reckless endangerment, he was confident that the conviction would be reversed. On February 9, 2015, the Board dismissed Appellant's original appeal, without prejudice, pending resolution of the criminal charges. MSPB Case No. 15-18 (2015). The Board's order provided that Appellant could refile his appeal within 15 days from the date the Circuit Court's decision on his criminal appeal became final.

On November 10, 2015, the Court of Special Appeals issued a decision affirming Appellant's conviction for reckless endangerment. [*Appellant*] v. *State of Maryland*, No. 1918, September Term, 2014 (2015) (Unreported). CX 11. On December 21, 2015, Appellant filed this appeal.²

FINDINGS OF FACT

At the time of his dismissal, Appellant was employed as a Master Firefighter/Rescuer with DFRS, and had been a firefighter for over 25 years. June 9, 2016, Hearing Transcript (Tr.) 27, 37, 68; Appellant's Post-Hearing Supplement, August 4, 2016; County Post Hearing Statement, August 4, 2016.

¹ Appellant was convicted of violating § 3-204 of the Criminal Law Article, which provides, in part:

- (a) A person may not recklessly:
 - (1) engage in conduct that creates a substantial risk of death or serious physical injury to another; . . .
- (b) A person who violates this section is guilty of the misdemeanor of reckless endangerment and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$5,000 or both. . . .

² The County filed a motion to dismiss the appeal as untimely. In the Board's Prehearing Order of March 14, 2016, the motion was denied, without prejudice. The Board provided that the County could raise the issue again should it appear that the appeal was filed more than 15 days after the Court of Special Appeals Mandate was issued pursuant to Maryland Rule 8-606. The County did not refile the motion to dismiss.

According to the Class Specifications, a Master Firefighter/Rescuer is responsible for “lead level work in fire suppression, fire prevention, communications, training, rescue, and emergency medical care.” CX 13. As an essential part of the work, a Master Firefighter/Rescuer “affects the rescue and safety of individuals . . .”. *Id.* The duties of the position include “rendering emergency medical care,” responding to medical emergencies, providing “immediate and efficient emergency medical care to the ill and injured at the scene of incidents,” and reporting “vital information to medical personnel.” *Id.* A Master Firefighter is required to maintain State certification as an Emergency Medical Technician Ambulance (EMT A). *Id.*

On July 10, 2013, around midnight, Appellant was involved in an altercation with a prostitute (DR) at her apartment in Baltimore. CX 11. Shortly after midnight the morning of July 11, 2013, Appellant claimed that DR attacked him with a knife. Joint Exhibit (JX) 1.³ Appellant struck DR “hard” in the head with a metal object. *Id.* The undisputed evidence indicates that after Appellant struck DR in the head with the metal object he ran from the scene, got into his vehicle, and drove away. After he drove away he called 911 to report that he had been assaulted. Tr. 67, 71; JX 1.

In Appellant’s 911 call he reported that a woman had struck him with a knife, that he was not injured, and he was leaving because the woman was unstable. JX 1. During Appellant’s criminal trial a recording of his 911 call was played, and the portion of the criminal trial transcript containing that call was introduced in the Board’s hearing as County Exhibit 14.⁴ The following are the relevant portions of the transcript of the 911 call:

OPERATOR: And what is the phone number you’re calling from?

CALLER: A girl attacked me with a knife.

* * *

OPERATOR: Okay. Is she still at the location with you right now, sir?

CALLER: Uh, yes.

* * *

OPERATOR: Okay sir, were you injured? Do you need an ambulance?

³At the hearing the parties introduced a Stipulation of Facts as Joint Exhibit 1, which the Board accepted into evidence. Montgomery County Code, § 2A-8(h)(11).

⁴Under the Board’s authority to request, receive, and introduce into the record additional documentary or other evidence, the Board’s Order of June 15, 2016, offered the County the opportunity to supplement the record by introducing the full transcript from Appellant’s criminal trial, or appropriate portions thereof, into evidence. *See* Montgomery County Code, § 2A-8(b)(3) and (h)(8); MCPR, § 35-10(f)(10). Subsequent to the hearing, the County introduced a partial transcript of Appellant’s criminal trial as County Exhibit 14.

CALLER: Uh, no, no. She, you know - -

OPERATOR: Okay.

CALLER: - - she lunged at me with a knife, but I was able to get away.

OPERATOR: Okay. How long ago did this happen, sir?

CALLER: About a minute ago.

OPERATOR: Okay, we're going to (inaudible) do you want to talk about it before they get there?

CALLER: I mean honestly, I would rather like leave because this girl is unbelievably unstable.

OPERATOR: Does she have any mental problems, sir?

CALLER: Handling a knife.

OPERATOR: Okay, do you want to speak to the police when he gets there, sir or are you, are you leaving?

CALLER: I would rather leave. I mean

OPERATOR: Do you want us to send off (inaudible) even though you're gone or no?

CALLER: I mean there is some minors so I mean, I don't know what to do.

OPERATOR: Okay. It will be left up to you. If you want me to set off, sir, I can do that for you.

CALLER: I - -

OPERATOR: Because you only know if it's safe to do so.

CALLER: I mean I'm okay to leave, but I mean this girl attacked me and I'm safe and I'm away, but I mean I would rather leave.

OPERATOR: Okay. If you feel safe to do so, sir, but that would have to be a decision you would make because out here, I can't make that decision for you. I don't want to tell you to do anything that, that would put you in danger. Only, you're the eyes and ears out there. So I can't tell you what to do.

CALLER: Well, I'm away and to get away. She attacked me and, and I left. So I, I would rather leave.

OPERATOR: Okay sir, thank you for calling.

CALLER: Okay.

CX 14, pp. 6-9.

The transcript of the 911 telephone call reveals that when Appellant made the call he was in no danger. CX14, p. 8 (“I’m safe and I’m away, but I mean I would rather leave.”).⁵ When Appellant nevertheless repeatedly expressed a desire to leave before the police arrived, the 911 operator told Appellant that it was his decision whether or not to stay on the scene since she could not assess whether or not he was safe. CX 14, pp. 8-9. When specifically asked if he was injured or needed an ambulance, Appellant responded in the negative. CX 14, p. 7. At no point during Appellant’s call to 911 did Appellant mention to the emergency dispatcher that he had struck DR in the head with a metal object or that she might be injured and in need of an ambulance.

A neighbor of DR placed a second 911 call and reported that DR was bleeding from the head and lying on the ground. JX 1; CX 14, p. 10. Because the neighbor told the 911 operator that DR had been injured, paramedics as well as police were dispatched to the scene. CX 14, p. 11. DR was taken to the Shock Trauma Center at the University of Maryland Medical Center and received treatment for a serious head injury. JX 1; CX 14, pp. 26, 31; Tr. 34.

The next day, July 12, 2013, the Baltimore City Police Department (BPD) contacted DFRS about a firefighter assaulting a woman in Baltimore City and requested a photograph of Appellant. JX 1. DR positively identified Appellant as her assailant. *Id.*; CX 14, p. 27. BPD arrested Appellant while he was on-duty with DFRS. *Id.*

Appellant claimed that he acted in self-defense. *Id.* In support of his claim, Appellant pointed out that in February 2014, DR was arrested for and charged with attempted murder in Prince George’s County. *Id.*

DFRS placed Appellant on paid administrative duty until his criminal trial took place 15 months later, on October 8 and 9, 2014. *Id.* On October 9, 2014, a jury convicted Appellant of reckless endangerment, a misdemeanor. *Id.* The Circuit Court for Baltimore City sentenced Appellant to five (5) years in prison, all but nine (9) months suspended. CX 4, CX 11. When released, Appellant was to be placed on three (3) years’ probation in Montgomery County. CX 4, CX 11; JX 1.

On October 29, 2014, DFRS served Appellant with the Statement of Charges (“SOC”), CX 7, at the Baltimore City jail. On November 2, 2014, DFRS received Appellant’s response to the SOC. CX 8. The next day, November 3, 2014, DFRS received a response to the SOC submitted by Appellant’s attorney. CX 9.

On December 4, 2014, DFRS dismissed Appellant, alleging violations of MCPR § 33-5(d), conviction of a crime that is related to or has a nexus with County employment. CX 10. Appellant was also charged with violating DFRS Policy and Procedure 502, Code of Conduct, § 5.0 (conduct themselves in a manner as to reflect favorably on DFRS in general) and § 5.14 (committing an act which constitutes conduct unbecoming ... including criminal conduct). CX 10, JX 1.

⁵ Appellant also testified that after he struck DR and ran away he no longer felt at risk. CX 14, pp. 118, 120.

POSITIONS OF THE PARTIES

County:

- Appellant caused significant personal injury to DR by hitting the woman “hard” in the head with a metal object.
- Appellant did not render aid or assistance to DR.
- In making a 911 call after the incident Appellant failed to advise the 911 operator that DR was injured.
- Appellant did not remain at the scene to assist or otherwise provide information to the public safety agency responding to the 911 call.
- Appellant was convicted by a jury of reckless endangerment.
- MCPR, § 33-5(d) provides that a criminal conviction may be grounds to impose discipline if there is a nexus with or a correlation to the employee’s duties.
- Saving lives is the primary priority of DFRS and as a Master Firefighter, Appellant is responsible for protecting the health and safety of citizens.
- Appellant’s conviction for reckless endangerment establishes that he engaged in conduct that created a substantial risk of death or serious physical injury to another person and thus constitutes sufficient nexus to his County emergency medical duties to warrant dismissal.
- The DFRS Code of Conduct, § 5.0, requires firefighters, both on and off-duty, to conduct themselves in such a manner as to reflect favorably on DFRS, while § 5.14 expressly prohibits “any criminal . . . conduct.”
- Although MCPR § 33-2(c)(1) generally requires progressive discipline, under subsection (c)(2) a department director may bypass progressive discipline and dismiss an employee in cases involving serious misconduct or a serious violation of policy or procedure.

Appellant:

- Appellant has served the County admirably and with exceptional performance for over twenty-five years and risen to the rank of Master Firefighter.
- On July 10, 2013, Appellant was attacked by DR and engaged in self-defense when he struck her in the head.
- Although Appellant was found guilty of reckless endangerment, that is not a crime of violence.
- Appellant behaved reasonably in defending himself from a knife-wielding and dangerous assailant, escaping, and calling emergency personnel.
- Appellant knew that police would respond to his 911 call.
- Appellant asked the 911 operator if he needed to remain on the scene and the operator answered in the negative.
- In situations where first responders arrive on scene where there is a risk of violence they are trained to stay away from the danger until it is safe for them to proceed. Appellant acted consistently with that training.
- In a prior incident a DFRS employee whose job responsibility was to drive fire trucks was arrested for DUI/DWI but not dismissed from employment.
- The woman who attacked Appellant was subsequently charged in a different incident not involving Appellant.

- Discipline is not warranted because on July 10, 2013, Appellant acted reasonably and in accordance with his training, knowledge, and experience.
- Appellant's conviction for reckless endangerment has no nexus his County employment.

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-2. Policy on disciplinary actions.

(a) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(b) ***Prompt discipline.***

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
- (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

(c) ***Progressive discipline.***

- (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:
 - (A) the severity of the employee's misconduct and its actual or possible consequences; or
 - (B) the employee's continuing misconduct or attendance violations over time.
- (2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(d) *Consideration of other factors.* A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

§ 33-3. Types of disciplinary actions.

(h) *Dismissal.* Dismissal is the removal of an employee from County employment for cause.

§ 33-5. Causes for disciplinary action. The following, while not all-inclusive, may cause for a disciplinary action by a department director against an employee who: . . .

(c) violates any established policy or procedure;

(d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment; . . .

Montgomery County Department of Fire and Rescue Services, Policies and Procedures, Code of Conduct, Code of Personal Conduct, May 6, 1996, which states in applicable part:

5.0 Employees will, at all times, conduct themselves in such a manner as to reflect favorably on the DFRS and Fire-Rescue-EMS Service in general. While this policy applies at all times, it is especially important when employees are wearing any portion of a fire department uniform that identifies the Department, have in their possession anything that identifies them with the DFRS or are on County or Corporation property.

5.14 No employee will commit any act which constitutes conduct unbecoming a merit system employee. "Unbecoming" conduct includes, but is not limited to, any criminal, dishonest or improper conduct.

ISSUE

Was Appellant's dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

As detailed above, the essential facts of this case are undisputed. Appellant was involved in a physical altercation that eventually led to his trial on assault and reckless endangerment charges. He was acquitted of the assault charges, but convicted on the reckless endangerment charge.

When, as here, the County seeks to discipline an employee on charges that involve off-duty misconduct, the County bears the burden of proving that there is a nexus between the alleged misconduct and the employee's position with the County. Thus, for example, the Board has sustained disciplinary action against a correctional officer who was involved with illegal narcotics while off the job, MSPB Case No. 14-17 (2014), as well as a security officer who engaged in domestic violence. MSPB Case No. 14-19 (2014).

To understand if there is a nexus between Appellant's conviction for reckless endangerment and his duties as a firefighter it is first necessary to understand the precise conduct underlying the reckless endangerment conviction. There might be a different inquiry if, for example, the underlying conduct was Appellant driving while intoxicated while DR was a passenger in his car, as opposed to his failure to inform the 911 operator that DR was injured and in need of medical assistance. And to glean this understanding, it is necessary to examine the law in the State of Maryland and the record of Appellant's Circuit Court trial.

The Court of Appeals has held that "conduct proscribed by the reckless endangerment statute includes the **willful failure to perform a legal duty.**" *State v. Kanavy*, 416 Md. 1, 11 (2010) (emphasis added). *Kanavy* involved a juvenile services employee who failed to "contact emergency services (9-1-1) in a timely manner." 416 Md. at 13. The Court discussed cases where it was reckless endangerment to not render or call for aid, to wit: (1) A nurse who waited five hours after her mother fell to summon help; and (2) allowing a two and a half year old to wander unattended in a residential and commercial neighborhood for six hours.

In its decision on Appellant's appeal of his conviction, the Court of Special Appeals noted that the trial judge responded to a question from the jury about the reckless endangerment count by stating, "[i]n response to your question, the court advises you that you can only consider actions that happened once [Appellant] and [DR] returned to [DR's address]." Thus, the jury was not allowed to consider, and the conviction could not have been predicated upon, the fact that Appellant drove while under the influence while DR was a passenger in his car. Indeed, Appellant argued in his appeal that the trial judge erred in its instruction to the jury in that "the court's response wrongly allowed the jury to consider whether [Appellant] committed reckless endangerment **by failing to advise the 911 operator of [DR]'s condition**, specifically, that he had struck her in the head with an object and that she was lying on the ground holding her head." CX 11, p. 5 (Emphasis added).

The Court of Special Appeals rejected Appellant's arguments on this score. CX 11, p. 6. Thus, it is manifest that Appellant's reckless endangerment conviction could have been predicated on this failure to inform the 911 operator that DR was at least potentially in need of medical

attention. And, under the facts presented to the Board, it is apparent that the jury most likely convicted Appellant of just this: failing to advise the 911 operator of DR's condition.⁶

With this understanding of the facts underlying the reckless endangerment conviction, there can be no real dispute that there is a nexus between the charged misconduct and Appellant's duties as a Master Firefighter. The DFRS is a public safety agency with a primary mission of protecting the health and safety of Montgomery County citizens. Appellant is a Master Firefighter, responsible for affecting "the rescue and safety of individuals," rendering "immediate and efficient emergency medical care to the ill and injured at the scene of incidents," and reporting "vital information to medical personnel." CX 13. In the words of Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, Appellant's "private conduct mocks the mission of the agency that employs him." *Wild v. U.S. Department of Housing & Urban Development*, 692 F.2d 1129, 1131-33 (7th Cir. 1982) ("the credibility and effectiveness of the department are undermined by . . . discordance between public duty and private conduct.").⁷ See also MSPB Case No. 14-19 (2014) (engaging in domestic violence is incompatible with the responsibilities of a security officer to protect the safety of County employees).

Appellant makes much of the reference to "violent crime" in the County's SOC and NODA, arguing that the County's decision to dismiss him was based on the erroneous belief that he had been convicted of a crime of violence. However mistaken the County may have been concerning the precise characterization of the crime for which Appellant was convicted, it does not appear that the decision to dismiss Appellant was based on that characterization. Appellant's discipline arose out of the actual nature of Appellant's actions and the fact that he was convicted of a crime. Tr. 42; CX 7, CX 10.

Appellant's conviction for reckless endangerment is undisputed.⁸ After a full trial, a judge and jury concluded that Appellant engaged in conduct that created a substantial risk of death or serious physical injury to DR. Criminal Law Article, § 3-204(a)(1). Appellant's alleged motives for his behavior do not alter the fact that a finding of guilt under the reckless endangerment statute

⁶ It is impossible, of course, to say with absolute certainty what precise conduct the jury found "create[d] a substantial risk of death or serious physical injury to another." But whether the conviction was based on Appellant's failure to inform the 911 operator of DR's potential need for medical attention or his failure to render aid to DR, either by providing her with emergency medical assistance himself, or by remaining near the scene to assist first responders, in either event there is no doubt that Appellant's reckless endangerment conviction goes to his failure to help a seriously injured person. That failure to act responsibly resulted in Appellant's conviction and forms the nexus with his County public safety position.

⁷ "If an employee of a manufacturer of safes moonlighted as a safe cracker, his days as an employee of that manufacturer would be numbered, even if he scrupulously avoided cracking safes manufactured by his employer. If an officer of a musicians' union owned a nightclub that employed non-union musicians, because their wages were lower, his days as an employee of the union would be numbered. A customs officer caught smuggling, an immigration officer caught employing illegal aliens, an IRS employee who files false income tax returns, a HUD appraiser moonlighting as a "slumlord"—these are merely the public counterparts of a form of conflict of interest that is not less serious for not being financial, that would not be tolerated in the private sector, and that we do not believe Congress meant to sanctify in the public sector." *Wild*, 692 F.2d at 1133.

⁸ In any case, the criminal conviction for reckless endangerment has a preclusive effect against any attempt by Appellant to question a finding in this forum that he engaged in conduct that created a substantial risk of death or serious injury. Cf., *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359 (2016) (permitting offensive nonmutual collateral estoppel in an administrative appeal); *Cosby v. Department of Human Resources*, 425 Md. 629 (2012) (court CINA finding collaterally estopped administrative appeal).

does not depend on “whether the defendant actually intended that his reckless conduct create a substantial risk of death or serious injury.” *Kilmon v. State*, 394 Md. 168, 174 (2006).

Appellant argues that his behavior the night of July 10-11 was reasonable in light of the fact that he was at risk of injury and acted in self-defense. Perhaps it was necessary for him to protect himself by striking DR and running away. Indeed, the Former Fire Chief acknowledged that in some circumstances Appellant might be expected to protect himself and disengage from a dangerous situation. Tr. 48. Nevertheless, Appellant’s actions after he was no longer in danger fell far short of what is expected of an emergency medical professional. Having disengaged, Appellant would be expected “to fully notify 911 of what occurred and to render assistance to the responders.” *Id.* The Chief testified that DFRS firefighters “are there to preserve life above all else, sometimes at the risk of our own lives,” and Appellant “failed to notify 911 that in fact this victim was lying in the front yard.” Tr. 22-23. The Chief further testified that Appellant “notified 911 but did not notify that this victim was in trouble and actually delayed care to this victim. . .” Tr. 32.⁹

The County has proven by a preponderance of the evidence that by failing to accurately and fully report to the 911 operator that a woman he had struck in the head was injured, Appellant violated DFRS Code of Conduct, § 5.0, which requires firefighters, both on and off-duty, to “at all times, conduct themselves in such a manner as to reflect favorably on the DFRS.” In addition, the County proved a violation of § 5.14, which expressly prohibits conduct unbecoming a merit system employee, specifically including “any criminal . . . conduct,” and MCPR § 33-5(d) (discipline permitted for conviction of a criminal offense which has a nexus with County employment).

The Board finds that there is a nexus between Appellant’s misconduct, which involved criminally reckless conduct that put another person at risk of death or serious injury, and his position with DFRS, an agency which is dedicated to the protection and preservation of life, health, and safety. Nexus may be demonstrated simply by showing that an employee engaged in off-duty misconduct that is inconsistent with the agency’s mission and undermines confidence in the employee. *See Brown v. Department of the Navy*, 229 F.3d 1356, 1361 (Fed. Cir. 2000). *See also White v. U.S. Postal Serv.*, 22 M.S.P.R. 452, 454-55 (1984), *aff’d*, 768 F.2d 334 (Fed. Cir. 1985) (nexus established where employee occupied a position of trust and was convicted for leaving the scene of an accident); *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75-76 (1987) (when employee engages in conduct antithetical to the agency mission, agency not required to demonstrate a specific impact on job performance or that the misconduct was publicized or a matter of notoriety to establish nexus); *Calderon v. Department of Justice*, No. AT-0752-14-1000-I-1, 2016 WL 3752380 (M.S.P.B. July 13, 2016) (Correctional officer removed, in part, for off-duty misconduct based on plea of “no contest” to a DUI charge); *Case v. Department of Army*, 861 F.2d 728 (Fed. Cir. 1988) (dismissal warranted when employee charged with wanton endangerment and terroristic threats).

⁹ Appellant testified that he was unaware that DR was seriously injured and in need of medical attention when he called the 911 operator. Tr. 67, 71. Even if this were true, Appellant nonetheless acknowledged that he struck DR “hard” in the head with a metal object. Thus, at a minimum, he was aware that there was at least a potential that DR would be in need of medical attention. Whether he knew he had seriously injured DR or merely that he might have done so, he nonetheless would have been expected to provide this critical information to the 911 operator.

Although Appellant committed the misconduct while off-duty, there is sufficient nexus with Appellant's County employment to warrant severe disciplinary action. Appellant's criminal misconduct, which created a substantial risk of death or serious injury to another person, was completely inconsistent with the mission of DFRS, and his actions impinge upon his reliability and integrity. The Board has considered Appellant's more than 25 years of service. However, the extreme seriousness of Appellant's misconduct, and his continued refusal to acknowledge his failure to act responsibly, demonstrate that Appellant lacks the potential for rehabilitation and should not be returned to a position in which he would be entrusted with the health and safety of the citizens of Montgomery County. The DFRS was justified in determining that it would be adverse to the mission of the agency to allow Appellant to continue his employment as a Master Firefighter. Therefore, the Board finds that the penalty of dismissal was appropriate in this case.

ORDER

For the foregoing reasons, the Board denies Appellant's appeal of his dismissal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 14, 2016

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), 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 2017, the Board issued the following decisions on appeals concerning the denial of employment.

EMPLOYMENT DECISIONS

CASE NO. 16-07

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of Appellant challenging the decision of the Montgomery County Office of Human Resources (OHR) not to select him for a position of Human Resources Specialist III. The County filed its response (County's Response) to the appeal on February 1, 2016, asserting that the County properly rated Appellant as a candidate and that neither Appellant nor any of the other candidates were offered the vacant HR Specialist III position. County's Response at 3. Appellant filed a reply to the County's Response on February 16, 2016 (Appellant's Reply) maintaining that he should have been given a noncompetitive promotion. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was hired by the Office of Human Resources as a Human Resources Specialist II, effective March 10, 2014. Appeal filed December 21, 2015 (Appeal) at 1; County Response at 2. The iRecruitment job posting for Appellant's position (IRC12601) indicated that the "[p]osition may be under filled" at several different classification levels, including Human Resources Specialist II. Appellant Exhibits, iRecruitment "Job: IRC12601" printed December 9, 2015. Appellant was offered and accepted the position at the Human Resources Specialist II level rather than at the Human Resources Specialist III level because, in the County's view, he lacked sufficient experience for the higher level. County Response at 2; Appeal at 1; Appellant's Reply at 1.

Appellant was rated as "Satisfactory" in his initial annual performance evaluation. Appellant's Reply at 2; Appellant Exhibit "Details: Appraise" printed June 29, 2015; County Response at 2.

Appellant applied for a competitive promotion to a Human Resources Specialist III position (IRC 19438) in October, 2015. Appeal at 1; County Response at 1. Appellant interviewed for the position on November 12, 2015. County Response at 1. On December 10, 2015, Appellant was notified orally and via iRecruitment that he had not been selected for the position. Appeal at 1; County Response at 1 and Attachment 2. Appellant filed this Appeal within ten workdays of the notification of nonselection.

The iRecruitment notification contained the following explanation for Appellant's nonselection:

Please be advised that based on specific business needs changes to the minimum qualifications have been made and therefore the position will not be filled from this

recruitment. I have posted a new recruitment that will be open until filled. For further information and to apply, please see IRC20188.

County Response, Attachment 2.

It appears that Appellant and all of the other candidates who were interviewed for the vacant Human Resources Specialist III position were so informed that the position would be re-advertised. County Response at 3 and Attachment 2. Appellant applied for the re-advertised Human Resources Specialist III position (IRC20188) on December 17, 2015. County Response at 3; Appellant Exhibits, iRecruitment “Jobs Applied For” printed December 17, 2015 and iRecruitment “Job: IRC20111 printed December 14, 2015. The difference between the original posting for the Human Resources Specialist II position (IRC 19438) and the revised recruitment (IRC20188) is that the revised posting contained an increased emphasis on labor relations and collective bargaining experience in the minimum qualifications, as opposed to more general human resources qualifications.

POSITIONS OF THE PARTIES

County:

- OHR sought to fill a vacant HR Specialist III position through a competitive hiring process and did not offer a promotional opportunity to Appellant or any other similarly situated HR Specialist II
- Appellant applied for the vacant position at the HR Specialist III level
- The recruitment was canceled and a new job posting was issued with minimum qualifications more targeted to labor relations and collective bargaining experience
- Noncompetitive promotion is at the discretion of management and not subject to appeal or grievance. Montgomery County Personnel Regulations (MCPR), § 27-2(b)(2)(D).
- A supervisor’s assignment of higher level duties to an employee is not considered a promotion unless formally designated as a promotion or temporary promotion. MCPR § 27-1(a).
- Appellant has not met his burden of proving that the County's decision on his application for the vacant HR Specialist III position was “arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.” Montgomery County Code, § 33-9(c).

Appellant:

- Appellant has successfully met the standards of Human Resources Specialist III classification specification
- Appellant has performed the duties and responsibilities at the Human Resources Specialist III level
- Appellant received a satisfactory annual performance evaluation based on the criteria of the Human Resources Specialist III classification

- Based on his successful performance of Human Resources Specialist III duties and responsibilities, Appellant should have been noncompetitively promoted to the Human Resources Specialist III classification and not required to compete competitively

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,

- (b) **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. . . Appeals filed with the Merit System Protection Board shall be considered pursuant to procedures adopted by the Board. The Board may order such relief as is provided by law or regulation.

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, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6. Recruitment and Application Rating Procedures, provides in pertinent part:

§ 6-9. Eligible list. After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories. The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

§ 6-14. 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 June 30, 2015), Section 27. Promotion, provides in relevant part:

§ 27-1. Policy on promotion.

- (a) A supervisor's assignment of higher-graded duties to an employee or an employee's assumption of higher-graded duties must not be considered a promotion or temporary promotion unless it has been formally designated as a promotion or temporary promotion.

§ 27-2. Types of promotion.

- (a) Competitive promotion. Prior to making the final selection for promotion, the department director must ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.
- (b) Proficiency advancement; noncompetitive promotion.
 - (1) Proficiency advancement. A department director may approve a noncompetitive promotion of an employee who has passed all required examinations and meets the requirements for a proficiency advancement from an entry or training level class to the designated budget level class within the same occupational series.
 - (2) Noncompetitive promotion.

* * *

(D) Noncompetitive promotion is the prerogative of management and not a right or entitlement of an employee. An employee may not file a grievance or appeal over the denial of a noncompetitive promotion.

§ 27-4. Appeal of promotional action.

- (a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.
- (b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. Grievances, provides in pertinent part:

§ 34-9. Grievance procedure.

- (d)(2) The grievant has the burden of proof in a grievance on any other issue.

§ 34-10. Appeal of a grievance decision.

- (a) An employee with merit system status may appeal a grievance decision issued by the CAO to the MSPB under Section 35 of these Regulations.

ISSUE

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

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over the Denial of a Noncompetitive Promotion

A noncompetitive promotion is the prerogative of management and not a right or entitlement of an employee. MCPHR, 2001, § 27-2(b)(2)(D). The regulation on noncompetitive promotion also specifically provides that "An employee may not file a grievance or appeal over the denial of a noncompetitive promotion." *Id.* Thus, it is clear that any attempt to appeal or grieve the denial of a noncompetitive promotion is outside the Board's jurisdiction. *Cf.*, MSPB Case No. 15-21 (2015) (MSPB has no jurisdiction over noncompetitive appointment); MSPB Case No. 14-13 (no jurisdiction over denial of noncompetitive reappointment).

Although Appellant does not expressly assert a claim of equitable estoppel against the County, that argument might be inferred from Appellant's claim that when he was hired he "was told by OHR upper management at the time, that if I successfully completed my probationary period year of performing the duties of the HR Specialist III position, that I would be put into that position noncompetitively." Appellant's Reply at 2. As the record contains no documents to corroborate that claim, we presume that any such representations were made orally.

We find that Appellant has not sufficiently alleged the elements of equitable estoppel. Appellant cannot rely solely on oral misrepresentations. *United States v. Vanhorn*, 20 F.3d 104, 112 (4th Cir. 1994) ("estoppel against the Government cannot be premised on oral representations"). Moreover, Appellant did not allege that any County employees engaged in affirmative misconduct. *Perez Peraza*, 114 M.S.P.R. 457 (2010) (Affirmative misconduct is a prerequisite for invoking equitable estoppel against the government; negligent provision of

misinformation does not constitute affirmative misconduct). Further, Appellant did not claim that he relied on the alleged misrepresentation to his detriment. There is nothing in the record to suggest that Appellant would have refused to accept the position into which he was originally hired had he known that a noncompetitive promotion to Human Resources Specialist III was not automatic upon successful completion of his probationary period. *King v. Office of Personnel Management*, 114 M.S.P.R. 181, 189 (2010)(equitable estoppel against the government requires that appellant have reasonably relied on a misrepresentation to his detriment and that he had changed her position for the worse or relinquished a valuable right). *See Gontrum v. Mayor and City of Baltimore*, 182 Md. 370, 378 (1943) (estoppel cannot be applied against a governmental defendant in a contract action).

Even were Appellant able to prove the elements necessary for estoppel, that doctrine may not be used to confer jurisdiction on the Board. *See Dunklebarger v. Merit Systems Protection Board*, 130 F.3d 1476, 1480 (Fed. Cir. 1997) (principles of estoppel do not apply to vest the Board with subject-matter jurisdiction); *Anderson v. Merit Systems Protection Board*, 12 F.3d 1069, 1069-71 (Fed. Cir. 1993) (doctrine of equitable estoppel does not confer Board jurisdiction where agency misled employees regarding the nature of their appointments); *Walton v. Dept. of Navy*, 42 MSPR 244, 249-50 (1989) (“subject matter jurisdiction cannot be conferred by estoppel based on misrepresentations”); *Morris v. Dept. of Interior*, 11 MSPR 126, 128 (1982) (“Jurisdiction may not be conferred on the Board by estoppel based on an appellant’s reliance on an agency’s misrepresentation.”). *Cf., Heartwood 88, Inc. v. Montgomery County*, 156 Md. App. 333, 371-72 (2004); *Gontrum*, 182 Md. at 378.

Accordingly, for the reasons discussed above, insofar as Appellant asserts entitlement to a noncompetitive promotion the Appeal must be denied for lack of jurisdiction.¹

Appellant Failed to Carry His Burden of Proof Regarding Nonselection or Nonpromotion

Although Appellant asserted that he is entitled to a noncompetitive promotion, which we address above, he nevertheless applied and interviewed for a competitive promotion to a Human Resources Specialist III position (IRC 19438). Appeal at 1. Appellant contests the decision not to select him for the position of Human Resources Specialist III.

In a nonselection or nonpromotion case an appellant has the burden of proving that the County’s decision not to promote him was arbitrary, capricious or based on other non-merit

¹ Among the documents Appellant submitted with his Appeal was a copy of § 5 of the MCPR Equal Employment Opportunity regulations. Appellant highlighted the portion of MCPR § 5-1(c) indicating that the regulations involving employment discrimination specifically address promotions. However, the Appeal itself and Appellant’s Reply do not appear to raise any allegations of employment discrimination. To the extent Appellant may have intended to raise such issues, the Board would be obligated to dismiss that portion of the appeal as the Board lacks jurisdiction over appeals that allege human rights violations. The County Code is explicit in requiring 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). To the extent that Appellant is alleging nonpromotion due to employment discrimination, the Board lacks jurisdiction over the appeal. *See* MSPB Case No. 14-40 (2014); MSPB Case 15-04 (2015); MSPB Case 15-31 (2015); *See also* MCPR § 5-4 (MSPB not listed as an agency where EEO complaints may be filed).

factors. Montgomery County Code, § 33-9(c). The Board concludes that Appellant has failed to meet this burden.

Appellant's grievance and response to the County's submission asserts that he should not have had to compete for appointment to a Human Resources III position, but fails to identify how the County's decision to conduct a competitive recruitment was arbitrary and capricious or otherwise illegal. It was a prerogative of management to engage in a competitive recruitment and, while the Board may or may not have taken action in the same manner, the Board cannot substitute its judgment when management is taking a discretionary action. *See* MSPB Case No. 13-14; MSPB Case No. 84-70 (1984).

Nor has Appellant demonstrated that the County's decision to cancel the recruitment and repost the vacancy was improper. All applicants were notified that no selection would be made, and under MCPR § 6-9 the OHR Director may "abolish an eligible list for good cause." Modifying the qualifications of the position to be more focused on labor relations and collective bargaining appears to be good cause within the Director's discretion for canceling recruitment IRC 19438 and initiating IRC20188.

The Board finds that Appellant has failed to meet his burden of showing that the County's decision to deny him a promotion to the position of Human Services Specialist III with OHR was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board denies Appellant's appeal of his nonselection or nonpromotion for the position of Human Services Specialist III with OHR.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
September 22, 2016

CASE NO. 16-15

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of Montgomery County's Office of Human Resources (OHR) Director to rescind a conditional offer of employment made to Appellant. The Appeal was filed April 25, 2016, and the County filed its response to the appeal (County's Response) on May 26, 2016. The Appellant did not exercise his right to make final

comments in reply to the County's submission. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a position as a Revenue Counter with the Montgomery County Department of Transportation, Parking Management Operations (DOT). As the job title suggests, the position involves counting and preparing for deposit currency and coins collected from parking meters and Ride-On Transit buses. *See* Class Specification, Code No. 004534 (October 2014).

On March 25, 2016, Appellant was given a conditional job offer that specifically advised him that he should "understand that this conditional offer of employment is also conditioned on the accuracy of the non-medical information that you have provided during the application process, and on the absence of any additional information that materially bears upon your qualifications and suitability for employment." County's Response, Attachment 1.

Appellant's job application included a resume. County's Response, Attachment 3. Appellant's resume indicates under "Professional Experience" that he was employed as a "Finger Printing Specialist" by "American Finger Printing, Bethesda, MD." Appellant's resume provides as the dates of employment "July 2011 - Present." *Id.*

The reference check by OHR revealed that Appellant was not then working for American Fingerprinting Services, and that he had only worked for that company for three to five months about four years ago.¹ County's Response, Attachments 4 and 5. The OHR employee conducting the reference check obtained that information from the owner of American Fingerprinting Services.

In a letter dated April 22, 2016, and attached to the Appeal, Appellant asserts that he discussed his current status with American Fingerprinting Services with the interview panel and told them that he was "an on call or as needed employee" and had never been terminated. Appellant's Letter dated April 22, 2016. After receipt of the Appeal, the OHR employee who conducted the reference check contacted the three members of the interview panel to find out whether Appellant had explained to the panel that he listed himself as currently working for American Fingerprinting Services because he was an "on call or as needed employee" and had never been terminated. According to the panel members, they did not discuss Appellant's resume and Appellant made no mention of his employment status with American Fingerprinting Services. County's Response, Affidavit of D.B., May 25, 2016, Attachment 5.

On April 13, 2016, Appellant was notified by the OHR Director that the conditional offer of employment was withdrawn because of "inaccurate information provided by [Appellant] with respect to [his] employment history and the subsequent reference information obtained" by the County. County's Response, Attachment 2.

¹ Appellant's resume apparently contains a typographical error as the name of the fingerprinting company is American Fingerprinting Services rather than American Finger Printing. Attachment to Appeal, Letter from the American Fingerprinting Services, dated April 22, 2016.

POSITIONS OF THE PARTIES

Appellant:

- Appellant listed his employment status with American Fingerprinting Services as “2011 to Present” because he was an “as needed” employee and had never resigned or been terminated
- Appellant explained the nature of his employment status with American Fingerprinting Services during his job interview
- Appellant gave the County recruiters contact information for the owner of American Fingerprinting Services
- The owner of American Fingerprinting Services confirms that Appellant was a part time, “as needed” employee, had not resigned, was never terminated, and was welcome to work any time
- Since he never technically left the employ of American Fingerprinting Services, Appellant’s resume was accurate
- Thus, because Appellant never technically left the employ of American Fingerprinting Services his resume was accurate and the conditional offer should not have been rescinded

County:

- The OHR background/reference check revealed that Appellant was not currently working for American Fingerprinting Services and that he only worked at the company for 3-5 months about 4 years ago.
- Appellant’s resume entry listing his employment with American Fingerprinting Services as “2011 – Present” is “misleading at best, and more likely knowingly false and inaccurate”
- The letter from American Fingerprinting Services is inconsistent with the information obtained in the reference check
- There is no indication that Appellant has actually been called to work by American Fingerprinting Services since 2011
- Appellant did not explain the “on call or as needed” distinction to the interview panel.
- 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 LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Merit System Law, 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, 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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

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, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

§ 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: . . .

(2) the applicant submits inaccurate or false information in the application or associated forms.

§ 6-14. 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

Was the County’s decision to rescind the conditional offer of employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factor?

ANALYSIS AND CONCLUSIONS

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, § 33-9(c); MSPB Case No. 15-01 (2015). The Board concludes that Appellant has failed to meet this burden.

We have held in prior decisions that failure to provide complete and accurate information during the application process constitutes a sufficient basis to rescind an offer of employment. *See* MSPB Case No. 15-01 (2015) (County may withdraw a conditional offer of employment if an applicant submits inaccurate or incomplete information); MSPB Case No. 11-07 (2011) (“falsification is serious misconduct which affects an individual’s reliability, veracity, trustworthiness and fitness for employment.”).

Moreover, the position at issue is one that involves the handling of money. The trustworthiness of a candidate for such a position is critical. *See* MSPB Case No. 15-23 (2015) (Trust is of paramount importance in a position that is responsible for handling financial transactions).

Appellant's resume indicates under "Professional Experience" that he was employed by American Fingerprinting Services from "July 2011 - Present." That entry would clearly suggest to any reasonable reader that Appellant is currently employed by and working for American Fingerprinting Services. However, the reference check by OHR revealed that Appellant had only worked for American Fingerprinting Services for three to five months about four years ago. County's Response, Attachments 4 and 5. Appellant has provided no evidence indicating that he had actually worked for American Fingerprinting Services at any time in the last four years. Under these circumstances, Appellant is unable to show how the County's conclusion that the resume entry was misleading and inaccurate was unreasonable, let alone arbitrary and capricious or otherwise illegal.

Appellant attempts to diminish the damaging impact of his inaccurate and misleading resume entry by claiming that during his job interview he explained his job status at American Fingerprinting Services when asked about the position. Appellant's Letter dated April 22, 2016. However, according to the sworn Affidavit of D.B., the three members of the interview panel only asked the structured interview questions and denied that Appellant brought up his employment status with American Fingerprinting Services during the interview. County's Response, Attachment 5.² Indeed, this is consistent with the County's guidance for conducting job interviews. *See Selection Guidelines for Montgomery County: A Users Guide For Hiring Managers*, (Revised 6/3/16), pp. 13, 30. Accordingly, we are not persuaded by Appellant's claim that he discussed his status with American Fingerprinting Services during his job interview.

With his Appeal, Appellant submitted a "clarification" letter from the owner of American Fingerprinting Services. Attachment to Appeal, Letter from the American Fingerprinting Services, dated April 22, 2016. However, Appellant did not provide the County with that letter prior to the decision to rescind the conditional offer. The Board has held that its decision will be based on the written record in the application process and, absent extraordinary circumstances, it will not consider evidence that was not submitted during the application process. No such extraordinary circumstances are present here.³

In any case, the letter does not provide any useful information concerning how recently Appellant actually worked for American Fingerprinting Services, merely saying that the owner considers Appellant to be an "as needed" employee welcome to work at any time. The letter does not contradict the information obtained during the reference check that Appellant had last worked for American Fingerprinting Services for three to five months about four years ago. Consequently,

² Hearsay, such as that contained in the Affidavit of D.B., is of course admissible in an administrative proceeding. Montgomery County Code, Administrative Procedures Act, § 2A-8(e).

³ For example, in MSPB Case No. 15-23 (2015) and MSPB Case No. 15-14 (2015), the appellants included in their appeals of their nonselections evidence that they had not submitted with their applications. The Board held in those cases that its decision will be based on the written record in the application process and, absent extraordinary circumstances, it will not consider evidence that was not submitted during the application process.

the Board cannot say that the County's decision that Appellant provided inaccurate and incomplete information as part of the application process was arbitrary, capricious, or otherwise unlawful based on the record before it at the time of its decision.⁴

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Revenue Counter with DOT.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
August 24, 2016

CASE NO. 17-05

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's September 27, 2016, appeal of the decision of the Department of Liquor Control (DLC or Department) not to select him for a position as a Liquor Store Manager. The County filed its response (County Response) to the appeal on January 4, 2017, asserting that DLC appropriately selected better candidates and that Appellant is unable to show that the County acted in a manner that was arbitrary and capricious, illegal, based on political affiliation or other nonmerit factors, or in violation of examination and scoring procedures. The Board considered the appeal record and has reached this decision.

FINDINGS OF FACT

In September 2015, the County initiated a competitive promotion process, limited to County employees, to create an eligible list for DLC Liquor Store Manager vacancies. County Response, Attachment 1, vacancy announcement IRC19299. On September 21, 2015, Appellant applied for the position of Liquor Store Manager with DLC. County's Response, p. 1. The County had two Liquor Store Manager vacancies, one each at the Goshen and Pike stores.

⁴ While the Board finds that the County was within its rights to withdraw Appellant's job offer in light of the discrepancy between his resume and the information obtained in the reference check, we suggest that the County consider giving job applicants with conditional offers an opportunity to explain issues raised in reference checks prior to withdrawing offers. Providing such an opportunity should, of course, be done in a manner that is consistent with the Public Information Act and other applicable laws. *See* General Provisions Article, § 4-310 ("A custodian shall deny inspection of a letter of reference.").

Appellant was among the fifteen applicants for the Liquor Store Manager position who met the minimum qualifications, passed the examination, and were placed on the eligible list. County Response, p. 1 and Attachment 2 (Affidavit of C.C.), ¶3. Appellant and two other applicants had scores of 92 on the examination, while seven other applicants had scores higher than 92. *Id.* All fifteen of the applicants on the eligible list were interviewed. County Response, p. 2.

Appellant has been employed by DLC for some 30 years and as an Assistant Liquor Store Manager for over 18 years. Appeal, p. 2; Appellant's Submission (December 1, 2016), p. 34. The County acknowledges that Appellant had more seniority with DLC and as an Assistant Liquor Store Manager than the two applicants selected for the Liquor Store Manager positions at the Goshen and the Pike stores. County Response, p. 2. However, other than the minimum qualifications for experience (3 years of retail liquor store experience, 1 year as Liquor Store Assistant Manager), and as a reflection of job related experience, seniority itself was not a selection criterion. County Response, Attachment 1. Moreover, the two selected applicants had higher test scores and performed better than Appellant in the interviews. *Id.* The interview panel developed consensus ratings for eight interview questions. The panel gave one of the selected applicants ratings of one above average, three slightly above average, and four average ratings on the interview questions. The other selected applicant received ratings of one above average, one slightly above average, five average, and one slightly below average on the eight questions. *Id.* The interview panel rated Appellant with four average and four slightly below average for the interview questions. County Response, Attachment 2, ¶3.

Appellant claims that on May 12, 2016, R.H., a DLC Field Supervisor orally promised that Appellant would be selected for the next promotion to Store Manager. Appeal, p. 2; Appellant's Submission, pp. 13, 32. On September 1, 2016, Ms. C.C., the Office of Human Resources (OHR) Recruitment and Selection Team member handling the recruitment process received an e-mail from Appellant stating that he had received a verbal job offer from R.H. The County provided an affidavit from Ms. C.C. indicating that she looked into Appellant's claim and that D.W., the Manager of the DLC Retail Division and Ms. R.H., the field supervisor identified by Appellant, both denied that Appellant had been promised or offered a promotion. County Response, Attachment 2, ¶4. The County did not provide affidavits from the DLC managers themselves.

As the eligible list for the Liquor Store Manager position (IRC 19299) will not expire until June 2017, there is a possibility that Appellant could be selected for any future vacant positions from the current list. County Response, p. 2 and Attachment 2, ¶5.

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?

POSITIONS OF THE PARTIES

Appellant:

- Appellant believes that despite his long service with DLC and as an Assistant Liquor Store

- Manager he has been wrongfully passed over for a promotion on several occasions.
- Given his experience and high test score, Appellant questions how the selected applicants were more qualified.
- As relief, Appellant requests appointment to a Liquor Store Manager position.

County:

- Appellant was in competition with 15 qualified applicants on the eligible list.
- The selected individuals were in the highest rating category, had higher test scores than Appellant, and performed better than Appellant in the interviews.
- The personnel regulations permit the agency to select an applicant from the highest rating category.
- Appellant has not met his burden of proof that the County’s decision was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or that announced examination and scoring procedures were not followed.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action, which provides, in pertinent 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, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016.) Section 6, Recruitment and Application Rating Procedures, which provides, in pertinent part:

§ 6-9. Eligible list.

After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories. The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

§ 6-14. 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, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, *Appointments, Probationary Period, and Promotional Probationary Period*, which provides, in pertinent 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 (As amended June 30, 2015), Section 27. *Promotion*, provides in relevant part:

§ 27-2. Types of promotion.

(a) **Competitive promotion.** Prior to making the final selection for promotion, the department director must ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

§ 27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

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), Section 35, *Merit System Protection Board Appeals, Hearings and Investigations*, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

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

ANALYSIS AND CONCLUSIONS

Appellant has the burden of proving that the County's decision not to select him for a Liquor Store Manager position was arbitrary, capricious, or based on other non-merit factors. Montgomery County Code, § 33-9(c); MSPB Case No. 15-01 (2015). The Board concludes that Appellant has failed to meet this burden.

The County conducted a competitive promotion process limited to County employees. It is undisputed that Appellant was one of 15 applicants on the eligible list, there were 9 applicants with either the same or higher examination scores than Appellant, and the two applicants selected to fill the Liquor Store Manager vacancies at the Goshen and Pike stores both had higher examination and interview scores than Appellant. Selection of a higher rated candidate is consistent with the County personnel regulations. MCPR, § 7-1. Accordingly, we find that the County has provided a legitimate explanation and justification for the Liquor Store Manager promotion decisions.

Appellant stresses his long tenure and experience with DLC and as an Assistant Liquor Store Manager in an apparent attempt to demonstrate he is better qualified than those selected. While Appellant's lengthy service is admirable, except for the minimum qualifications specified in the IRC19299, seniority itself was not a selection criterion. Appellant has not provided any other evidence or argument to show that he is clearly more qualified than the selected applicants. In a non-selection case, the Board will not substitute its judgment for that of the hiring official unless the Appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 06-02 (2006).

Appellant claims that on May 12, 2016, he received a telephone call from DLC retail supervisor R.H. telling him that he "would be the next to be promoted to Liquor Store Manager." Appeal, p. 2; Appellant's Submission, pp. 13, 32. Although Appellant has consistently asserted that the oral assurance was made, his attempts to obtain written confirmation were unsuccessful. The County denies that the promise was made by providing an affidavit from the OHR recruitment coordinator, C.C., who says she spoke to R.H. who denied making the assurance to Appellant. County Response, Attachment 2, ¶4. Inexplicably, the County did not introduce an affidavit from R.H. herself.

Hearsay, such as that contained in the Affidavit of C.C., is admissible in an administrative proceeding. Montgomery County Code, Administrative Procedures Act, § 2A-8(e). Nevertheless, we are obligated to take into consideration the reliability of such second level hearsay, also referred to as "hearsay within hearsay." *See Travers v. Baltimore Police Department*, 115 Md. App. 395, 413 (1997). The County's failure to even provide an explanation for why it did not produce an affidavit from R.H. raises concerns over the reliability of the hearsay contained in C.C.'s affidavit. *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725-26 (1989). For these reasons we will credit Appellant's claim that he received some sort of an oral assurance about the next Liquor Store Manager opening from R.H.

Notwithstanding the oral statement, Appellant has not sufficiently alleged the elements of equitable estoppel that might justify binding the County to a promise by R.H. *See* MSPB Case No. 16-07 (2016). Estoppel against the government may not be grounded on oral representations.

Heckler v. Community Health Services, 467 U.S. 51, 65 (1984) (“estoppel cannot be erected on the basis of oral advice”). See *United States v. Vanhorn*, 20 F.3d 104, 112 (4th Cir. 1994) (“estoppel against the Government cannot be premised on oral representations”). Furthermore, Appellant did not allege that R.H. or any other County employee engaged in affirmative misconduct. *Perez Peraza*, 114 M.S.P.R. 457 (2010) (Affirmative misconduct is a prerequisite for invoking equitable estoppel against the government; negligent provision of misinformation does not constitute affirmative misconduct).

Moreover, Appellant also cannot demonstrate the elements of estoppel against the County because he has not shown that R.H. was authorized to make an oral commitment that he would be promoted. Estoppel against the government may only be predicated upon the acts of those acting within the scope of their authority. *City of Baltimore v. Chesapeake Marine Ry. Co.*, 233 Md. 559, 580 (1964) *overruled, in part, on other grounds by Travelers Indem. Co. v. Nationwide Const. Corp.*, 244 Md. 401, 414-16 (1966); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (“anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority”).

Further, there is nothing in the record to suggest that Appellant somehow relied on the oral promise to his detriment. *King v. Office of Personnel Management*, 114 M.S.P.R. 181, 189 (2010) (equitable estoppel against the government requires detrimental reliance such as relinquishing a valuable right). See *Gontrum v. Mayor and City of Baltimore*, 182 Md. 370, 378 (1943) (estoppel cannot be applied against a governmental defendant in a contract action).

Accordingly, we hold that Appellant is not entitled to estoppel against the County for the oral statement of R.H., and has not met his heavy burden of proving that the County’s decision on his application for promotion was in any way arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors.

ORDER

For the foregoing reasons, the Appeal of Appellant’s non-selection for the position of Liquor Store Manager, is hereby **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
March 6, 2017

CASE NO. 17-10

FINAL DECISION AND ORDER

On November 21, 2016, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board), challenging a determination by the County not to promote him to the position of Transit Information Systems Technician (TIST) with the Montgomery County Department of Transportation (DOT or Department). On December 22, 2016, the County filed a response to the appeal (County Response). Appellant filed a reply to the County's response on January 3, 2017 (Appellant's Response). On January 17, 2017, the Board requested additional information from the County, and on February 2, 2017, the County provided a supplemental response (County's Supplemental Response). Appellant filed a final reply on February 6, 2017. (Appellant's Rebuttal).

FINDINGS OF FACT

On July 22, 2016, Appellant applied for the position of Transit Information Systems Technician (vacancy announcement IRC22356) with DOT.¹ County's Response p. 1; County's Supplemental Response, Attachment 1. On August 24, 2016, Appellant was informed by the County Office of Human Resources (OHR) that he was not qualified for the TIST position because he lacked the required Commercial Driver's License. Appellant appealed that determination to the Board. After receiving the appeal, OHR reevaluated Appellant's application and concluded that he had improperly been deemed not qualified because a CDL was not required until after hiring. Appellant's status was changed from not qualified to "rater review" or qualified. As a result, Appellant's appeal was dismissed as moot. See MSPB Case No. 17-03 (2016).

This appeal was filed after Appellant was not selected for a TIST position despite having been included on the list of qualified candidates. Although Appellant was one of 13 applicants who met the minimum qualifications for the position, he did not receive enough points to be rated "Well Qualified" due to a below average score of five points (out of 20) on the criterion "Experience working with WLAN and LAN hardware and network equipment." County Response, p. 2. Although the County's initial response indicated that two subject matter experts rating the applicants had agreed on Appellant's below average rating, the County did not provide the Board with a specific explanation of the factual basis for the rating. County Response, p. 2. Consequently, by letter dated January 17, 2017, the Board requested that the County provide a more complete explanation for its actions:

The Board would appreciate a fuller explanation as to why Appellant was not rated Well Qualified, including factual specificity as to why Appellant received a below average rating on the criteria "Experience working with WLAN and LAN hardware and network equipment." The Board also requests that the County provide the specific reasons the five applicants rated as Well Qualified were more qualified than Appellant. In that regard, the Board would especially like the County's explanation of why it believes the selected applicant was better qualified for the

¹ The Appeal erroneously referenced IRC23010, a vacancy announcement for a mail clerk position. The parties have informed the Board that they agree that IRC22356 is the correct vacancy announcement at issue in this appeal.

position than Appellant. The County's response should, where necessary and appropriate, include sworn statements and supporting documentation.

In response to the Board's request the County's February 2, 2017, supplemental response provided more detailed explanations and sworn statements.

Vacancy announcement IRC22356 sets out a detailed job description of the TIST position, the minimum qualifications, and the preferred criteria. County Response, Attachment 1; County Supplemental Response, Attachment 1. The applications of those candidates deemed to have met the minimum qualifications listed in the vacancy announcement were then reviewed, using the preferred criteria in the vacancy announcement, by two subject matter experts, Mr. V and Mr. B County Supplemental Response, p. 2.²

Based on the results of the evaluation, applicants meeting the minimum qualifications were rated as either "Well Qualified" or "Qualified." With regard to the preferred criteria that would be used in the rating process, the vacancy announcement emphasized in bold lettering that an applicant must include specific information related to the preferred criteria in his or her resume:

Resume 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. The system only allows for one document to be submitted so your preferred criteria must be part of the resume.

County's Response, Attachment 1, p. 4 (emphasis in original).

The preferred criteria listed in the vacancy announcement were:

1. Experience interpreting and applying schematics, wiring diagrams, troubleshooting guides, and operation and maintenance manuals to solve complex problems.
2. Experience maintaining any of the following: Computer Aided Dispatch and tracking, video surveillance, and/or revenue collection systems and components.
3. Ability to work independently to solve complex technical issues with electronic systems and components.
4. Experience working with WLAN and LAN hardware and network equipment.
5. Strong written and oral communication skills, such as presentations, briefings, reports, proposals, etc.

County's Response, Attachment 1, p. 4.

² Mr. V. is an information technology manager with 30 years of experience in both hardware and software, and has served as an IT Manager for the County and DOT Transit. County Supplemental Response, Attachment 4, ¶1. Mr. B. is a Senior Transit Information Systems Technician who has worked for DOT almost 29 years. County Supplemental Response, Attachment 5, ¶1.

Using the preferred criteria listed in the vacancy announcement, the subject matter experts rated five candidates as Well Qualified, with scores ranging from 60 to 75. County Supplemental Response, p. 4; Attachment 4, ¶5. A minimum score of 60 was required to be rated as Well Qualified. *Id.* Appellant was rated with a score of 50. *Id.* According to both subject matter experts, Appellant did not receive enough points to be rated “Well Qualified” in large part due to a below average score of 5 points (out of 20) on criterion 4, “Experience working with WLAN and LAN hardware and network equipment.” County Supplemental Response, p. 3; Attachment 4, ¶5; Attachment 5, ¶5.

Reviewing Appellant’s resume, Mr. V concluded that: “No experience working with LAN or WAN or network equipment was mentioned - no routers, no hubs, no switches.” County Supplemental Response, p. 3; Attachment 4, ¶5. Mr. B’s review of Appellant’s resume led him to find that Appellant “did not mention any experience working with this type of equipment, no access points, hubs, routers or even switches.” County Supplemental Response, p. 3; Attachment 5, ¶5. Mr. B also noted that “the other applicants . . . provided examples of some type of experience working with or having been trained on this equipment or having enough knowledge through other sources to justify a higher rating.” *Id.* While Appellant has asserted that he has WLAN and LAN experience from his temporary promotion to a TIST position, Appellant’s Rebuttal, p.1, his application and resume lacked any reference to experience working with WLAN and LAN hardware and network equipment. County Supplemental Response, Attachment 3.³

The candidates deemed “Well Qualified” all scored higher on criterion 4, with one receiving a score of 10, two a score of 15, and two receiving the maximum score of 20. County Supplemental Response, p. 4. In contrast to Appellant, all of the other candidates had experience with routers, hubs or switches. County Supplemental Response, Attachment 4. One of the applicants had a Computing Technology Industry Association (CompTIA) certification in Network+ and Security, and had worked directly with Cisco switches. Another applicant had WAN experience working with digital signs, while yet another applicant had experience with LAN related network settings as well as with switches and overall network signaling. *Id.*

As noted above, Mr. B also concluded that all of the other applicants provided examples of experience working with or having been trained on access points, hubs, routers or switches. County Supplemental Response, Attachment 5. Mr. B noted that one applicant had daily work experience with cable equipment, performed network trouble shooting, and was CompTIA Network+ certified. *Id.* Another applicant demonstrated experience in the criterion 4 subject matter by, in part, providing specific examples. Yet another applicant had knowledge in WLAN/LAN and had installed and terminated cable for Power over Ethernet access points. *Id.*

Appellant’s total score also suffered because of his rating on preferred criteria 3, “Ability to work independently to solve complex technical issues with electronic systems and components,” Appellant received a score of 10 while all of the “Well Qualified” applicants had scores of 15 or

³ Appellant’s resume did state that he had experience maintaining communications equipment, apparently checking antenna strength and functionality. Appellant’s Response, p. 8 (“checking the antennas (GPS, LAN and RADIO) and replacing the antennas when broken or not functioning properly, replacing radios and or radio handsets when needed and checking fuses and power to radio when trouble-shooting.”).

20. County Supplemental Response, pp. 4-5, Attachment 4, ¶5. According to the subject matter experts, because Appellant’s resume does not reflect significant experience solving complex issues or working independently he was given an average score. *Id.* On the other hand, all of the Well Qualified candidates had held positions requiring substantial independent work. *Id.*

The County provided evidence supporting a determination that the two “Well Qualified” applicants selected for the TIST positions were better qualified than Appellant.⁴ Applicant 1 has a B.A. degree in Electrical Engineering and almost 12 years of experience in electronics. County Supplemental Response, p. 5. Applicant 1 also had experience as a supervisor of CSX switch technicians. County Supplemental Response, Attachment 4, ¶5. Applicant 2 has a B.A. degree in Information Technology and almost seven years of experience in electronics. *Id.*; County Supplemental Response, Attachment 6, ¶4. Appellant has a certificate from Computer Learning Centers and has significantly less experience in electronics than the two selected candidates. County Supplemental Response, Attachment 3.

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?

POSITIONS OF THE PARTIES

Appellant:

- The County’s decision to not interview Appellant for the position was arbitrary and capricious.
- Appellant performed all of the functions of the TIST position for 29 months between 2011 and 2013.
- Appellant performed all functions, including WLAN & LAN duties, proficiently during his PACE and temporary appointment.
- Three vacancies for TIST positions have been filled since then and the only time Appellant got an interview for the position was as a result of a decision in MSPB Case No. 13-12.
- Appellant believes that the County is refusing to promote him in retaliation for his previous complaints to the MSPB.
- As relief, Appellant requests appointment to a TIST position.

County:

- Appellant was in competition with 12 other qualified applicants, including 5 who were in a higher rating category (“Well Qualified”).
- The personnel regulations permit the agency to select an applicant from the highest rating category.

⁴ The County also provided an explanation of the reasons why the three “Well Qualified” applicants not selected were nevertheless superior to Appellant. County Supplemental Response, p. 4 and Attachment 4.

- The selected individuals were not only in the highest rating category, but also significantly better qualified than Appellant.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action, which provides, in pertinent 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, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which provides, in pertinent part:

§ 6-5. Competitive rating process.

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

. . .

§ 6-14. 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, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which provides, in pertinent 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 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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.

ANALYSIS AND CONCLUSIONS

The Personnel Regulations require that a job vacancy announcement include the rating process and rating criteria that will be used to create an eligible list. MCPR, § 6-5(b). The Board finds that the recruitment in connection with vacancy announcement IRC22356 complied with this requirement. The vacancy announcement clearly describes the applicant rating process. The announcement explicitly stated that Appellant must include information specific to the preferred criteria. County's Response, Attachment 1, p. 4. One of the preferred criteria was experience with WLAN and LAN hardware and network equipment. *Id.*

Appellant argues that he was improperly rated in that, he had performed all functions including WLAN & LAN duties proficiently during his PACE and temporary appointment to a TIST position. Appellant's Response, p.1; Appellant's Rebuttal, p. 1. However, the Board has reviewed Appellant's resume and finds a paucity of information with regard to Appellant's experience with WLAN and LAN hardware and network equipment. Appellant received a below average rating because the resume Appellant submitted with his application did not include reference to experience working with WLAN and LAN hardware and network equipment. Thus, the County properly evaluated the information provided in Appellant's application and, as a result, Appellant's score suffered.

Appellant notes that in one of his previous appeals, MSPB Case No. 13-12 (2013), the Board found that the County had acted arbitrarily and capriciously when it failed to find that Appellant met the minimum qualifications for the TIST position after having been temporarily promoted to the position. In that case the Board ordered that Appellant be given priority consideration. The County then gave Appellant priority consideration, interviewing him before any other candidates, but hired someone else. Appellant appealed that non-selection and, in MSPB Case No. 14-39 (2014), the Board specifically found that Appellant's temporary service in the TIST position did not require a conclusion that he be rated higher. The Board held that Appellant's lower rating was because he "simply did not interview well" and upheld the County's decision not to promote Appellant. *Id.*, at p. 6. Similarly, in this case it appears that Appellant simply did not submit a well written resume and application. The County is entitled to assume that an applicant has put his best foot forward in drafting his resume and that the resume reflects an his preferred experience in the best light possible. As the Board has held in previous cases, "[i]t is Appellant's

responsibility to ensure that his resume reflects his qualifications for the position he is seeking.” MSPB Case No. 15-07 (2015).

Appellant argues that because the County lost MSPB Case No. 13-12 when it did not rate him as qualified, his rating in this recruitment must also be incorrect. Appellant alleges that “the County since 2013 has been enthralled with a pay me back complex as it relates to my pursuit of advancing in employment opportunities.” Appeal, p.2. Beyond mere speculation, Appellant has not provided any evidence to support his belief. Accordingly, Appellant has not met his heavy burden of proving that the County’s decision was arbitrary, capricious or based on other non-merit factors. Montgomery County Code, § 33-9(c); MCPR, § 34-9(d)(2).

The County has offered legitimate reasons for selecting applicants other than Appellant for the TIST position. The County provided persuasive evidence supporting a determination that the two “Well Qualified” applicants selected for the TIST positions were better qualified than Appellant. The individuals selected certainly had suitable credentials to be rated “Well Qualified,” while Appellant was appropriately rated “Qualified,” a lower rating category. As noted above, Appellant’s suggestion that his experience in the TIST position should ensure that he be rated higher was specifically rejected by this Board in MSPB Case No. 14-39, at p. 6.

Selection of a higher rated candidate is consistent with the County personnel regulations. MCPR, § 7-1. It is telling that in his rebuttal to the County’s supplemental response concerning the specific qualifications of the selected applicants Appellant made no attempt to explain in what way he is better qualified. In a non-selection case, the Board will not substitute its judgment for that of the hiring official unless the Appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 06-02 (2006).

Appellant has failed to demonstrate that the County’s decision on his application was in any way arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

For the foregoing reasons, the Appeal of Appellant’s nonselection for the position of Transit Information System Technician (IRC22356), is hereby **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
February 27, 2017

APPEALS PROCESS GRIEVANCES

In accordance with § 34-10(a) of the Montgomery County Personnel Regulations (MCPR), 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 2017, the Board issued the following grievance decisions.

CASE NO. 16-19

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the decision of the Montgomery County's Office of Human Resources (OHR) Director to extend Appellant's probationary period. The Appeal was filed May 24, 2016, and the County filed its response to the appeal (County's Response) on June 27, 2016. Appellant filed final comments in reply to the County's submission (Appellant's Reply) on July 12, 2016. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Effective April 6, 2015, Appellant was hired by the Montgomery County Office of Human Resources as a Human Resources Specialist II. Appeal, Exhibit A; County's Response, Exhibit A. On April 5, 2016, one day before the expiration of his 12 month probationary period, Appellant's supervisor, L.O., met with him and advised him that his probationary period was being extended for an additional six months, until October 3, 2015. County's Response, Exhibits B, C, and D. She then provided him with written confirmation later that afternoon. *Id.*

On January 29, 2016, the OHR Director told Appellant and several other employees in the Compensation Division to report to her because the previous division supervisor had transferred to another County job. County's Response, Affidavit of OHR Director, Exhibit E. In mid-February 2016, the OHR Director delegated supervisory responsibility for Appellant to the Supervisor as the Manager for Classification and Compensation. *Id.*

Appellant alleges that the OHR Director did not inform him prior to April 6, 2016, that L.O. was his supervisor, and that there is no written documentation to support the statement in her affidavit that she had delegated supervisory responsibility of Appellant in mid-February. Appellant provided a print out from one of his HR Employee Self-Service pages that he contends shows that L.O. was not designated as his manger until June 3, 2016. Appellant's Reply, Exhibit A.

On April 5, 2016, the OHR directed L.O. to meet with Appellant and advise him that his probation was being extended for six months. County's Response, Affidavit of OHR Director, Exhibit E. As noted above, that same day Appellant's supervisor, L.O., did meet with and notify him of the decision. County's Response, Exhibits B, C, and D. Written confirmation was provided later that afternoon, to which Appellant responded in writing. *Id.*

Appellant submitted what appears to be a screen shot from the ORACLE OHR computer system and an email exchange indicating that on April 6, 2016, the ORACLE system automatically converted his status to that of a permanent employee. Appeal, Exhibit C. The County acknowledges that on April 6, 2016, the OHR computer system altered Appellant's status by default and that it was necessary to manually adjust the end date of Appellant's to October 5, 2016 in the ORACLE database. That change was made at the direction of the OHR Director on April 6, 2016. County's Response, Affidavit of OHR Director, Exhibit E.

On July 31, 2009, the prior OHR Director Joseph Adler issued a memorandum with the subject “Merit System Status.” In its entirety, the Adler memorandum said:

Montgomery County Personnel Regulation (MCPR) Section 7-2(g)(1) requires the Office of Human Resources (OHR) notify a department director of a newly appointed employee's eligibility for merit system status 60 calendar days prior to the end of the employee's probationary period. The intention of the notification is to provide the department sufficient opportunity to process the action that is to be taken, before the end of the probationary period. As provided in MCPR Section 7-2(g)(3), “*At the expiration of an employee's probationary period, a department director must: (A) grant merit status; (B) extend the probationary period; or (C) terminate the employee's appointment*”.

Under established procedures, departments are currently notified of an employee’s forthcoming merit system status date, via the transmittal of a Personnel Action Form (PAF), eight weeks before the implementation date. Commencing August 2009, the subject notification will include a reminder of the action that must be taken, by the department, in order to grant merit system status. As the mechanism for processing merit system status, the PAF is also utilized to implement an extension of the probationary period and to effect termination of employment.

As evidence that an employee is to be granted merit system status the director, or designee, must sign the PAF and return it to OHR Records Management two weeks prior to the expiration of the probationary period. If the department intends to extend the probationary period, or to take action to terminate the employee, this information must be communicated to OHR Labor Relations in a timely manner to allow sufficient opportunity for OHR to review the subject action and time for the department to implement the action before the employee’s date of eligibility for merit system status occurs. If you have questions regarding this procedure please contact your OHR Labor Relations Specialist.

Appeal, Exhibit F; County’s Response, Exhibit F (emphasis in original).

POSITIONS OF THE PARTIES

Appellant:

- The County did not provide timely written notification of a probationary period extension by April 6, 2016
- The notification on April 5, 2016, was improperly provided by a manager who was not officially designated as Appellant’s supervisor until June 3, 2016, so she had no authority to extend Appellant’s probation
- Because the OHR computer system (Oracle) automatically changed Appellant’s status to merit system, it was improper for OHR to manually change his status back to probationary

- In a July 31, 2009, memorandum the prior OHR Director changed County policy so that if a timely affirmative action was not taken by a department to extend a probationary period the default was set to grant the employee merit system status
- Since the current OHR Director was hired, extending probation and terminating employees hired under the previous administration has become the norm

County:

- The CAO specifically delegated decision making authority for extensions of probation to the OHR Director
- The OHR Director made the decision to extend Appellant’s probation and properly instructed his supervisor to implement the decision
- Appellant’s supervisor provided timely notification of the probation extension by advising him of the decision in a meeting on April 5, the day before his probationary period would have expired, then confirming the notification in writing the same afternoon
- Merit status is not granted by default. The OHR computer system’s default settings do not provide merit system rights
- The manual entry of Appellant’s probationary status in the OHR computer system was merely the correction of an inaccurate entry
- Because Appellant lacks merit system status he cannot appeal to the MSPB
- Appellant has the burden of proof, MCPR § 34-9(d), and must show that the County’s decision was arbitrary and capricious, illegal, based on political affiliation, or based on non-merit factors. Montgomery County Code, § 33-9(c)

APPLICABLE LAW AND REGULATIONS

Montgomery County Charter, Article 4, Merit System and Conflicts of Interest, which states in applicable part:

Section 401. Merit System.

The Council by law may exempt probationary employees . . . from some or all of the provisions of the law governing the merit system

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 provides, in applicable part:

§ 1-40. Merit system status: The condition achieved by a merit system employee who satisfactorily completes the required probationary period and is entitled to the rights and privileges described in these Regulations.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7.

Appointments, Probationary Period, and Promotional Probationary Period, which states in applicable part:

§ 7-2. Probationary period; promotional probationary period.

(c) *Extension of the probationary period or promotional probationary period.*

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

* * *

(g) *Merit system status*

(1) OHR must notify the department director 60 calendar days before the end of a newly appointed employee's probationary period.

(2) The department director may grant merit system status to an employee after the employee completes the required probationary period if the employee's performance, attendance, and conduct were satisfactory during the probationary period.

(3) At the expiration of an employee's probationary period, a department director must:

(A) grant merit system status;

(B) extend the probationary period; or

(C) terminate the employee's appointment.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. *Grievances*, provides in pertinent part:

§ 34-2. Eligibility to file a grievance.

(a) A merit system employee who has successfully completed the probationary period and has merit system status, including a term employee, may file a grievance on a matter described in Section 34-4.

(b) A probationary or temporary employee may file a grievance over a disciplinary action, except for an oral admonishment, but may not appeal a grievance decision by the CAO to the MSPB.

§ 34-10. Appeal of a grievance decision.

(b) A probationary or temporary employee may not appeal a grievance decision by the CAO to the MSPB.

ISSUES

1. Was Appellant's probationary period properly extended for an additional six months?
2. If so, does the Board have jurisdiction to hear the grievance appeal of a probationary employee during the employee's probationary period?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 16-04 (2015). *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

Appellant Did Not Obtain Merit System Status

It is undisputed that L.O. met with Appellant on April 5, 2016, providing him with oral and written notice that his probationary period was being extended for six months. Thus, Appellant received timely notification prior to the expiration of his probationary period

Appellant nevertheless argues that L.O. was not officially his supervisor and as a result the notification was ineffective due to her lack of authority under MCPR § 7-2(g)(3) ("At the expiration of an employee's probationary period, a *department director must . . .* (B) extend the probationary period. . .") (emphasis added). The OHR Director provided a sworn affidavit stating that L.O. was indeed appointed as Appellant's supervisor but, more importantly, the County correctly points out that the supervisory status of L.O. is irrelevant. L.O. did not make the decision to extend Appellant's probationary period. That decision was made by the OHR Director. County's Response, Affidavit of the OHR Director, Exhibit E. Whether or not L.O. was technically Appellant's supervisor, she certainly was the agent the OHR Director used to communicate her decision to Appellant prior to the expiration of his probationary period.

Appellant contends that the Adler memorandum requires that an employee receive timely written notice of a decision to extend a probationary period, suggesting that such notice should be provided two weeks prior to the expiration of the initial probationary period. The Adler memorandum does nothing of the sort. The Adler memorandum requires departments to advise OHR Labor Relations of a decision to extend probation or terminate an employee "in a timely manner to allow sufficient opportunity for OHR to review the subject action and time for the

department to implement the action before the employee's date of eligibility for merit system status occurs." Appeal, Exhibit F; County's Response, Exhibit F.¹ There is no requirement that such notification be provided to the employee. Moreover, no specific time limit for the notification to OHR is established except in cases where merit system status is to be granted, and no consequences for failure to abide by the memorandum are created. In any case, we find that Appellant did receive proper and timely notification of the extension of his probationary period.²

Appellant argues that the Adler memorandum was a policy that "put into place a procedure that unless an extension or a termination of an employee occurs before the expiration of their probationary period in ORACLE they would automatically be granted merit status at 12.01 [sic] a.m. the following day." Appeal at 1. Contrary to Appellant's arguments, the Adler memorandum does not purport to allow merit system status to be conferred by default. The memorandum merely instructs OHR to provide department directors with reminders about an employee's pending eligibility for merit system status "to provide the department sufficient opportunity to process the action that is to be taken, before the end of the probationary period." Appeal, Exhibit F; County's Response, Exhibit F. The department directors remain obligated by the regulations to affirmatively make a decision to grant merit system status, extend probation, or terminate the appointment. MCPR § 7-2(g)(3) ("a department director *must* (A) grant merit system status; (B) extend the probationary period; or (C) terminate the employee's appointment."). Indeed, the memorandum's second paragraph explicitly makes this point by noting that the notification to the departments "will include a reminder of the action that must be taken, by the department, in order to grant merit system status." Appeal, Exhibit F; County's Response, Exhibit F.

For the above reasons we conclude that OHR properly extended Appellant's probationary period and, as a consequence, Appellant lacks merit system status.

The Board Lacks Jurisdiction Over a Grievance Appeal By a Probationary Employee

As discussed above, prior to the expiration of his 12 month probationary period Appellant was advised that his probationary period was being extended, and on April 6, 2016, the OHR Director instructed her staff to take actions necessary for the County's records to reflect the extension of his probation. We find that Appellant is not employed in a permanent position, but rather remains a probationary employee. Accordingly, he is not entitled to full merit system protections, including the right to appeal a grievance to the Board.

¹ It would border on the absurd to contend that the OHR Director is obligated to formally notify herself of her own decision, and that the failure to do so in writing by a certain date must result in the cancellation of her decision to extend Appellant's probationary period and confer him with merit system status.

² While MCPR § 7-2(g)(3) mandates that a department director make a decision to grant merit system status, extend the probationary period, or terminate the employee, it does not explicitly address the consequences of a failure by a department director to make the decision prior to the expiration of an employee's probationary period. It could be argued that even had there been a failure to provide timely notification that Appellant's probationary period was being extended, merit system status would not have been conferred by that omission. Although prior decisions of this Board do suggest that the lack of an affirmative act does not result in the automatic grant of merit system status, *see* MSPB Case No. 87-57 (1987) ("attainment of merit system status is achieved only after a positive act by management and . . . such status may not be granted or attained by default"), we urge the County to simply clarify the regulation.

The Montgomery County Charter provides the County Council with the right to exempt probationary employees from some or all of the provisions of law governing the merit system. Montgomery County Charter, § 401. The County Council has acted on that authority and has generally denied probationary employees the right to file and pursue appeals with the MSPB. The County Council defined merit system employees in the Montgomery County Code as employees in “permanent career positions.” Montgomery County Code, § 33-6. Under MCPR § 1-40, an employee does not obtain merit system status and become “entitled to the rights and privileges described in these Regulations” until the employee “satisfactorily completes the required probationary period.”

The County personnel regulations specifically provide that while probationary employees may file grievances over disciplinary actions, they may not appeal grievance decisions to the MSPB. MCPR § 34-2(b) (“A probationary or temporary employee may file a grievance over a disciplinary action, except for an oral admonishment, but may not appeal a grievance decision by the CAO to the MSPB”); MCPR § 34-10(b) (“A probationary or temporary employee may not appeal a grievance decision by the CAO to the MSPB”). Indeed, because in this case the extension of Appellant’s probationary period was not a disciplinary action it is not grievable. *See* MSPB Case No. 99-01 (1998).³ The Board is simply without jurisdiction to hear the appeal of a probationary employee’s grievance, no matter what the nature of that employee’s claim.

As Appellant’s probationary period was properly extended, and an appeal of a grievance decision to the MSPB by a probationary employee is specifically barred under the County personnel regulations, the Board concludes that it lacks jurisdiction over Appellant’s grievance appeal.⁴

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant’s grievance appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
September 22, 2016

³ *See* MCPR § 1-17, which defines a disciplinary action as “One of the following adverse personnel actions taken by a supervisor against an employee: (a) oral admonishment; (b) written reprimand; (c) forfeiture of annual leave or compensatory time; (d) within-grade salary reduction; (e) suspension; (f) demotion; or (g) dismissal.” We note that Appellant does not appear to claim that this appeal involves a disciplinary action. Any attempt to make such a claim would be to no avail based on this definition.

⁴Even if Appellant could have been considered a merit system employee, his failure to appeal to the CAO and thus exhaust his administrative remedies would have required the Board to dismiss his appeal on that basis. *See* MSPB Case No. 11-08 (2011).

ORDERS REQUESTING DECISION

CASE NO. 17-04

ORDER REQUESTING DECISION

On September 26, 2016, Appellant filed a grievance appeal with the Merit System Protection Board (MSPB or Board). Although Appellant has not yet received a Step 2 grievance decision of the County Administrative Officer (CAO), she nevertheless claims the right to immediately file this appeal with the Board. Appellant alleges that she has been “denied . . . fair treatment” because the CAO’s designee conducted a “sham” Step 2 grievance meeting on September 12, 2016, in violation of various Merit System principles outlined in § 33-5 of the Montgomery County Code. Appellant contends that an immediate appeal to the Board is justified because the County “has demonstrated animus against Grievant and intent to deny a fair hearing within 30 days of filing of the grievance.” Appellant’s Grievance Statement, p. 1.

Under Montgomery County Personnel Regulation (MCPR) § 34-9(a)(3), if the CAO does not respond to a grievance within the specified time limits the grievant may appeal to the Board. In this case the CAO held a timely hearing, but Appellant alleges that it was a “sham” and therefore she has the right to an immediate appeal to the Board.

The Board believes that the processing of Appellant’s grievance appeal would benefit from a Step 2 decision by the CAO. MCPR § 34-9(a)(4) provides that “If 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.” The Board will hold this appeal in abeyance until such time as the CAO has responded to the Step 2 grievance.

The Board hereby **ORDERS** that MSPB Case No. 17-04 be held in abeyance, and that the CAO provide a response to the grievance by October 27, 2016.

For the Board
September 27, 2016

CASE NO. 17-08

ORDER REQUESTING DECISION

On November 10, 2016, Appellant filed a grievance appeal with the Merit System Protection Board (MSPB or Board). Appellant’s grievance is against both the Office of the County Attorney and the Chief Administrative Officer (CAO).

Under Montgomery County Personnel Regulation (MCPR) § 34-5, an employee may file a direct appeal with the MSPB in cases of demotion, suspension, termination, dismissal, or involuntary resignation. Appellant does not allege that her grievance involves any of those issues. Section 34-5 further provides that an employee “may appeal the final grievance decision by the CAO to the MSPB.” Appellant seeks an immediate appeal to the MSPB pursuant to § 34-9(a)(3), which allows an appeal to the Board if a supervisor, department director, or the CAO does not respond to a grievance within the specified time limits.

Although Appellant has not yet received a Step 2 grievance decision of the CAO, she nevertheless claims the right to immediately file this appeal with the Board. Appellant alleges that because her grievance is against both the Office of the County Attorney and the CAO, a Step 2 meeting would be “farcical” and “futile since the CAO and his staff are the subject of the grievance and would have a conflict of interest in deciding a grievance directed at their own conduct.” Grievance Appeal, pp. 1-2. Grievant further alleges that she is entitled under MCPR § 34-9(a)(3), to immediately appeal to the Board because the CAO failed to respond separately to the grievance within the time limits under Step 1. Grievance Appeal, p. 1.

The Board believes that the processing of Appellant’s grievance appeal would benefit from adherence to the steps of the grievance procedure and a Step 2 decision by the CAO. MCPR § 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.” The Board will hold this appeal in abeyance until such time as the CAO has held a Step 2 meeting with Appellant and issued a written decision.

The Board hereby **ORDERS** that MSPB Case No. 17-08 be held in abeyance, and that the CAO provide a response to the grievance by December 27, 2016. Upon receiving the CAO’s response Appellant may either submit a written request that the Board resume processing her appeal or, if satisfied with the CAO’s response, withdraw her appeal.

For the Board
November 17, 2016

CASE NO. 17-23

ORDER REQUESTING DECISION

On April 3, 2017, Appellant filed this direct grievance appeal with the Merit System Protection Board (MSPB or Board).¹ Appellant’s grievance is against the Montgomery County Office of the County Attorney, and alleges that the County Attorney improperly disclosed her

¹ The Appeal filed with the Board does not contain a certificate of service indicating compliance with the requirement in Montgomery County Personnel Regulation § 35-5 that every document filed with the Board be copied to every other party, although an electronic copy was emailed to the County’s representative the next day. The Board trusts that in the future both parties will heed the requirements of MCPR § 35-5 and provide contemporaneous service and a certificate of such service.

previous grievances to the Maryland Court of Special Appeals in the course of defending against her Public Information Act litigation.

Under Montgomery County Personnel Regulation (MCPR) § 34-5, an employee may file a direct appeal with the MSPB in cases of demotion, suspension, termination, dismissal, or involuntary resignation. Appellant does not allege that her grievance involves any of those issues. Section 34-5 does provide that an employee may appeal a Step 2 grievance decision of the County's Chief Administrative Officer (CAO) to the MSPB.

Even though Appellant has not yet received a Step 2 grievance decision of the CAO, she nevertheless claims the right to immediately file this appeal with the Board.² Appellant alleges that "because the CAO and his staff have previously been compromised by relying on the contaminated advice" of the Office of the County Attorney in considering her previous six grievances, and the "CAO and his staff already are the subject of other grievances filed by Grievant alleging abuses of the grievance process," a Step 2 grievance hearing with the CAO or his designee would be "farcical" and "futile."³ Moreover, Appellant alleges that because attorneys in the Office of the County Attorney have already provided legal advice to the Office of Human Resources and the CAO in her prior grievances, those attorneys are not impartial and are subject to the "command influence" of the County Attorney.

On the record before us thus far, the Board is not prepared to find that adherence to the requirement that the grievance process be exhausted before appealing to the Board would be futile or unfair to Appellant. At the Step 2 hearing Appellant may argue the issues and present the facts she believes establish alleged improprieties.

The Board concludes that the processing of Appellant's grievance appeal would benefit from adherence to the steps of the grievance procedure and a Step 2 decision by the CAO. The Board will hold this appeal in abeyance until the CAO has held a Step 2 meeting with Appellant and issued a written decision. MCPR § 34-9(a)(4) ("[i]f an employee files an appeal with the MSPB . . . 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.").

Accordingly, the Board hereby **ORDERS** that MSPB Case No. 17-23 be held in abeyance, that a Step 2 meeting be conducted in accordance with the grievance regulations, that the CAO provide a response to the grievance within 45 days of the Step 2 meeting, and that in no event shall the CAO response be provided later than July 5, 2017. Upon receiving the CAO's response, Appellant may either submit a written request that the Board resume processing her appeal or, if satisfied with the CAO's response, withdraw her appeal.

² Although Appellant purports to be appealing a March 24, 2017, Step 1 decision by the County Attorney denying her grievance, a copy of that denial was not submitted with the Appeal. The only document submitted with the Appeal was the grievance statement signed by Appellant on March 3, 2017. Appeal, Exhibit 1. Board consideration of an appeal challenging a grievance decision will require the Board to review the decision being challenged. Thus, should this case go forward, Appellant should provide the March 24, 2017, Step 1 decision to the Board. *See*, MCPR § 35-4.

³ Appellant's previous grievance appeals are docketed as MSPB Case Nos. 16-09, 16-11, 16-12, 17-02, 17-04, and 17-08.

The Board also strongly encourages the parties to pursue alternative dispute resolution for all seven grievances, and suggests that the mechanisms provided under MCPR § 34-8 may be useful in that endeavor.

For the Board
April 18, 2017

DISMISSAL OF APPEALS

The County's Administrative Procedures Act (APA), Montgomery County Code § 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 2017, the Board issued the following dismissal decisions.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 17-01

FINAL DECISION AND ORDER

On August 16, 2016, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a determination by the Office of Human Resources (OHR) that she was “qualified” for a Management and Budget Specialist III position in the Office of Management and Budget (OMB). Appellant contends that she should have been rated as “well qualified.”

The County contends that the appeal is premature and the Board lacks jurisdiction because Appellant has been deemed “qualified” for the position, placed on the eligible list, and no selection has been made. County Response, p. 2. In her reply, Appellant argues that the appeal is not premature because, as a practical matter, an applicant is unlikely to be selected unless ranked as “well qualified.” Appellant’s Rebuttal, p. 2.

FINDINGS OF FACT

On July 29, 2016, Appellant applied for the position of a Management and Budget Specialist III, IRC24401, with OMB. County Response at 1. Forty six (46) individuals applied for the position. A member of the OHR Recruitment and Selection team determined that Appellant was among twenty six (26) of the applicants who met the minimum qualifications. Subject matter experts chosen by OMB then reviewed the 26 qualified applicants and rated seven (7) of them as “well qualified.” County Response, Affidavit of Recruitment and Selection Team member, Attachment 2. Although Appellant was not rated as “well qualified,” because she was rated as “qualified” she was placed on the Eligible List. *Id.* at 1-2.

Appellant points out that the OHR website contains the following general guidance as part of the explanation of what the OHR ratings mean: “Qualified - Applicant has been rated “Qualified” but is not likely to receive further consideration because other candidates were rated “Well-Qualified.” Appellant’s Rebuttal, p. 2 and Attachment 2.¹ Appellant also notes that OHR’s online “Explanation of Rating Process” provides, in part, that “[t]he hiring department may interview only candidates in the highest rating category (usually “Well Qualified”).” Appellant’s Rebuttal, p. 2 and Attachment 3.² There is no evidence in the record that Appellant specifically received an individualized notice from OHR informing her that because she had not been rated “well qualified” she was unlikely to receive further consideration for the position or would be denied further consideration.

¹ The FAQs may be found at <http://www.montgomerycountymd.gov/HR/Recruitment/CareerFAQ.html#1>

² The Explanation of Rating Process may be found at: <http://www.montgomerycountymd.gov/HR/Recruitment/RatingsExplained.html#1>. The next sentence of the document also states that “[t]he hiring department is not required to interview all candidates in the highest rating category.”

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 pertinent 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 February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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.

ANALYSIS AND CONCLUSIONS

In previous cases this Board has held that where an appellant has been deemed “qualified” for a position and placed on an eligible list, but no selection has been made, the Board lacks jurisdiction over the appeal because no denial of employment has occurred. MSPB Case No. 14-41 (2014); MSPB Case No. 14-16 (2014); MSPB Case No. 14-14 (2014). A denial of employment that would permit an appeal occurs when the County determines that an employee or applicant does not meet the minimum qualifications for a position or has provided other notice that the employee or applicant will not receive further consideration for a position. MSPB Case No. 14-12 (2014).

In a prior case, MSPB Case No. 10-10 (2009), the Board initially accepted jurisdiction over an appeal by an applicant who had been deemed “qualified” because the notice from OHR specifically informed him that it was unlikely he would receive further consideration for the position. Subsequent to the decision in MSPB Case No. 10-10, the Board clarified its position on this issue. MSPB Case No. 14-14, at p. 3 and n. 1 (“To the extent that this disposition may diverge from prior Board decisions, *see, e.g.*, MSPB No. 10-10, we are clarifying our precedent.”). Thus, in MSPB Case No. 14-41 (2014), the Board held that it lacks jurisdiction over an appeal by an applicant rated “qualified” where the applicant had not received specific notice that it was unlikely he would receive further consideration for the position. In this case, although the OHR website contains a general statement concerning consideration of applicants, there is no indication in the

record that Appellant specifically and directly received such a notice regarding the position at issue.

Moreover, while it is “unlikely” that an applicant rated as “qualified” will receive further consideration, it is still possible. We are unaware of any limitation on a hiring department’s flexibility to interview and consider all applicants on an Eligible List or only those rated as “well qualified.” Indeed, if a hiring department is unsatisfied with the “well qualified” applicants, there appears to be no barrier to the hiring department interviewing and considering applicants rated as “qualified.” We conclude that unless an applicant is specifically advised that he or she will not receive further consideration, they have not been denied employment. MSPB Case No. 14-41.

Thus, the Board concludes that Appellant cannot be deemed to have been denied employment by being rated as “qualified” for the OMB Management and Budget Specialist III position.³ Accordingly, the Board finds that it lacks jurisdiction over and must dismiss the appeal.⁴

ORDER

For the foregoing reasons, the Appeal is hereby **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
October 27, 2016

CASE NO. 17-06

ORDER

On November 3, 2016, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging an alleged dismissal by his employer, the Montgomery County Department of General Services. Along with his appeal Appellant submitted a Statement of Charges - Dismissal, dated October 26, 2016. On that same date the Board sent a written response to Appellant informing him that because he had not yet been issued a Notice of Disciplinary Action (NODA), processing of his appeal would be stayed until he submitted a NODA. On November 15, 2016, Appellant filed another copy of the October 26, 2016, Statement of Charges and was again advised by letter, on November 16, that a NODA was necessary for the Board to proceed. Having not received a copy of a NODA, on December 13, 2016, the Board sent

³ Both parties also argue the substance of Appellant’s complaint regarding her rating. However, because the Board lacks jurisdiction it need not address the merits of that issue.

⁴ Appellant may file a new appeal with the Board should she not be selected for the Management and Budget Specialist III position. *See* MSPB Case No. 14-16 (2014).

a third letter to Appellant advising him that “if the MSPB does not receive a copy of the required documentation, *i.e.*, a NODA, by January 9, 2017, an order dismissing your case will be issued.” As of this date the Board has not received a NODA.

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

Montgomery County Code, § 33-12(a), provides that merit system employees who have been “notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board. . .”. While it is true that under the Montgomery County Personnel Regulation (MCPR) § 35-2(a), an employee with merit system status has the right to appeal a dismissal to the Board, the regulations provide a specific process by which the County must provide formal notification of a disciplinary action from which an employee may appeal to the Board. The personnel regulations make a clear distinction between a Statement of Charges, which notifies an employee of a *proposed* disciplinary action “[b]efore taking a disciplinary action,” § 33-6(b)(1), and a Notice of Disciplinary Action, which provides notice of the actual imposition of discipline. § 33-6(c). As we stated in MSPB Case No. 07-13 (2007) p. 14, n. 12: “Unlike the *NODA*, which actually effectuates a disciplinary action against an employee, the Statement of Charges basically functions as a *proposal for discipline*, letting the Appellant know what the various charges are against him/her, the evidence that management has gathered to support the charges, and giving the Appellant the opportunity to provide the deciding official, the Director, with Appellant’s side of the story.” (Emphasis added).

It is only after an employee receives a NODA that an appeal to the Board is permitted. MCPR § 35-3(a) (“An employee has 10 working days to file an appeal with the MSPB in writing *after* the employee: (1) receives a notice of disciplinary action. . .”) (emphasis added). The Board has no jurisdiction to entertain an appeal of a Statement of Charges that has not been followed by a NODA. *See, Weber v. Department of the Army*, 45 M.S.P.R. 406, 409 (1990) (Board only has jurisdiction over removal action that has been effected, not a proposed removal).

Furthermore, MCPR § 35-4(d)(1) provides that an employee contesting a disciplinary action “must include the following documentation with the appeal: (1) If the employee is contesting a disciplinary action, a copy of the Notice of Disciplinary Action must be provided to the Board.” After being given multiple opportunities, Appellant has not provided a copy of a NODA. Thus, because Appellant has not provided the copy of the NODA, perhaps because no disciplinary action has yet been effectuated against him, the Board must dismiss this matter for failure to comply with established appeal procedures and because the Board lacks jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 15-09 (2015).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 17-06 is dismissed. Should a NODA ultimately be issued, Appellant may then timely file an appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, §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
January 17, 2017

CASE NO. 17-17

ORDER

On February 6, 2017, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging an alleged three (3) day suspension by his employer, the Montgomery County Department of Correction and Rehabilitation. On that same date the Board sent a written response to Appellant informing him that because he had not yet been issued a Notice of Disciplinary Action (NODA), processing of his appeal would be stayed until he submitted a NODA. Later that day, Appellant submitted additional documents including a Statement of Charges – Three (3) Day Suspension, dated January 23, 2017. On February 7, 2017, Appellant was again advised by letter that a NODA was necessary for the Board to proceed. Having not received a copy of a NODA, on March 2, 2017, the Board sent a third letter to Appellant advising him that “if the MSPB does not receive a copy of the required documentation, *i.e.*, a NODA, by March 27, 2017, an order dismissing your case will be issued.” As of this date the Board has not received a NODA.

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

Montgomery County Code, § 33-12(a), provides that merit system employees who have been “notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board. . .”. While it is true that under the Montgomery County Personnel Regulation (MCPR) § 35-2(a), an employee with merit system status has the right to appeal a dismissal to the Board, the regulations provide a specific process by which the County must provide formal notification of a disciplinary action from which an employee may appeal to the Board. The personnel regulations make a clear distinction between a Statement of Charges, which notifies an employee of a *proposed* disciplinary action “[b]efore taking a disciplinary action,” § 33-6(b)(1), and a Notice of Disciplinary Action, which provides notice of the actual imposition of discipline. § 33-6(c). As we stated in MSPB Case No. 07-13 (2007) p. 14, n. 12: “Unlike the *NODA*, which *actually effectuates a disciplinary action* against an employee, the Statement of Charges basically functions as a *proposal for discipline*, letting the Appellant know what the various charges are against

him/her, the evidence that management has gathered to support the charges, and giving the Appellant the opportunity to provide the deciding official, the Director, with Appellant's side of the story." (Emphasis added).

It is only after an employee receives a NODA that an appeal to the Board is permitted. MCPR § 35-3(a) ("An employee has 10 working days to file an appeal with the MSPB in writing *after* the employee: (1) receives a notice of disciplinary action. . .") (emphasis added). The Board has no jurisdiction to entertain an appeal of a Statement of Charges that has not been followed by a NODA. MSPB Case No. 17-06 (2017).

Furthermore, MCPR § 35-4(d)(1) provides that an employee contesting a disciplinary action "must include the following documentation with the appeal: (1) If the employee is contesting a disciplinary action, a copy of the Notice of Disciplinary Action must be provided to the Board." After being given multiple opportunities, Appellant has not provided a copy of a NODA. Thus, because Appellant has not provided the copy of the NODA, perhaps because no disciplinary action has yet been effectuated against him, the Board must dismiss this matter for failure to comply with established appeal procedures and because the Board lacks jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 17-17 is dismissed. Should a NODA ultimately be issued, Appellant may then timely file an appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 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 29, 2017

CASE NO. 17-19

FINAL DECISION AND ORDER

On February 23, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board), challenging a decision by the Montgomery County Department of Transportation (DOT or Department) to suspend him for ten (10) days. With the appeal Appellant included four exhibits. On February 28, 2017, Appellant filed an additional statement with three unnumbered exhibits. (Appellant Supplemental Submission). On March 1, 2017, the County filed a response to the appeal with one attachment (County Response). Appellant filed a reply to the County's response on March 2, 2017 (Appellant Rebuttal), and on March 6, 2017, another response. (Appellant Additional Rebuttal). On March 8, 2017, Appellant submitted yet another response. (Appellant Final Rebuttal).

FINDINGS OF FACT

On December 4, 2015, Appellant, a Ride On Bus Operator in DOT Transit Services division, called Central Communications with a request to be relieved. Appeal, p. 2; AX 2; Appellant Supplemental Submission, p. 6. DOT management decided to view the video from the bus camera and discovered that Appellant had covered the lens of the camera on his bus with a piece of paper. Appellant Exhibits (AX) 1 and 2. It is undisputed that Appellant disabled the camera so that it could not observe the driver. Appeal, p. 1 (“My actions on 12/4/15 merely resulted in me as the Operator not being visible on the video footage from the (incapacitated) camera on the Bus.”); AX 1 and 2.

Viewing operation of the camera as important for both rider and driver safety, management at DOT treated Appellant’s action as an offense worthy of discipline. AX 2, p. 5; Appellant Supplemental Submission, p. 3. In DOT’s view, covering the lens prevents a bus camera from, among other things, verifying that a driver was using a seatbelt and had both hands on the steering wheel while the bus was in motion, deterring assaults, fraud, and other crimes, as well as to assist in the prosecution of criminals and the resolution of litigation. *Id.* Thus, Appellant received a Statement of Charges for a 30-day suspension, dated February 18, 2016. Appellant Supplemental Submission, p. 2.

On March 16, 2016, Appellant agreed to Alternative Dispute Resolution (ADR) and signed a form entitled “Employee Acknowledgement for Participation in the ADR Process.” County Exhibit 1. The form contained a statement in bold lettering representing that the employee signing the document understood that by doing so he was electing to relinquish his right to file an appeal to the MSPB:

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 may have to file an appeal with the Merit System Protection Board (MSPB) concerning the subject matter of this process.

County Exhibit 1 (emphasis in original). The form also contained two check boxes above the signature lines. One box was to indicate that the employee agreed to participate in ADR and one that would indicate that the employee was declining ADR. Appellant checked the box by the following statement, which was also in bold type:

Yes – I wish to participate in the ADR process and I understand that in doing so, I am waiving my right to appeal with the MSPB.

County Exhibit 1 (emphasis in original).

The ADR conference that was held that same day, March 16, 2016, did not result in an agreement resolving the matter. County Response, p.1; AX 1; Appellant Rebuttal, p. 1. DOT then issued a Notice of Disciplinary Action (NODA) for a 30-day suspension on May 27, 2016. AX 2; County Response, p. 1. The discipline imposed by the NODA related to the December 4, 2015,

camera covering incident. On June 9, 2016, the Union (MCGEO) filed a grievance concerning the NODA. AX 2.

On June 20, 2016, DOT decided to reduce the discipline to be levied on Appellant, for his actions on December 4, 2015, withdrawing the May 27, 2016, NODA for a 30-day suspension and issuing an amended NODA imposing a 10-day suspension. Appellant Rebuttal; Appeal, p. 1; County Response, p. 1. It is undisputed that the 10-day suspension related to the December 4, 2015, event. Appeal, pp. 1-2.

The June 9, 2016, grievance filed by MCGEO continued to a Step 2 grievance hearing that was begun on August 5, 2016, then held in abeyance. AX 2, p. 4; AX 3. The hearing was completed on 1/13/17. *Id.*; Appeal, p. 2.

The Chief Administrative Officer (CAO) issued a Step 2 decision denying the grievance on February 8, 2017. AX 2, pp. 4-6. On February 13, 2017, MCGEO wrote to Appellant informing him of the CAO's decision and declining to pursue arbitration under the collective bargaining agreement. AX 2, p. 1 ("Based on the facts and circumstances in this case, the Union does not believe it will be successful at arbitration."). On February 22, 2017, Appellant nevertheless requested that MCGEO proceed to arbitration. AX 4. The record contains no indication that MCGEO has granted Appellant's request. As noted above, on February 23, 2017, Appellant filed this appeal with the MSPB.

ISSUES

Does the Board have jurisdiction over the instant appeal?

POSITIONS OF THE PARTIES

Appellant:

- DOT management deliberately misrepresented Appellant's December 4, 2015 telephone call to Central Communications concerning his shoulder injury to view the video from the bus camera. The video of Appellant's December 4, 2015, shift should not have been viewed by management.
- The Department has exaggerated the details of the December 4, 2015, event as Appellant's actions in blocking the camera lens did not put passengers at risk and merely resulted in Appellant as the Operator not being visible.
- The Department improperly delayed the imposition of discipline until more than 30 days after the incident.
- Appellant did participate in the ADR process, but since that process did not result in a resolution of the case he proceeded through the grievance process and properly appealed the Step 2 CAO decision to the MSPB.¹

¹ In his Additional Rebuttal of March 6, 2017, Appellant urges the Board to ignore the February 18, 2016, Statement of Charges he submitted with his February 28, 2017, Supplemental Submission. *See* Appellant Supplemental Submission, p. 2; Appellant Additional Rebuttal, p. 1 ("I would kindly request that the MSPB disregard the letter dated 2/18/16 and any references I make to that letter in relation to MSPB case # 17-19 because this letter was used

County:

- By signing the Employee Acknowledgement for Participation in the ADR Process form on March 16, 2016, Appellant knowingly waived his right to appeal his suspension to the MSPB.

APPLICABLE LAW

Montgomery County Charter, Article 4, Merit System and Conflicts of Interest, provides, in applicable part:

§ 401. Merit System

Officers and employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system only to the extent that the applicability of those provisions is made subject to collective bargaining by legislation enacted under Section 510, Section 510A, or Section 511 of this Charter. . . .

§ 404. Duties of the Merit System Protection 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 . . .

Montgomery County Personnel Regulations (MCPR), 2001, (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), Section 33. *Disciplinary Actions*, provides in pertinent part:

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

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

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

(c) ***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.

as part of the ADR process.”). Appellant’s request is apparently premised on his belief that it provides further confirmation of his election to participate in an Alternative Dispute Resolution process in lieu of the MSPB appeal process. As the authenticity of the letter is not in question and it has relevance to this case, Board will accept the letter as part of the record.

(2) *Right to appeal a grievance decision to the MSPB.* An employee . . . may appeal a decision on a grievance over a disciplinary action to the MSPB.

Agreement between Montgomery County, Maryland and the Municipal & County Government Employees Organization/United Food and Commercial Workers Union Local 1994, for the Office, Professional, and Technical (OPT) and Service, Labor, and Trades (SLT) bargaining units, for the years July 1, 2016, to June 30, 2017, Article 10, Grievances, which states in relevant part:

10.3 Discipline Grievances

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.

10.4 Exclusivity of Forum

This procedure shall be the exclusive forum for the hearing of any grievance and the exclusive remedy for any grievance as defined above.

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 voluntarily 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 not to exceed twenty-five (25) minutes with each side having the opportunity to respond not to exceed five (5) minutes each. Presentation and format shall be established by the Committee.

(6) If parties agree with the recommendation of the Committee, Notice of Disciplinary Action is issued with no grievance. If Union disagrees with the committee's recommendation, it is free to grieve the Notice of Disciplinary Action. If the 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. . . .

ANALYSIS AND CONCLUSIONS

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 15-28 (2015). *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

While § 404 of the County Charter provides that the Board normally has jurisdiction over suspension cases, the County Charter also provides, in § 401, that employees subject to a collective bargaining agreement may be excluded from certain merit system remedies to the extent those provisions are made subject to collective bargaining. MSPB Case No. 13-03 (2013), p. 6. Thus, the right under MCPR § 33-9(b)(2) to file a disciplinary grievance appeal with the Board does not include those situations in which an employee freely elects to utilize the procedures under § 33-9(a)(2) to file a grievance by using the procedures in a collective bargaining agreement. *Id.*

The Board lacks jurisdiction over this matter because Appellant elected to challenge his discipline by pursuing remedies under the collective bargaining agreement instead of exercising his right to appeal directly to the Board. Subsection 10.3 of the collective bargaining agreement between the County and MCGEO provides in unequivocal terms that “[a]ny employee initiating a grievance under this procedure regarding suspension . . . waives any right to have that action reviewed by the Montgomery County Merit System Protection Board.” Further, § 10.4 emphasizes that the contractual procedure “shall be the exclusive forum.” Finally, in establishing an ADR process, which Appellant pursued on March 16, 2016, the collective bargaining agreement expressly stipulates that “in using this process an employee waives any right to file with MSPB on suspensions, demotions and dismissal actions. . . .” § 10.12(a)(7).

Appellant's irrevocable election was done knowingly and in a writing witnessed by his union representative. The “Employee Acknowledgement for Participation in the ADR Process” form expressly indicated in two places that by signing it Appellant understood that he would be waiving his right to file an appeal with the MSPB.² Although Appellant may not be entirely pleased with how his grievance was handled by the union, he voluntarily elected to pursue the negotiated ADR and grievance procedure, and thereby waived his right to appeal to the MSPB. *See* MSPB Case No. 13-03 (2013), p. 6. *C.f.*, *Jones v. Department of Justice*, 53 M.S.P.R. 117, 120, *aff'd*, 983

² Moreover, the June 20, 2016, NODA also expressly advised Appellant that by electing to have the union file a grievance on his behalf under the collective bargaining agreement he would be waiving the right to file an appeal with the MSPB.

F.2d 1088 (Fed.Cir.1992); *Duncan v. Merit System Protection Board*, 82 F.3d 433 (Fed. Cir. 1996).³

Accordingly, the Board finds that the appeal must be dismissed due to a lack of jurisdiction.

ORDER

For the foregoing reasons, the Appellant's Appeal is hereby **DISMISSED** for lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
March 27, 2017

CASE NO. 17-22

FINAL DECISION AND ORDER

On April 3, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board),¹ once again challenging a decision by the Montgomery County Department of Transportation (DOT or Department) to suspend him for ten (10) days for an incident which occurred on December 4, 2015.² With the appeal Appellant included two exhibits and a more detailed statement of his appeal, which we will identify as Appellant Exhibit 3. On May 3, 2017, the County filed a response to the appeal with one attachment (County Response). Appellant filed a reply to the County's response on May 8, 2017 (Appellant Rebuttal).

FINDINGS OF FACT

On December 4, 2015, Appellant, a Ride On Bus Operator in DOT Transit Services division, covered the lens of the camera on his bus with a piece of paper. Appellant Exhibit (AX) 2. Viewing operation of the camera as important for both rider and driver safety, management at DOT treated Appellant's action as an offense worthy of discipline. Appellant received a Statement of Charges for a 30-day suspension, dated February 18, 2016. AX 2.

³ We note that the current "Employee Acknowledgement for Participation in the ADR Process" form does not suffer from the infirmities of the form criticized by the Board in MSPB Case Nos. 08-12 and 08-14 (2008).

¹ The online appeal to the Board was filed on Sunday, April 2, 2017. Because the appeal was filed on a non-workday when the Board offices are closed, based on prior Board decisions the appeal was considered as officially filed on Monday, April 3. *See* MSPB Case Nos. 17-16 and 17-14 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

² Appellant previously challenged the same disciplinary action in MSPB Case No. 17-19 (March 27, 2017).

On March 16, 2016, Appellant agreed to Alternative Dispute Resolution (ADR) and signed a form entitled “Employee Acknowledgement for Participation in the ADR Process.” County Exhibit 1. The form contained a statement in bold lettering representing that the employee signing the document understood that by doing so he was electing to relinquish his right to file an appeal to the MSPB:

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 may have to file an appeal with the Merit System Protection Board (MSPB) concerning the subject matter of this process.

County Exhibit 1 (emphasis in original). The form also contained two check boxes above the signature lines. One box was to indicate that the employee agreed to participate in ADR and one that would indicate that the employee was declining ADR. Appellant checked the box by the following statement, which was also in bold type:

Yes – I wish to participate in the ADR process and I understand that in doing so, I am waiving my right to appeal with the MSPB.

County Exhibit 1 (emphasis in original).

As the Board found in MSPB Case No. 17-19, the ADR conference that was held on March 16, 2016, did not result in an agreement resolving the matter and DOT issued a Notice of Disciplinary Action (NODA) for a 30-day suspension on May 27, 2016. The discipline imposed by the NODA related to the December 4, 2015, camera covering incident. On June 9, 2016, the Union (MCGEO) filed a grievance concerning the NODA. On June 20, 2016, DOT decided to reduce the discipline to be levied on Appellant, for his actions on December 4, 2015, withdrawing the May 27, 2016, NODA for a 30-day suspension and issuing an amended NODA imposing a 10-day suspension. It was undisputed that the 10-day suspension related to the December 4, 2015, event. The June 9, 2016, grievance filed by MCGEO continued to a Step 2 grievance hearing that was begun on August 5, 2016, then held in abeyance. The hearing was completed on January 13, 2017. The Chief Administrative Officer (CAO) then issued a Step 2 decision denying the grievance on February 8, 2017, and on February 13, 2017, MCGEO wrote to Appellant informing him of the CAO’s decision and declining to pursue arbitration under the collective bargaining agreement. On February 23, 2017, Appellant filed Case No. 17-19 with the MSPB. That appeal was dismissed on March 27, 2017.

Appellant explains the basis for this Appeal, Case No. 17-22, as follows:

Because of the failure by both the internal EEOC office and the Union to separate the retaliation claim from the disciplinary action, I now lack confidence that this matter of retaliation will be addressed by either the union or the internal EEOC office. So I appeal now to the MSPB.

AX 3, p. 2. Appellant further explains that his complaint in this Appeal relates to the same incident and discipline that were the basis for the ADR process that was the focus of MSPB

Case No. 17-19, but that the difference here is that his claim that the issue of retaliation was not addressed in that litigation:

Since the issue of retaliation failed to be addressed by my representation during the entire (3/2016 thru 2/2017) prolonged ADR/Grievance process or during my initial visit (1/29/16) and follow-up visit on (3/27/17) with the internal EEOC office it is only right for me to conclude that the retaliation concern was held in abeyance and at this time I have now decided to appeal to the MSPB due to my lack of confidence in either the Union or the internal EEOC office giving this issue the scrutiny which I feel it warrants.

Appellant Reply, p. 2 (emphasis in original).

ISSUES

Does the Board have jurisdiction over the instant appeal?

ANALYSIS AND CONCLUSIONS

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 17-19 (2017); MSPB Case No. 15-28 (2015). *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

In Case No. 17-19, this Board found that it lacked jurisdiction over an appeal of the discipline imposed on Appellant for the December 4, 2015, incident because Appellant elected to pursue remedies under the collective bargaining agreement instead of exercising his right to appeal directly to the Board. Appellant's irrevocable election was done knowingly and in writing, and he was also advised of his options in the Notice of Disciplinary Action. Appellant voluntarily elected to pursue the negotiated ADR and grievance procedure, and waived his right to appeal to the MSPB. In this case Appellant is appealing the exact same discipline that was the subject of Case No. 17-19. For the reasons detailed in Case No. 17-19, Appellant has waived his right to appeal that discipline to the Board and the Board remains without jurisdiction to entertain this appeal.

Appellant appears to be attempting to distinguish this Appeal from Case No. 17-19 by arguing that in the prior matter the union did not adequately assert retaliation as an improper basis for the 10-day suspension. However, even if there was a failure to specifically assert that argument, whether due to inadvertence, mistake, or conscious trial strategy by his representative, Appellant has waived his right to appeal the 10-day suspension to the MSPB.³

³ The "waiver" at issue here may not be a true waiver, but instead merely part of an election of remedies. We have no difficulty honoring an election of remedies that channels an employee's redress to a negotiated process, rather than an appeal to this Board, and hold that the Board lacks jurisdiction in this appeal because Appellant elected to proceed through the negotiated process. To further reduce the possibility of misunderstanding by employees, the Board

In addition, even if Appellant had not waived his right to appeal to the MSPB, this Appeal was filed in an untimely manner. The CAO's decision that Appellant seeks to challenge was issued on February 8, 2017, and this Appeal was filed over seven weeks later, on April 3, 2017. Montgomery County Personnel Regulation, § 35-3(a) (appeal must be filed within 10 working days).

Moreover, it is undisputed that both Case No. 17-19 and this appeal arise from precisely the same incident and discipline. Appellant's claim in Case No. 17-19 was identical to this appeal, *i.e.*, that the 10-day suspension for obstructing the camera on his bus on December 4, 2015, was improper. Appellant may not now relitigate the same case. Because the claim presented in this appeal is identical to that determined in Case No. 17-19, the parties are the same, and there was a final decision by the Board, the elements of *res judicata* are satisfied.⁴ Appellant may not relitigate that claim by switching legal theories. *Esslinger v. Baltimore City*, 95 Md. App. 607, 619 (1993). *See Batson v. Shiflett*, 325 Md. 684, 702 (1992) ("agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court.").

Accordingly, the Board finds that the appeal must be dismissed.

ORDER

For the foregoing reasons, the Appellant's Appeal is hereby **DISMISSED** for lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
May 23, 2017

Appellant's petition for judicial review, filed in the Circuit Court for Montgomery County, Maryland, Civil Action No. 433663-V, was still pending on the publication date of this report.

strongly urges the County to amend the Employee Acknowledgement form to expressly say that by electing to challenge the proposed discipline through the collective bargaining grievance procedure, the employee will be deemed to have chosen that process as the exclusive forum and remedy and will have forfeited any opportunity to appeal to the Board.

⁴ The elements of *res judicata* 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 was a final judgment on the merits. *Colandrea v. Wilde Lake Community Association, Inc.*, 361 Md. 371, 392 (2000). Even if it may be argued that because the Board dismissed Case No. 17-19 for lack of jurisdiction it may not be considered an adjudication on the merits, this Appeal must be dismissed because the *res judicata* effects of Case No. 17-19 do apply to the jurisdictional question upon which the prior case was decided. *Anne Arundel County Board of Education v. Norville*, 390 Md. 93, 113, n. 15 (2005).

CASE NO. 17-26

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of Appellant challenging the decision of the Montgomery County Department of Correction and Rehabilitation (DOCR) to terminate her employment during her probationary period. The Board has reviewed and considered the submissions of the parties.

On April 17, 2017, Appellant filed an appeal with the Board alleging that the County acted improperly when it issued a Notice of Termination during Probationary Period on April 14, 2017. The basis for Appellant's Appeal is that: "Many of the examples and situations listed in my termination letter are false and inaccurate." The County filed a Motion to Dismiss the appeal for lack of jurisdiction on May 22, 2017. Although the deadline for Appellant to submit a response was June 5, 2017, to date no response has been filed.

FINDINGS OF FACT

Effective May 16, 2016, Appellant was hired by the Montgomery County Department of Correction and Rehabilitation as a Work Release Coordinator for DOCR's Pre-Release and Reentry Services. County Exhibit 1. On April 14, 2017, before the expiration of Appellant's 12-month probationary period, the Acting Director of DOCR issued a Notice of Immediate Termination During Probation. County Exhibit 2. The Notice of Immediate Termination During Probation, signed by the Acting DOCR Director, stated that Appellant was being terminated because of "a pattern of poor judgement and decision making, in addition to unprofessional behavior." County Exhibit 2, p. 1. The Notice of Immediate Termination During Probation detailed numerous examples of Appellant's alleged misbehavior to support the DOCR decision.

APPLICABLE LAW AND REGULATIONS

Montgomery County Charter, Article 4, Merit System and Conflicts of Interest, which states in applicable part:

Section 401. Merit System.

* * *

The Council by law may exempt probationary employees . . . from some or all of the provisions of the law governing the merit system

Section 404. Duties of the Merit System Protection 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

Montgomery County Code, Chapter 33, Merit System Law, Section 33-12. Appeals of disciplinary actions; grievance procedures, which states in applicable part,

- (a) *Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay. . . .
- (b) *Grievances.* A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment . . . Grievances do not include the following: . . . failure to reemploy a probationary employee;

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 provides, in applicable part:

1-40. Merit system status: The condition achieved by a merit system employee who satisfactorily completes the required probationary period and is entitled to the rights and privileges described in these Regulations.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7. Appointments, Probationary Period, and Promotional Probationary Period, which states in applicable part:

7-2. Probationary period; promotional probationary period.

(e) *Termination during probation of a probationary employee*

- (1) A department director may immediately terminate a probationary employee at any time during the probationary period.
- (2) A department director who terminates a probationary employee must ensure that the employee receives severance pay as required under Section 10-22 (a)(1) of these Regulations.
- (3) A probationary employee who is terminated may not grieve or appeal the termination or a supervisor’s failure to inform the employee that the employee’s work performance was marginal or inadequate.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended October 21, 2008), Section 1. Termination, provides in applicable part:

29-1. Definition.

Termination: A nondisciplinary act by a department director to end an employee’s County employment for a valid reason. Examples of valid reasons for termination include those stated in Section 29-2.

29-2. Reasons for termination.

(a) A department director may terminate the employment of an employee:

(1) who is a probationary employee; . . .

29-5. Notice of termination for probationary and temporary employees.

Before terminating the employment of a probationary or temporary employee, a department director must give the employee a written notice that states the effective date of the termination and the reason for the termination.

29-7. Appeal of termination.

(c) A probationary or temporary employee may not appeal a termination.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. Grievances, provides in pertinent part:

34-2. Eligibility to file a grievance.

(b) A probationary or temporary employee may file a grievance over a disciplinary action, except for an oral admonishment, but may not appeal a grievance decision by the CAO to the MSPB.

34-6. Matters that are not grievable.

(a) The following matters are not grievable: . . .

(3) termination of a probationary employee;

34-10. Appeal of a grievance decision.

(b) A probationary or temporary employee may not appeal a grievance decision by the CAO to the MSPB.

ISSUE

Does the Board have jurisdiction to hear the appeal of a probationary employee terminated during her probationary period?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over a Termination Appeal By a Probationary Employee

The Montgomery County Charter provides the County Council with the right to exempt probationary employees from some or all of the provisions of law governing the merit system. Montgomery County Charter, § 401. The County Council has acted on that authority, and has generally denied probationary employees the right to file and pursue appeals with the MSPB.

Specifically, regarding this matter, the County Personnel Regulations expressly provide that a probationary employee may not challenge a termination before the Board by way of an appeal, grievance, or any other method. MCPR, § 7-2(e)(3) ("A probationary employee who is terminated may not grieve or appeal the termination"); § 29-7(c) ("A probationary . . . employee may not appeal a termination"); § 34-6(a)(3) ("The following matters are not grievable: . . . (3) termination of a probationary employee").

Pursuant to § 404 of the Charter, only merit system employees have the right to appeal a removal action to the Board. The County Council defined merit system employees in the County Code as employees in "permanent career positions." County Code, § 33-6. Under MCPR § 1-40, an employee does not obtain merit system status and become "entitled to the rights and privileges described in these Regulations" until the employee "satisfactorily completes the required probationary period." It is undisputed that Appellant was not employed in a permanent position but, rather, was a probationary employee. Appellant, who was terminated prior to completing her probationary period, was therefore not in a permanent career position which would have entitled her to full merit system protections, including the right to appeal her removal. Accordingly, the Board concludes that Appellant lacks merit system status and, therefore, lacks appeal rights to the Board.

Appellant argues that the reasons given for her termination are inaccurate. Appellant's attempt to raise this issue misconstrues the jurisdiction of the Board. The personnel regulations do not permit a probationary employee to appeal or grieve disputes related to job performance. It is simply not within the jurisdiction of the MSPB to hear and resolve disputes relating to an employee's performance during her probationary period. Indeed, the personnel regulations specifically provide that a probationary employee may not grieve or appeal a termination. MCPR § 7-2(e)(3) ("A probationary employee who is terminated may not grieve or appeal the termination

or a supervisor's failure to inform the employee that the employee's work performance was marginal or inadequate.”). The Board has long held that it is simply without jurisdiction to hear the appeal of a probationary employee termination, no matter what the nature of that employee's claim. *See*, MSPB Case No. 16-04 (2015).

An appeal to the MSPB over the termination of a probationary employee is specifically barred under the disciplinary regulations, grievance procedure, and the regulations governing probationary employment. Accordingly, the Board lacks jurisdiction over Appellant's appeal of her termination.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that the County's Motion to Dismiss be, and in its entirety is, hereby **GRANTED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 12, 2017

DISMISSAL FOR MOOTNESS

CASE NO. 16-17

ORDER OF DISMISSAL

On May 9, 2016, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge her termination from employment with the County's Department of Health and Human Services. On November 22, 2016, Appellant sent an email to the Board stating "I have decided to drop the appeal and accept the termination that became effective May 9, 2016."

Montgomery County Personnel Regulations, § 35-7, provides that the Board may dismiss an appeal if the appellant fails to prosecute the appeal, or for any other reason consistent with applicable laws, rules and regulations. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 16-17 is hereby dismissed.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §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
November 23, 2016

CASE NO. 17-03

FINAL DECISION AND ORDER

On September 12, 2016, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a determination by the Office of Human Resources (OHR) that he did not meet the minimum qualifications for the position of Transit Information Systems Technician with the Montgomery County Department of Transportation (DOT or Department).

On August 24, 2016, Appellant was informed by OHR that he was not qualified for the Transit Information Systems Technician position because he lacked the required Commercial Driver's License (CDL). The OHR rater determined that at the time of the application Appellant was medically unable to drive a bus and thus unlikely to possess and maintain a valid Class B CDL. County Response, p. 2 and Attachment 5.

After receiving the appeal in this matter, OHR reevaluated Appellant's application and concluded that he had been improperly deemed not qualified. Appellant's status was changed from not qualified to "rater review" or qualified. *Id.* Appellant's application is now being rated by DOT

subject matter specialists to determine which qualified candidates will be interviewed. Based on these actions, the County has moved to dismiss the appeal as moot.

An appeal must be dismissed as moot where an agency completely rescinds the action appealed. MSPB Case No. 14-11 (2012). *See Hodge v. Department of Veterans Affairs*, 72 M.S.P.R. 470 (1996). The County has demonstrated to the Board that it has rescinded the action appealed and has moved forward to review Appellant's application in the pool with all qualified applicants. Accordingly, the Board hereby dismisses the appeal as moot. Montgomery County Personnel Regulations (MCPR), § 35-7(d).¹

ORDER

For the foregoing reasons, the Appeal is hereby **DISMISSED** as moot.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
October 27, 2016

CASE NO. 17-11

ORDER OF DISMISSAL

Appellant filed an appeal from the decision of the Department of Fire and Rescue Services to dismiss him from the position of Fire/Rescue Lieutenant, effective December 6, 2016. The Merit System Protection Board (Board or MSPB) received the appeal on December 5, 2016. On January 19, 2017, Appellant filed an email with the Merit System Protection Board asking to withdraw his appeal in the above-captioned case.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal by an appellant renders that appeal moot. MSPB Case No. 88-15 (1990). *See* MCPR §35-7(b)(Board may dismiss an appeal if the appellant fails to prosecute the appeal).

Accordingly, the Board hereby **ORDERS**, that the above-captioned appeal be **DISMISSED**, with prejudice.

¹ The County also asserts that the appeal is untimely under MCPR § 35-3(b) ("An applicant has 10 working days to file an appeal . . . after the applicant receives notice that the applicant will not be appointed . . .") since it was not officially filed with the MSPB until 12 working days after Appellant received notice that he had been deemed not qualified. Appellant claimed that due to computer problems he did not receive adequate notice until September 2. However, since this appeal is being dismissed as moot, the Board need not address the issue of timeliness.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
January 19, 2017

CASE NO. 17-18

ORDER OF DISMISSAL

Appellant filed an appeal from the decision of the Department of General Services, Division of Fleet Management Services to suspend him for five (5) days. The Merit System Protection Board (Board or MSPB) received the appeal on February 15, 2017. On April 3, 2017, Appellant filed a notice with the Merit System Protection Board stating that he wished to withdraw his appeal in the above-captioned case.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal by an appellant renders that appeal moot. MSPB Case No. 17-11 (2017); MSPB Case No. 88-15 (1990). *See* MCPR § 35-7(b) (Board may dismiss an appeal if the appellant fails to prosecute the appeal).

Accordingly, the Board hereby **ORDERS**, that the above-captioned appeal be **DISMISSED**, with prejudice.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
April 4, 2017

DISMISSAL FOR UNTIMELINESS

CASE NO. 16-13

ORDER

On April 4, 2016, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the Gaithersburg - Washington Grove Volunteer Fire Department's (GWGVFD) decision to remove him from the rolls of the GWGVFD. On July 19, 2016, Appellant provided a copy of an email notification dated August 27, 2015, which apparently was the official notice that the GWGVFD was dismissing Appellant from the GWGVFD. On August 18, 2016, the GWGVFD filed a Motion to Dismiss (MTD) the appeal on the basis of untimeliness.

Board staff has reached out to Appellant to ascertain if he would be submitting a response to the GWGVFD motion. In a telephone conversation on October 17, 2016, Appellant indicated that he would be filing a response on October 18. When no response was filed, on October 24, 2016, the Board's Executive Director wrote a letter to Appellant advising him that if he did not submit a written response on or before November 9, 2016, the Board would proceed to make a decision on the MTD. The letter also advised Appellant that a failure to respond would require the Board to consider whether to dismiss the appeal for failure to prosecute. As of this date the Board has heard nothing further from the Appellant and has not received Appellant's response to the MTD.

There is no doubt that the appeal in this matter was filed more than 30 days after notice of the removal action. Appellant submitted an email dated August 27, 2015, in which the GWGVFD told Appellant "I regret to inform you that the membership of the GWGVFD, at their regular monthly meeting on August 26, 2015, voted to drop you from the rolls of this department due to conduct unbecoming a member." A letter containing the same notification was also mailed to Appellant on August 27, 2015. MTD, Attachment B. On November 13, 2015, in an email to the GWGVFD requesting reinstatement, Appellant acknowledged having received the August 27 notice of removal. MTD, Attachment C. On December 7, 2015, Appellant emailed the MSPB indicating that he had been notified of his dismissal in September 2015, and that he wished to appeal. He was advised that day by Board staff regarding how to file an online appeal. The appeal was not filed until April 4, 2016.

The Montgomery County Code, § 21-7(b), and Montgomery County Personnel Regulations, §35-3(c), require that a volunteer firefighter's appeal to the MSPB be filed within 30 days of the action being challenged. While Appellant's Appeal claims that he received notice of the removal action on September 15, 2015, rather than on August 27, 2015, his appeal is nevertheless untimely by nearly six months. Even were the Board to treat Appellant's December 7, 2015, inquiry as an appeal, it would still be untimely by three months.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 16-13 is hereby dismissed.

Pursuant to Montgomery County Code, § 21-7(f) and § 33-15, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may, within 30 days, file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
November 14, 2016

CASE NO. 17-07

FINAL DECISION AND ORDER

On November 10, 2016, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board), challenging his nonselection for the position of Chief of the Division of Finance and Procurement, a high level management position in the Office of the County Attorney (OCA). That same day, pursuant to Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), the Board requested that Appellant submit a copy of the notification of his non-selection and any other relevant documents. On November 28, 2016, Appellant provided a copy of an email exchange that he had with the County Attorney in which he was informed that he had not been selected for the position.¹ On December 13, 2016, the County filed a response (County's Response) to the appeal which included four attachments. Appellant filed a reply (Appellant's Reply), erroneously dated December 13, 2016, on January 23, 2017.² The appeal was considered and decided by the Board.

FINDINGS OF FACT

It is undisputed that Appellant received notice of his nonselection by email from the County Attorney on September 24, 2016. On September 30, 2016, Appellant was also electronically notified of his non-selection through an email generated by iRecruitment. County Response, Attachments 2 and 3. The Appeal was filed with the MSPB November 10, 2016, 34 working days after Appellant received notice of the denial from the County Attorney.

POSITIONS OF THE PARTIES

Appellant:

- Appellant takes the position that his appeal was timely and that dismissal is not mandated.
- Appellant contends that the notification of nonselection should have provided notice of his appeal rights and a warning of the deadlines.

¹ In providing the notice of nonselection Appellant claimed that a copy of the email had been attached to his original submission. A review of the electronic and paper files in this matter confirms that there was no attachment submitted with the appeal.

² An unsigned version of Appellant's Reply, also erroneously dated December 13, 2016, was submitted by facsimile on January 17, 2017.

- Appellant asserts that dismissal of his appeal would be arbitrary and capricious.
- Appellant argues that as a veteran with a disability he is entitled to priority consideration and that the County failed to provide such consideration.
- Appellant claims that the County hired a long-time Associate County Attorney who was preferred by the County Attorney, but that doing so was an improper basis for bypassing the disabled veteran preference.
- While Appellant did note in his interview that he can no longer work the 14-hour days required of some younger attorneys, he did not think that would be a problem because as a County Attorney his work hours would be regulated.
- Appellant's interview remarks should not have been interpreted to suggest that he was looking for a position in which he could "coast," or that he is dissatisfied with his current situation.
- Appellant argues that he is fully qualified for the position, and specifically has private sector general counsel experience which qualifies him to perform the position's general counsel and administrative functions, as opposed to Appellant's litigation and appellate advocacy experience.
- Appellant suggests the County Attorney has an improper personal bias against him.
- Appellant contends that the process by which the County may bypass an applicant with priority consideration status was not followed.
- Appellant desires to be hired into the Chief of the Division of Finance and Procurement position in the Office of County Attorney.

County:

- The County's position is that the appeal is untimely as Appellant was notified on September 24, 2016, that he was not selected for the position but did not file an appeal until November 10, 2016.
- 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 as he received priority consideration.
- Because Appellant's application was first considered without competition or comparison with other candidates, and legitimate reasons were provided for his nonselection, he was given *bona fide* priority consideration.
- 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. MCPR § 6-14; § 33-9(c); § 34-9(d).
- The Board should dismiss the appeal based on it being untimely.

APPLICABLE 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 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 February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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.

- (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 the appeal timely?

ANALYSIS AND CONCLUSIONS

Under the 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 on September 24, 2016, and again on September 30, 2016, of the County's decision not to select Appellant for the OCA Chief of the Division of Finance and Procurement position.³ Ten working days from those dates would have been either October 7 or October 14, 2016. However, Appellant did not file his appeal until November 10, 2016. The appeal was untimely filed.

Appellant argues that even though his appeal was filed more than ten working days after he was advised of his nonselection, his late filing should be excused because the notices informing him of his nonselection should have contained a statement advising him of his appeal rights.

³ Appellant's Reply suggests that he may not have received the September 30, 2016, notice provided through the County's iRecruitment system, or that the notice was ambiguous. The County provided documentary evidence and an affidavit demonstrating that such notice was provided online and by way of an automatically generated email to the address provided by the applicant. County Response, Attachments 2 and 3. Nevertheless, the Board need not address Appellant's arguments concerning the September 30 notice since the September 24, 2016, notice of nonselection Appellant submitted to the Board on November 28, 2016, unquestionably and unambiguously provided him with notice of nonselection 34 work days before the appeal was filed.

Appellant, however, fails to identify any such requirement in the County Code or regulations. As Appellant bears the burden of proof, that failure is fatal to his appeal. We also note that in contrast to the absence of a requirement for a statement of appeal rights and time limits in the regulations concerning nonselection, those governing disciplinary actions and grievances expressly require a statement of appeal rights and time limits in notices and decisions. *See, e.g.,* MCPR § 33-6(c); § 34-10(c)(1). Applying the maxim of interpretation *expressio unius est exclusio alterius*, the Board concludes that the inclusion of the requirement for notice of appeal rights in discipline and grievance matters strongly suggests that the absence of an express requirement for nonselection cases means that there is no such obligation.

The Board generally does not waive the 10-day filing limit, and Appellant has provided no evidence or persuasive argument for why the Board should do so in this case. *See* MSPB Case No. 14-43 (2014); MSPB Case No. 14-08 (2013).⁴ Because we find that the appeal is untimely, we need not address Appellant's arguments that the County failed to properly provide him with priority consideration due to his status as a veteran with a disability.

Accordingly, Appellant's appeal must be dismissed as untimely.

ORDER

Based on the foregoing, Appellant's appeal regarding his denial of employment is hereby **DISMISSED** as untimely.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
March 8, 2017

CASE NO. 17-14

FINAL DECISION AND ORDER

On January 6, 2017, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board), challenging a decision by the County Chief Administrative Officer (CAO) denying his grievance concerning the propriety of his position reporting to and being

⁴ The Board notes that Appellant is an experienced attorney, and that the relevant regulations providing appeal rights and time frames are available on the County website and the American Legal Publishing Online Library. Moreover, Board decisions discussing the time limits for appeal of nonselection decisions are on the same MSPB website where Appellant filed his online appeal.

supervised by another position in the same classification.¹ On February 13, 2017, the County filed a response, which it amended on February 14, 2017. (County Response). Appellant filed a reply on February 27, 2017. (Appellant Reply).

FINDINGS OF FACT

Appellant is employed as a Records Manager with the Department of Correction & Rehabilitation (DOCR). In 2013, DOCR requested that the Office of Human Resources (OHR) conduct an individual position classification study of Appellant's position. Appellant Reply, Appellant Exhibit (AX) 4. The study was conducted and, on November 4, 2014, the OHR Director granted the request by reclassifying Appellant's position upward from Program Manager II to Manager III (Management Leadership Service III), effective July 13, 2014. AX 4.

Prior to his upward reclassification, Appellant reported to a Deputy Warden who is also a MLS III. County Response, p. 1; AX 4. Because that supervisory relationship remained unchanged after the reclassification, Appellant asked the Warden to change his reporting relationship so that he was supervised by a higher echelon manager. County Response, p.1; Appellant Reply, pp. 1-2.

By email dated October 12, 2015, the Warden denied Appellant's request while leaving open the possibility that he might reconsider:

I am in the process of reviewing and making some incremental changes in our organizational structure that will reflect a future oriented flow that recognizes how our department can best accomplish its mission. As I do this, I will keep your suggestion and thoughts as related to me in mind. *At this time, I am not inclined to make any changes. The chain of command will remain, Deputy Warden of MCDC who reports to the Warden of Detention Services.*

CX 4 (emphasis added).

Eleven months later, on September 13, 2016, Appellant filed this grievance. County Response, p.2; CAO Step 2 Response, p. 1. The CAO's Step 2 decision denying Appellant's grievance was issued on December 16, 2016.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, which states in applicable part:

¹ The online appeal to the Board was filed on January 6, 2017, at 4:16 p.m. Because the appeal was filed on a day the Board offices are closed (Friday) as well as after normal business hours, based on prior Board decisions the appeal was considered as officially filed on Monday, January 9. See MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

§ 33-13. Appeal procedures.

The county executive shall prescribe by personnel regulations . . . procedures covering appeals, including grievances which shall include the time limit for filing such appeal. . . .

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, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides in relevant part:

§ 1-31. Grievance: A formal complaint of a merit system employee arising from a misunderstanding or disagreement between the employee and supervisor over a term or condition of employment.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, provides in pertinent part:

§ 34-9. Grievance procedure.

(a) *Time limit for filing a grievance.*

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

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

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), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

(b) An employee with merit system status 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.

§ 35-3. Appeal period.

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

(3) receives a written final decision on a grievance. . .

ISSUE

Is the grievance appeal timely?

ANALYSIS AND CONCLUSIONS

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 15-28 (2015). *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

It is undisputed that Appellant was advised on October 12, 2015 that the Warden would not grant his request to be supervised by someone above the MLS III level: "I am not inclined to make any changes. The chain of command will remain, Deputy Warden of MCDC who reports to the Warden of Detention Services." CX 4. Because a grievance must be filed within 30 calendar days after "the date on which the employee knew or should have known of the occurrence or action on which the grievance is based," MCPR §34-9(a)(1), it is apparent that Appellant's grievance was filed ten months late.

Appellant's grievance is plainly not a "continuing violation." Nothing in the status of Appellant's supervisory relationship to the Deputy Warden changed from the time he was reclassified, to when the Warden refused to alter the *status quo*, to when Appellant finally filed a grievance. Even though the effects of the Warden's decision continue, there were no related, discrete grievable acts which occurred within 30 days prior to the grievance filing. *See* MSPB Case No. 05-04 (2005).

Appellant's argument that the October 12 response from the Warden was "ambiguous" is unavailing. Appellant Reply, p. 3. While the Warden's response leaves open the possibility that he might reconsider the decision in the future, it unambiguously states the decision to deny Appellant's request: "The chain of command will remain." CX 4. Thus, the clock for the grievance procedure time limits began when Appellant was advised of the Warden's decision to deny his request to be supervised by a higher echelon manager.² Under MCPR § 34-9(a)(1) Appellant was

² The County does not argue, and thus we do not consider, whether the time limit for Appellant to file his grievance began when, on July 13, 2014, he was reclassified without any change to his supervisory relationships. Nor do we express any opinion as to timeliness of any subsequent grievance Appellant might file as the Warden's "process of reviewing and making some incremental changes in our organizational structure" unfolds.

required to file a grievance within 30 calendar days after he knew that a grievable action had occurred. On October 12, 2015, Appellant possessed actual knowledge of all the information necessary for him to file a grievance over the alleged harm. *See* MSPB Case No. 15-28 (2015); MSPB Case No. 11-08 (2011); MSPB Case No. 06-03 (2006). *See also* MSPB Case No. 03-08 (2003) (While claims regarding failure to grant compensatory time filed outside grievance time frame were untimely, claims concerning events within those time frames were timely). Therefore, the grievance filed in September 2016 is unquestionably late.

Because we find that the grievance was untimely filed, we need not address Appellant's argument that management's decision to maintain his position's reporting relationship to the Deputy Warden was improper.

Accordingly, Appellant's grievance appeal must be dismissed as untimely.

ORDER

Based on the foregoing, Appellant's appeal regarding the denial of his grievance is hereby **DISMISSED** as untimely.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
March 27, 2017

CASE NO. 17-16

FINAL DECISION AND ORDER

On February 6, 2017, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board), challenging a January 30, 2017, decision by the Director of the County Office of Human Resources (OHR) denying as untimely his grievance requesting a 20% salary increase.¹ With his Appeal, Appellant filed a copy of the OHR Director's memorandum (Exhibit 1) and a copy of his January 12, 2017, grievance (Exhibit 2). The County filed a response on March 6, 2017, with four exhibits. (County Response). Appellant submitted a response on March 22, 2017. (Appellant Response). By letter dated April 12, 2017, the Board requested that the County provide additional information and, on April 27, 2017, the County provided a supplemental response with an affidavit and two exhibits. (County Supplement Response). Appellant filed a

¹ The online appeal to the Board was filed on February 3, 2017, at 7:13 a.m. Because the appeal was filed on a day the Board offices are closed (Friday), based on prior Board decisions the appeal was considered as officially filed on Monday, February 6. *See* MSPB Case No. 17-14 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

reply with one attachment on April 27, 2017, (Appellant Reply), and an additional reply on May 1, 2017. (Appellant Supplemental Reply).

FINDINGS OF FACT

Appellant accepted a promotion to a Safety and Training Instructor position with the Department of Transportation (DOT) on August 3, 2016. County Response, p. 1 and Exhibit 3, Affidavit of Ms. CC, ¶2. Positions in the Safety and Training Instructor classification are compensated at the Grade 19 salary level. After receiving the promotion offer on August 3, 2016, Appellant discussed the salary for the new position with Ms. CC, a member of the OHR Recruitment and Selection Team. Appellant requested a 20% salary increase over what he was earning as a Grade 15 Ride On Bus Operator (Transit Bus Operator). Appellant Response, pp. 1, 3; County Response, p. 2; Affidavit of CC, ¶2. Appellant's request was denied, and he accepted the Safety and Training Instructor position at the Grade 19 minimum. Appellant Response, pp. 1, 4; Affidavit of CC, ¶2.

Appellant had requested the 20% salary increase based on his reading of Montgomery County Personnel Regulation (MCPR) § 10-5(c)(1)(H)(i). Appeal, attachment to January 12 grievance; County Response, Exhibit 1. Section 10-5(c)(1)(H)(i) permits a department director to recommend, and the OHR Director to approve, a salary increase of up to 20% when an employee receives a promotion of at least 3 grades when there are "extraordinary circumstances." Appellant notes that the four grade promotion he was offered qualifies as an "extraordinary circumstance" under the regulation. Appeal, January 12, 2017, Grievance, p. 2. Ms. CC conveyed Appellant's salary proposal to DOT management, but his request was denied. Affidavit of CC, ¶2; Appeal, Exhibit 2; County Response, Exhibit 1.

Appellant alleges that the only reason he accepted the promotion to Safety and Training Instructor without a 20% salary increase was that Ms. CC told him that it was a "final offer." Appellant Response, p. 1. He further alleges that he was unable to obtain advice on the issue because the union was not willing to advise him since he would be promoted to a position that was not in the bargaining unit. *Id.* In the absence of advice from the union or anyone else he accepted the position because he "didn't want to lose out on a promotion because of money." *Id.* As a result, Appellant claims that he "did not receive a fair opportunity to negotiate" his salary. Appeal, Exhibit 2.

On January 12, 2017, over five months after his request for a 20% salary increase was denied and he accepted the promotion, Appellant filed the grievance that is the subject of this appeal. County Response, p. 1; County Supplemental Response, Affidavit of Ms. GB, ¶4; Appeal, Exhibit 2. Appellant asserts that Ms. GB told him that because the grievance was late it would be denied, and that when he asked if he would have received the salary increase had he filed his grievance on time, she answered in the affirmative. Appellant Response, p. 2. Appellant also alleges that when he asked for a Step 2 appeal with the County Chief Administrative Officer (CAO), Ms. GB told him that she was a designee of the CAO and would get back to him in a week. Appellant Response, p. 4. Appellant further alleges that he was never contacted by Ms. GB or the CAO. *Id.* However, in her affidavit Ms. GB states that because the grievance involves OHR, a

member of the OHR Labor Team would not be the CAO designee. Affidavit of GB, ¶5.² Ms. GB also specifically denied that she told Appellant she would be the CAO's designee, and claims that she has never served in that role. *Id.*, ¶11 and 12. Ms. GB further suggests in her affidavit that she told Appellant that he would have received a Step 2 hearing had he filed a timely grievance, *Id.*, ¶8.

On January 30, 2017, the OHR Director denied the grievance as untimely. Appeal, p. 1 and Exhibit 1; County Response, Exhibit 2; County Supplemental Response, Affidavit of GB, Exhibits A and B. Ms. GB provided the OHR Director's response to Appellant by email dated February 1, 2017. Affidavit of GB, ¶9 and Exhibit A. Although the email refers Appellant to the County personnel regulations concerning grievances, neither the email nor the OHR Director's response explicitly advised Appellant of the appropriate way to appeal the OHR Director's Step 1 decision to the CAO at Step 2 of the grievance procedure. In response to Appellant's email asking "How do I file an appeal?" Ms. GB responded "you would appeal the designation [*sic*] made by the OHR Director to the Merit System Protection Board." Appellant Reply, Exhibit 1. Ms. GB's response was evidently based on her understanding that, to the best of her knowledge, "there was no CAO designee assigned because [Appellant's] grievance was dismissed by the OHR Director. . .". Affidavit of GB, ¶10.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, which states in applicable part:

§ 33-9. Equal employment opportunity and affirmative action.

- (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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

² Although MCPR § 34-1(b) defines CAO's designee as "a staff member of the Labor/Employee Relations Team," MCPR § 34-9(g)(1) limits that definition by providing that "[i]f the OHR Director issues the decision on the grievance at the Step 1 level, the CAO must appoint a designee who is not a subordinate of the OHR Director to conduct the Step 2 meeting."

§ 33-13. Appeal procedures.

The county executive shall prescribe by personnel regulations . . . procedures covering appeals, including grievances which shall include the time limit for filing such appeal. . . .

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, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides in relevant part:

§ 1-31. Grievance: A formal complaint of a merit system employee arising from a misunderstanding or disagreement between the employee and supervisor over a term or condition of employment.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015), Section 10, Employee Compensation, provides, in pertinent part:

§ 10-5. Salary-setting policies.

(c) Salary on promotion.

(1) *Compensation for a regular (non-temporary) promotion.*

(H) In extraordinary circumstances, the department director may recommend and the OHR Director may approve a total increase of not to exceed 20 percent of base salary. Extraordinary circumstances means:

- (i) a promotion of at least 3 grades; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended June 30, 2015), Section 27, Promotion, provides in relevant part:

§ 27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, provides in pertinent part:

§ 34-1. Definitions.

(b) *CAO's designee*: For the purpose of this section, a staff member of the Labor/Employee Relations Team.

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

(d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential, overtime pay, leave, insurance, retirement, or a holiday;

§ 34-5. Matters that may either be appealed directly to the MSPB or grieved under the grievance procedure. An employee with merit system status may choose to file either an appeal directly with the MSPB or a grievance under the County grievance procedure over a demotion, suspension, termination, dismissal, or involuntary resignation. If the employee chooses to file a grievance, the employee may appeal the final grievance decision by the CAO to the MSPB.

§ 34-6. Matters that are not grievable.

- (a) The following matters are not grievable:
- (1) a position classification;
 - (2) performance ratings, except in cases of failure to follow established procedures;
 - (3) termination of a probationary employee;
 - (4) the termination of a term employee at the end of the term of employment or the completion of the work the employee was hired to perform;
 - (5) resignation, but an involuntary or coerced resignation may be appealed under Section 34 or 35 of these Regulations;
 - (6) employee awards;
 - (7) a matter for which another County appeal process is available, except for a suspension, demotion, dismissal, or termination;
 - (8) a matter that has been clearly identified as not grievable by a statute, regulation, or MSPB decision; and

- (9) employment discrimination or harassment in violation of Section 5 of these Regulations, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation.
- (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) *Time limit for filing a grievance.*

(2) A grievance may be dismissed by the OHR Director if it is not filed within 30 calendar days after:

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

(3) If a grievant does not file the grievance at the next step of the grievance procedure within the time limits specified in the procedure, the OHR Director may consider the grievance resolved on the basis of the most recent response and may end the consideration of the grievance.

* * *

(e) ***Steps of the grievance procedure.*** The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of individual*
1	Employee	Present job-related problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor within 30 calendar
		If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.
	Department Director	Give the employee a written response within 15 working days after the written grievance is received.
2	Employee	If not satisfied with the department director’s response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the
	CAO’s Designee	Must meet with the employee, employee’s representative, and department director’s designee within 30 calendar days to attempt to resolve the

	Employee and Dept. Director	Present information, arguments, and documents to the CAO's designee to support their positions
	CAO's Designee	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended
	CAO	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.
3	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under Section 35 of these Regulations
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

* * *

(g) *Step 2 meeting.*

(1) If the OHR Director issues the decision on the grievance at the Step 1 level, the CAO must appoint a designee who is not a subordinate of the OHR Director to conduct the Step 2 meeting. . .

§ 34-10. Appeal of a grievance decision.

(c) A written grievance decision must include information about:

- (1) how the employee may appeal the decision to the next step of the grievance procedure or file an appeal with the MSPB, if applicable; and
- (2) the time limits for appealing the grievance to the next step, or to the MSPB.

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), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

(c) An employee with merit system status 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.

- (d) 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:

- (3) receives a written final decision on a grievance. . .

ISSUE

Was the grievance filed timely?

ANALYSIS AND CONCLUSIONS

As we have recognized in many cases, this Board’s jurisdiction is not plenary but is, rather, limited by statute. *See, e.g.,* MSPB Case No. 15-28 (2015). *See, 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 tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

It is undisputed that Appellant filed his grievance on January 12, 2017, protesting an August 3, 2016, decision to deny him a 20% salary increase. Because a grievance must be filed within 30 calendar days after “the date on which the employee knew or should have known of the occurrence or action on which the grievance is based,” MCPR § 34-9(a)(1), it is apparent that Appellant’s grievance was filed over four months late.

Furthermore, we note that Appellant’s grievance is not a “continuing violation.” Even though the effects of the salary decision associated with his promotion continue, there were no related, discrete grievable acts which occurred within 30 days prior to the grievance filing. *See* MSPB Case No. 17-14 (2017); MSPB Case No. 05-04 (2005). Thus, the clock for the grievance procedure time limits began when Appellant was advised of the decision to deny his request to be compensated at the level he requested. Under MCPR § 34-9(a)(1), Appellant was required to file a grievance within 30 calendar days after he knew that a grievable promotion action had occurred. On August 3, 2016, Appellant possessed actual knowledge of all the information necessary for him to file a grievance over the alleged harm. *See* MSPB Case No. 17-14 (2017); MSPB Case No. 15-28 (2015); MSPB Case No. 11-08 (2011); MSPB Case No. 06-03 (2006). Therefore, the grievance was unquestionably filed late.

Appellant argues that he was unaware of his right to file a grievance until December 2016. Appeal, p. 2; Appellant Reply, p. 1. However, Appellant can point to no requirement in the County Code or regulations that OHR or management specifically advise him of his right to file a grievance over the amount of salary he was offered for his promotion. As Appellant bears the burden of

proof, that failure is fatal to his appeal. We also note that, in contrast, the regulations governing disciplinary actions and appeals of grievances already filed expressly require a statement of appeal rights and time limits in notices and decisions. *See, e.g.*, MCPR § 33-6(c); § 34-10(c)(1). The inclusion of express requirements for notices of appeal rights in those cases strongly suggests that the absence of an express requirement for the initiation of grievances means that there is no such obligation. *See* MSPB Case No. 17-07 (2017).

Although we find that the grievance was untimely filed, we are troubled by the failure of the OHR Director to comply with the regulation on notice, MCPR § 34-10(c), in her grievance decision of January 30, 2017. Also concerning is that upon his inquiry to an OHR Labor Relations Specialist, Appellant was given incorrect appeal information. In her February 2, 2017, email to Appellant Ms. GB told Appellant “To file an appeal, you would follow Section 34-6 (b) of the Personnel Regulations, which states you would appeal the designation [*sic*] made by the OHR Director to the Merit System Protection Board.” County Exhibit 4. However, MCPR § 34-6(b) only authorizes a direct appeal to the Board from a Step 1 decision by the OHR Director regarding matters that are listed in § 34-6(a) as not grievable. Appellant’s dispute over his salary upon promotion and the proper application of the compensation policy in MCPR § 10-5(c)(1)(H)(i) is not the type of matter included in the § 34-6(a) list of issues which are not grievable. Indeed, MCPR § 34-4(d) explicitly provides that an employee with a dispute over the application of the compensation policy may file a grievance. Moreover, the parties have not suggested that the personnel regulations would permit an employee to file a direct appeal with the MSPB over a promotional salary dispute.

We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.

Nevertheless, we strongly suggest that OHR address the lapses outlined above. Standard procedures should be instituted by OHR, and appropriate training provided to OHR staff, to prevent such oversights from reoccurring.

Accordingly, Appellant’s grievance appeal must be dismissed as untimely.

ORDER

Based on the foregoing, it is **ORDERED** that:

1. Appellant’s grievance appeal is hereby **DISMISSED**; and
2. OHR implement standard procedures and provide appropriate training to OHR staff to prevent employees from being given inadequate or misleading information concerning their grievance appeal rights.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18,

Appeals to court of MSPB decisions, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
May 11, 2017

RECONSIDERATION

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code Section 2A-7(c) of the Administrative Procedures Act (APA). There is no specific time limit for filing such a motion under the APA or the Board's current procedures. Rather, the APA indicates that motions should be filed promptly.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days from a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within ten (10) days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

During fiscal year 2017, the Board issued the following decision on a Request for Reconsideration of a Preliminary Matter.

CASE NO. 17-23

ORDER DENYING REQUEST FOR RECONSIDERATION

On April 24, 2017, Appellant filed a Request for Reconsideration (Appellant's Request), seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Order Requesting Decision dated April 18, 2017.¹ In that April 18 Order, the Board held this appeal in abeyance and requested that the County's Chief Administrative Officer (CAO) conduct a Step 2 meeting in accordance with the grievance regulations, provide a response to the grievance within 45 days of the Step 2 meeting, and provide a response no later than July 5, 2017. The Order provided that upon receiving the CAO's response Appellant could either submit a written request that the Board resume processing her appeal or, if satisfied with the CAO's response, withdraw her appeal.

Appellant's Request for Reconsideration, p. 1, again alleges that the CAO is incapable of impartially and fairly conducting a Step 2 grievance hearing because the CAO's designees have received advice from the Office of the County Attorney that is "contaminated by command influence." Appellant further alleges that she expects that the CAO's designee "will continue to improperly permit [County Attorney] to withhold relevant documents." Request for Reconsideration, p. 2. Appellant also suggests that there has been "impermissible *ex parte* contact" between the Office of the County Attorney and a CAO designee because the CAO designee was told about this grievance after the conclusion of the Step 2 hearing for the sixth grievance, which is the subject of MSPB Case No. 17-08. *Id.* Finally, Appellant acknowledges "that the Board may benefit from the results of a Step 2 meeting," but suggests that it would be best if the CAO utilizes an independent fact finder. Request for Reconsideration, p. 3.²

The Board is not prepared to conclude that adherence to the requirement that the grievance process be exhausted before appealing to the Board is futile or unfair to Appellant. We do not see a basis to conclude that the CAO or his designees have a personal bias against Appellant, or that they would be unable to assess a Step 2 grievance fairly and objectively because of prior involvement in related grievances. *See Public Service Commission v. Wilson*, 389 Md. 27, 92 (2005) (No presumption that Chair of the PSC, who initially fired an employee, would be biased in an administrative appeal of the employee's subsequent firing). The CAO and his designees are entitled to a presumption of honesty and integrity. *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011); *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397, 410 (1999). At the Step 2 hearing Appellant is free to argue the issues and present the facts she believes establish bias or other alleged improprieties.

¹ Pursuant to § 35-11(a)(5) of the Montgomery County Personnel Regulations (MCPR), any request for reconsideration of a preliminary ruling must be filed within five (5) calendar days from the date of the ruling, and any opposition to the request must be filed within five (5) calendar days thereafter.

² Appellant also suggests that Office of Human Resources (OHR) should be required to explain why Alternative Dispute Resolution (ADR) pursuant to MCPR § 34-8 is not permitted. Request for Reconsideration, p. 4. A Board order to that effect would be premature. The Board has not been provided with information indicating that Appellant has requested ADR, that the County has refused such a request, or that an alleged failure to comply with § 34-8 has been the subject of a grievance.

Regarding the alleged impropriety of the Office of the County Attorney providing counsel to the CAO, we note that in *Consumer Protection Division v. Morgan*, 387 Md. 125, 193–94 (2005), the Maryland Court of Appeals expressly rejected an argument that the combination of prosecutorial and adjudicatory functions in the Office of the Attorney General, on its face, necessarily “makes the adjudicatory process farcical” and violates due process. At the Step 2 meeting the Appellant may raise the issue and present facts she believes indicate that an actual conflict exists regarding the particular attorney acting as counsel to the CAO.

Concerning Appellant’s allegation of indirect “command influence” on the designee of the CAO because an attorney from the Office of the County Attorney may provide advice to the CAO, the fact that the CAO’s designee will not be called upon to decide whether *her* superior was wrong in the Step 1 decision is a critical distinction from the situation addressed in *Mayer v. Montgomery County*, 143 Md. App. 261 (2002). The CAO and his staff do not report to the County Attorney or the OHR Director. Rather, the County Attorney and the OHR Director are subordinate to the CAO, who reports directly to the County Executive and “supervise[s] all departments, offices, and agencies of the Executive Branch.” Montgomery County Charter, § 211.

Appellant has not suggested that the CAO designee will be an employee of the Office of the County Attorney or OHR, presumably because in Appellant’s prior grievances the CAO’s designee was an Assistant Chief Administrative Officer reporting directly to the CAO. Thus, unlike in *Mayer*, there is no allegation here that the CAO designee will be a subordinate of the Step 1 decision maker. If the CAO designee is not a subordinate of the Step 1 decision maker there can be no reasonable argument that the CAO designee will be subject to the “command influence” of the County Attorney. Appellant’s argument appears to be that since all attorneys in the Office of the County Attorney are subject to command influence, the CAO’s designee will also be subject to the such influence if one of those attorneys provides her with advice. We decline to assume that any attorney assigned to provide advice to the CAO’s designee will necessarily be subject to undue influence, or that the CAO designee will fail to perform her job with independence and integrity, or unthinkingly follow whatever advice is provided by an attorney acting as her counsel. *Cf. Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011).

Finally, Appellant acknowledged “that the Board may benefit from the results of a Step 2 meeting,” but argues that it would be best if the CAO utilizes an independent fact finder. Request for Reconsideration, p. 3. The Board views the decision to appoint an independent fact finder as normally one within the CAO’s discretion. *Cf. Spencer v. State Board of Pharmacy*, 380 Md. 515, 532–34 (2004). It is not evident that it would be an abuse of that discretion to appoint an Assistant CAO as the designee, or even that the CAO will refuse Appellant’s request to appoint an independent fact finder. Thus, on the record before us, the Board declines to mandate that the CAO utilize that option.

The Board concludes that the processing of Appellant’s grievance appeal would benefit from adherence to the steps of the grievance procedure and a Step 2 decision by the CAO. Accordingly, the Board hereby **DENIES** Appellant’s reconsideration request.

For the Board
May 8, 2017

MOTIONS

The County's Administrative Procedures Act (APA), Montgomery County Code, § 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 2017 the Board issued the following decision on a motion filed during the course of an appeal proceeding.

MOTION TO DISMISS

CASE NO. 17-12

ORDER

On December 7, 2016, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a five (5) day suspension imposed by the Office of Human Resources (OHR). On December 29, 2016, Appellant filed a Motion to Dismiss the charges against him, alleging procedural errors and that the Notice of Disciplinary Action (NODA) and Statement of Charges (SOC) were defective. Appellants Motion to Dismiss (Appellant's MTD).

Specifically, Appellant's Motion to Dismiss argued that the NODA and the SOC were defective because:

1. They were unsigned;
2. They failed to adequately describe the charges;
3. The SOC denied Appellant the opportunity to respond to the OHR Director;
4. The SOC and NODA failed to adequately address the determination to bypass progressive discipline; and
5. The NODA failed to acknowledge Appellant's response to the SOC.

The County's Opposition to Appellant's Motion to Dismiss (County Opposition), filed January 10, 2017, argues in response that:

1. The Montgomery County Personnel Regulations (MCPR) do not explicitly require that a NODA be signed;
2. The NODA and the SOC adequately describe the charges, thus Appellant's objections are merely stylistic;
3. Appellant submitted a one-line response to the SOC which was considered by the OHR Director;
4. There is no requirement that specific language be used regarding progressive discipline, and a determination regarding the proper level of discipline is inappropriate in a preliminary motion; and
5. Although the NODA fails to memorialize Appellant's response, that omission is a matter which may easily be remedied by an amended NODA.

The Board has carefully considered the motion to dismiss and the arguments of the parties and finds no basis for dismissing the charges against Appellant.

First, the Board agrees with the County's argument that neither MCPR § 33-6 nor any other provision called to the Board's attention by the parties explicitly requires that a NODA be signed. Appellant's reliance on MSPB Case No. 07-05 as precedent for his position is misplaced. That case involved a NODA which indicated it was from a Department Director when it was actually signed by a subordinate manager, and there was no written document delegating the Director's

authority to the subordinate. Here, the Director issued a written delegation of authority to the Deputy Director authorizing him to take disciplinary action under MCPR § 33-4. County Submission, Exhibit 4; County Opposition, Exhibit 1. Of course, had the NODA been signed most questions concerning compliance with the authorization and approval requirements of the MCPR would be answered. Nevertheless, at the hearing the County may produce evidence that the SOC and NODA were properly authorized and issued by the appropriate officials, and Appellant may attempt to challenge that evidence and prove otherwise.

Second, it appears to the Board that the SOC and NODA give sufficient detail to provide Appellant with adequate notice of the charges. Although the Board has cautioned the County to specifically label each charge in a disciplinary matter so as to comply with the dictates of MCPR § 33-6 and Due Process, it has also said that the proper standard to assess the adequacy of such charges is whether the County has given adequate notice so as to enable the employee to make an informed response. *See* MSPB Case No. 07-10 (2007), MSPB Case No. 07-13 (2007), and MSPB Case No. 08-09 (2008). Appellant's criticisms of the SOC and NODA in the Motion to Dismiss and his Prehearing Submission belie his claim that the charges are so deficient as to deny him the ability to provide an informed response. Whether one considers the SOC and NODA to be artfully drafted, there is sufficient specificity and clarity concerning the nature of the charges to proceed to a hearing.

Third, the question of whether Appellant actually had an opportunity to respond to the OHR Director is a factual matter more appropriate for the hearing.

Fourth, a determination of the proper level of discipline, including the use of progressive discipline, may be dependent on the facts and circumstances underlying the charges. Thus, it is an issue more appropriate after the hearing rather than as a preliminary motion.

Fifth, the failure to specifically acknowledge Appellant's response to the SOC in the NODA is a technicality that is curable. Presumably the requirement is designed to ensure that management considers an employee's response before taking final action. What matters is whether the Director actually did consider the response before imposing discipline. As such, it is a factual question for the hearing whether the Director did carefully consider Appellant's response.¹

Having considered the pleadings of the parties, it is hereby **ORDERED** that Appellant's Motion be, and hereby is, **DENIED**.

For the Board
March 7, 2017

¹ As Appellant's entire response was so brusque ("My only comment at this time is that the Statement of Charges is defective big time."), there may also be an issue as to whether the response was so nonspecific and flippant that no consideration or response was required. *See* Appellant's MTD, p. 2 and Attachment 3.

ENFORCEMENT OF BOARD DECISIONS AND ORDERS

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions. Montgomery County Personnel Regulations, § 35-15.

The Board may also be asked to enforce a final decision. The Board, where appropriate, may seek enforcement of its decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. Montgomery County Code, § 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly failed to comply with the Board decision to determine whether there is a basis for seeking enforcement.

During FY17, the Board issued a decision concerning a request for enforcement and two agreements were entered into the record.

CASE NO. 16-20

FINAL DECISION AND ORDER

On June 22, 2016, Appellant filed a request for enforcement with the Merit System Protection Board (Board or MSPB), alleging that the County has failed to enforce the Board's Final Decision and Order and Decision on County's Request for Reconsideration in MSPB Case No. 12-13 (March 24, 2013) (Final Decision) and MSPB Case No. 12-13 (June 10, 2013) (Reconsideration Decision). *See* Request for Enforcement of the Merit System Protection Board's Rulings of March 24, 2013 and June 10, 2013 (Appellant's Request). Specifically, in MSPB Case No. 12-13, the Board ordered the County not to reduce Appellant's Social Security Adjustment Option benefits until May 1, 2016, and upon that date only reduce Appellant's benefit based on the formula communicated to Appellant in 1996. *See* Final Decision and Reconsideration Decision. Appellant asserts that, inconsistent with the Board's previous orders, effective May 1, 2016, the County reduced his pension by the wrong amount.

The Board issued a Show Cause Order providing the County with the opportunity to respond to Appellant's enforcement request. The Board ordered the County to provide an explanation of how the County has fully complied with the Board's decisions in MSPB Case No. 12-13, or a statement of such good cause as may exist for why the Board's decisions had not been complied with by the County. Show Cause Order, MSPB Case No. 16-20 (June 23, 2016).

On July 16, 2016, the County submitted a Response to Show Cause Order (County Response) providing its explanation for how the County had complied with the decisions in MSPB Case No. 12-13. Appellant submitted a response (Appellant's Response) on July 25, 2016, disputing the County's explanation.

POSITIONS OF THE PARTIES

Appellant asserts that the County used an incorrect calculation when it reduced his Social Security Adjustment Option benefits, effective May 1, 2016. Appellant alleges that the County Employee Retirement Plan failed to properly implement the MSPB's March 24, 2013, Final Decision and June 10, 2013, Reconsideration Decision in Case No. 12-13. Under the Board's orders, the County is prohibited from reducing Appellant's benefits to a level "other than the one communicated to Appellant seventeen years ago." Reconsideration Decision, p. 5.

Appellant claims that by reducing his monthly pension benefit from \$6,107.79 to \$4,419.84, the County has disregarded the Board's decisions of March 24, 2013 and June 10, 2013.¹ Appellant's Request, p. 1. According to Appellant, he and his wife were verbally told by a County employee in 1996 that on May 1, 2016, his monthly pension benefit would never be reduced by more than \$1,200, and then at a subsequent meeting told by the same employee that the reduction would be \$1,077. Appellant's Request, pp. 2-3, 5. Appellant also asserts that he

¹ Appellant's petition contains an apparent math error by stating that the reduction was \$1,787.95. The reduction was actually \$1,687.95.

testified during the Board's hearing that his retirement benefit would never be reduced by more than \$1,200. *See* MSPB Case No. 12-13, December 4, 2012, Hearing Transcript, p. 114.

The County claims that it properly calculated the appropriate May 1, 2016, reduced retirement benefit amount by applying cost of living adjustments to both his benefits and the reduced benefit amount. County Response, p. 3. The County takes the position that Appellant was not advised that his benefit would be reduced by a specific dollar amount in 2016, but that both his benefits and any eventual reduction would be subject to cost of living adjustments (COLAs). County Response, p. 3; County Exhibit E.² The County also submits that income verification statements which Appellant presented to the Board during MSPB Case No. 12-13 also reflected the benefit reduction amount as being subject to COLA calculations. County Exhibit F.³ The County notes that the reduction amount calculated in the 2003 statement is \$1,219.74, and the reduction amount in the 2010 statement is \$ 1,499.76.⁴

APPLICABLE LAW

Montgomery County Code, Chapter 33, Merit System Law, § 33-14, Hearing Authority of Board, which states in applicable part,

(c) *Decisions*. . . . The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

(8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;

* * *

(10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

ANALYSIS AND CONCLUSIONS

The Board's orders in MSPB Case No. 12-13 are enforceable through a petition for enforcement. Montgomery County Code, § 33-14(c). *See Watson v. Office of Pers. Mgmt.*, No. 79 M.S.P.R. 308, 313 (1998); *Souders v. Office of Personnel Management*, 35 M.S.P.R. 353, 355 (1987). In this enforcement action, the Board's authority to order compliance is limited to the action required by its orders in MSPB Case No. 12-13. *Cf.*, *Heath v. Department of Agriculture*, 111 M.S.P.R. 434 (2009).

The Board's Reconsideration Decision in MSPB Case No. 12-13, at p. 5, provided that "[t]he County must continue to pay Appellant his current retirement benefit until age 66 at which time it may reduce the payment *based on the formula* it conveyed to Appellant seventeen years ago." (Emphasis added). The Reconsideration Decision went on to say that the County may not

² MSPB Case No. 12-13, Appellant Exhibit 3.

³ MSPB Case No. 12-13, Appellant Exhibits 4 and 5; December 4, 2012, Hearing Transcript, pp. 66-67.

⁴ The County's Response also contains a math error by stating that the reduction in the 2010 statement is \$1,489.76.

reduce Appellant's retirement benefit to a level "other than the one communicated to Appellant seventeen years ago." *Id.* Given Appellant's allegations regarding noncompliance, the County is required to show that its calculation of the reduced benefit was proper. *Henderson v. Office of Personnel Management*, 88 M.S.P.R. 470 (2001). The question is the proper interpretation of the reduction calculation communicated to Appellant.

In MSPB Case No. 12-13 the Board found that in late 1996 Appellant was told that he would receive a monthly benefit of \$3,897.09 until he reached age 66, at which point his benefit would be reduced by \$1,077 (his estimated Social Security benefit) to \$2,820.09. That reduced benefit was 72.36% of the original full benefit (\$3,897.09). County Exhibit C; MSPB Case No. 12-13, Appellant Exhibit 13. Appellant argues that instead of a formula, the County should simply have used the specific dollar amount (\$1,077) mentioned in the documents provided to him 20 years ago, and discussed with him by a County employee, to determine the adjusted benefit. Appellant's argument that the specific dollar amount provided 20 years ago controls the determination of the reduced benefit ignores, however, that the documents also explicitly provide that the reduced benefit would be \$2,820.09. However, as noted above, the Board's Reconsideration Decision said that his benefits would be reduced "*based on the formula*" conveyed to him. The precise numbers provided in the estimates of two decades ago are only the starting point for calculating Appellant's benefits.

The purpose of the retirement option chosen by Appellant is to provide higher benefits until normal Social Security retirement age, and then reduce those benefits by an amount roughly equal to the estimated Social Security benefit. The goal is for total retirement benefits to remain somewhat level. *See* MSPB Case No. 12-13, January 30, 2013, Hearing Transcript, pp. 48-49. But both the County retirement benefit and the estimated Social Security benefits are subject to COLAs and have increased over the years.⁵ What the County has done is take into account the COLA increases applicable to Appellant's retirement benefits, and then reduce Appellant's monthly retirement benefit using the same formula it applied to his initial monthly benefit.

Because the percentage of any future cost of living adjustments were unknown at the time the estimates were provided to Appellant, all the numbers were subject to adjustment to account for those COLAs. Over the years, annual COLAs increased Appellant's benefit from \$3,897.09 to \$6,107.79 per month.⁶ To calculate the reduced benefit amount as of May 1, 2016, the County applied the annual COLAs to the estimated reduced benefit of \$2,820.09, which resulted in a COLA-adjusted reduced monthly benefit of \$4,419.84, or 72.36% of \$6,107.79.⁷ That is the same

⁵At the hearing in MSPB Case No. 12-13, Appellant introduced a Social Security Statement dated January 14, 2011, estimating his Social Security benefits at age 66 to be \$2,332 per month. Appellant Exhibit 12. While we need not precisely determine what portion of the over 100% increase from the \$1,077 estimate is attributable to COLAs and how much is due to Appellant's employment elsewhere subsequent to his service with the County, at least some of the increase is due to Social Security COLAs. *See* <https://www.ssa.gov/OACT/COLA/colaseries.html>.

⁶There appears to be no dispute that Appellant is and has been entitled to receive yearly COLAs under Montgomery County Code, § 33-44.

⁷Appellant objects to County Exhibit A, which includes the COLA calculations, as unverified documents not introduced into evidence at the hearings in MSPB Case No. 12-13. We find that it is appropriate for the County to provide an explanation of how it has complied with our prior orders. Moreover, calculation of the benefit reduction pursuant to those orders required information not available until the COLAs were determined each year.

percentage reduction (72.36%) that the original reduced monthly benefit of \$2,820.09 is from the original full monthly benefit amount of \$3,897.09.

It is noteworthy that the estimated reduction amounts that were calculated and provided in writing to Appellant in the 2003 and 2010 were, respectively, \$1,219.74 and \$1,499.76. County Exhibit F; MSPB Case No. 12-13, Appellant Exhibits 4 and 5. Thus, Appellant was on notice prior to the hearings in MSPB Case No. 12-13 that the May 1, 2016, monthly reduction amount would exceed \$1,077. Indeed, during the hearing Appellant specifically elicited testimony regarding the reduction amounts reflected in those statements, and never raised an issue concerning the fact that the amounts exceeded \$1,077. December 4, 2012, Hearing Transcript, pp. 66-67.

There is no dispute that the County complied with the Board orders in MSPB Case No. 12-13 by not reducing Appellant's benefits until May 1, 2016. It is also clear that the orders in MSPB Case No. 12-13 did not direct the County to pay a specific amount in benefits as of that date. Instead, the Board ordered the County not to reduce Appellant's benefit to a level "other than the one communicated to Appellant seventeen years ago." If it were possible to determine the exact amount of the benefit reduction at the time the Board issued its orders in MSPB Case No. 12-13, the Board would certainly have done so for the sake of clarity. However, because determination of the appropriate benefit level requires taking into account a variable factor, *i.e.*, the yearly cost of living increases, the orders referenced the information provided to Appellant at the time he made his election. Thus, Appellant is mistaken in his belief that he was guaranteed a benefit reduction of a specific dollar amount. Rather, he was assured that his benefits and the eventual reduction would be determined according to calculations that take into account yearly cost of living adjustments.

We find that the County utilized the appropriate method of calculation and obtained the correct result. Accordingly, because there is no failure to comply with the Board orders in MSPB Case No. 12-13, we deny Appellant's petition for enforcement.

ORDER

For the foregoing reasons, Appellant's Request for Enforcement is **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
October 25, 2016

Appellant's petition for judicial review of this decision was dismissed by the Circuit Court for Montgomery County on April 17, 2017(Civil Action No. 427306-V).

CASE NO. 16-18

ORDER ACCEPTING SETTLEMENT AGREEMENT

On May 12, 2016, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a dismissal imposed by the Montgomery County Department of Transportation.

On April 10, 2017, the parties filed a settlement agreement with the Merit System Protection Board (Board or MSPB) in the above-captioned case. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

As this case involves a disciplinary action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, and freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records as a settled case;
2. That the appeal in this Case No. 16-18 be and is hereby **DISMISSED** as settled;
3. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
April 18, 2017

CASE NO. 17-12

ORDER ACCEPTING SETTLEMENT AGREEMENT

On December 7, 2016, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a five (5) day suspension imposed by the Montgomery County Office of Human Resources.

On March 24, 2017, the parties filed a settlement agreement with the Merit System Protection Board (Board or MSPB) in the above-captioned case. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the parties have agreed to enter the settlement agreement into the record. The parties further agreed that the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement. MCPR § 35-15.

As this case involves a disciplinary action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 16-10 (2016); MSPB Case No. 16-03 (2016); MSPB Case No. 15-24 (2015); MSPB Case No. 10-13 (2010). *Cf., Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, and freely entered into by the parties. *Id.; McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records as a settled case;
2. That the appeal in this Case No. 17-12 be and is hereby **DISMISSED** as settled, and the hearing scheduled for April 24 and 25, 2017, is cancelled;
3. That within 60 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement required to be effectuated by that date;
4. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
March 27, 2017

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), "[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 2017, the Board issued the following Show Cause Orders.

CASE NO. 16-17

SHOW CAUSE ORDER

On May 9, 2016, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge her termination from employment with the County's Department of Health and Human Services. On May 9, 2016, the Board acknowledged receipt of the appeal and ordered the parties to file prehearing submissions.

The County requested an extension of time within which to file its prehearing submission. Board's staff contacted Appellant to ascertain whether she objected to the request. Appellant told Board staff that she agreed with the extension, but also said that she was interested in withdrawing her appeal. Board staff advised Appellant that if she did decide to withdraw her appeal she should do so in writing.

Subsequently, the case was held in abeyance while the parties conducted settlement negotiations. After the County notified the Board that those efforts had failed, the Board resumed processing of the case and issued a scheduling letter on October 13, 2016, resetting deadlines for the prehearing submissions. On October 17, 2016, the County filed a Motion to Dismiss, or, In the Alternative, To Extend County's Time to File Pre-Hearing Submission.

In support of its motion, the County argues that because Appellant has orally expressed a desire to both Board staff and the Associate County Attorney that she wished to withdraw her appeal, the case should be dismissed unless Appellant expresses her intent to pursue the appeal in writing. In the alternative, the County asks for an extension of time within which to file its prehearing submission.

Accordingly, pursuant to § 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 accept her oral representations that she does not wish to pursue this case and dismiss her appeal based on failure to prosecute. Appellant's submission is due by close of business **November 21, 2016**. The County's Reply is due by **November 29, 2016**. The deadlines for prehearing submissions are hereby suspended pending receipt of submissions pursuant to this Order.

For the Board
November 3, 2016

CASE NO. 17-27

SHOW CAUSE ORDER

On March 24, 2017, Appellant was sent a Notice of Intent to Terminate (NOIT) and, on April 27, 2017, a Notice of Termination. On May 8, 2017, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge her termination from employment with the County's Office of Human Resources. On May 9, 2017, the Board

acknowledged receipt of the appeal and ordered the parties to file prehearing submissions. The County requested an extension of time within which to file its prehearing submission, which was granted.

On June 15, 2017, the County notified Appellant and the Board that the NOIT and the Notice of Termination were being withdrawn and a that a new NOIT would be issued. The County acknowledged that Appellant's appeal had correctly noted that the NOIT failed to contain the required notice that she could respond within 10 days and to whom she could respond. The County represents that Appellant will be placed on administrative leave, effective Monday, May 8, 2017, so that she will be made whole for any loss of salary and benefits. The County further indicates that Appellant will remain on administrative leave until the effective date of any subsequently issued termination. For these reasons, the County argues that this appeal, MSPB Case No. 17-27, should be dismissed.

The Board's Executive Director requested that the County's representative and Appellant discuss whether Appellant would like to withdraw her appeal or agree to a joint motion to dismiss. The County's representative sent an email to Appellant asking if she was willing to withdraw her appeal. Appellant acknowledged that her "consent is not necessary for any correction of a procedural error," but stated that she had "concerns and questions."

Pursuant to § 35-7(d) of the Montgomery County Personnel Regulations, the Board hereby orders Appellant to show good cause as to why the Board should not dismiss her appeal as moot if the County satisfactorily provides written certification that it has taken the above described actions to rescind the Notice of Termination and reinstate Appellant with full back pay. Appellant's submission is due by close of business **July 11, 2017**. The County's Reply is due by **July 18, 2017**. The deadlines for prehearing submissions are hereby suspended pending receipt of submissions pursuant to this Order.

For the Board
June 19, 2017

ATTORNEYS 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 2017, the Board issued the following attorneys fee decisions.

CASE NO. 14-33

DECISION ON ATTORNEY FEE REQUEST

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellants' Amended Petition for Award of Attorney's Fees and Costs (Appellants' Amended Petition).¹ Appellants' Amended Petition seeks \$48,894.30 in attorney's fees for 173.5 hours of attorney and paralegal time. All of that time was billed by a Washington, D.C., law firm (the firm), and paid to the firm by Lodge 35 of the Fraternal Order of Police (FOP), which had agreed to pay the attorney fees on behalf of the individual Appellants. *See* Appellants' Amended Petition. The County objects to certain elements of the Appellants' Amended Petition, arguing that the requested billing rates are higher than the actual rates agreed to between the FOP and the firm, and that the Statement reflects excessive hours and certain duplicative billing. *See* County's Supplemental Response.

POSITIONS OF THE PARTIES

Following the Board's February 9, 2015, Final Decision and Order in favor of the Appellants, and the November 24, 2015, affirmance of that order by the Circuit Court for Montgomery County, Appellants are seeking attorney's fees and expenses incurred during both the Board proceedings and the subsequent litigation before the Circuit Court. The total amount of attorney's fees and costs being sought is \$48,894.30. Appellants' Amended Petition at 1. This request is comprised of \$45,575.00 for attorney and paralegal fees, and costs of \$3,319.30. Appellants' Amended Petition at 6.

Appellants have submitted billing records showing a total of 173.50 hours of attorney and paralegal time. *See* Appellants' Amended Petition at 3; C Affidavit, ¶ 8 and Exhibit A to C Affidavit. Billing records submitted by Appellants also indicate expenses consisting of charges for online legal research, photocopying, postage, and telephone use. *See* C Affidavit, ¶ 18 and Exhibit A to C Affidavit.

Pursuant to a fee agreement between the firm and the FOP, the firm agreed to bill the FOP at a blended hourly rate of \$210.00 for all attorneys and \$100.00 per hour for paralegals.² Appellants' Amended Petition at 5. Those are the rates at which the firm regularly bills the FOP. C Affidavit, ¶ 12. The firm billed the entire 173.50 hours of attorney and paralegal time and expenses to the FOP, and the FOP paid the firm the entire amount at the agreed upon rates. Appellants' Amended Petition at 3; C Affidavit, ¶ 1. The total amount of billings for attorneys and paralegals at the agreed upon rates, not including expenses, was \$34,207.50. C Affidavit, ¶ 11.

Appellants' counsel argue that they agreed with the FOP to accept the contractually specified rates for representing Appellants because the firm charges labor organization clients, such as the FOP, reduced rates "due to public-spirited considerations." Appellants' Amended Petition at 5. Indeed, the firm asserts that it generally bills its clients at rates lower than charged

¹ Appellants' Petition for Award of Attorney's Fees and Costs (Appellants' Petition) was filed on February 19, 2015.

² The FOP agreed to pay attorney fees on behalf of the Appellants. Appellants' Amended Petition at 3, n.1.

by attorneys in the market because most of the firm's clients are unions, employees, or nonprofit entities that cannot afford to pay prevailing rates. C Affidavit, ¶ 12. The firm further asserts that it currently bills many of its clients at rates of \$400 or more per hour for senior attorneys, \$250 or more for associates, and \$125 or more for paralegals. C Affidavit, ¶ 13.

Accordingly, the firm contends that they are nevertheless entitled to be reimbursed at the relevant prevailing market rates. Seeking what they argue is the market rate for attorneys of similar experience under guidelines issued by the United States District Court for the District of Maryland, the firm requests that fees be awarded at an hourly rate of \$400.00 for attorney L, \$300.00 for attorney C, \$210.00 for attorney I, and \$110.00 for paralegals. Appellants' Amended Petition at 4. Utilizing these higher rates, Appellants arrived at the requested total of \$45,575.00 for attorney and paralegal fees.

The County's Supplemental Response incorporated its March 2, 2015, response to the Appellants' February 19, 2015, petition for attorney's fees and costs. *See* County's Response to Petition for Attorney's Fees, March 2, 2015 (County's Response). The County raised various objections to the fees request in its two responses. A central argument of the County is that Appellants are not entitled to bill at rates higher than those agreed to by the firm and the FOP. County's Supplemental Response at 2. The County also maintains that the firm is seeking compensation for work unrelated to this appeal, is billing an excessive number of hours for the nature and difficulty of the work performed, and that there is duplicative billing.

The County's response to Appellants' Amended Petition asks that Appellants be awarded \$9,814.29 in attorney's fees and expenses for those costs incurred after June 25, 2015. County's Supplemental Response at 5. In its March 2, 2015, response the County requested that the MSPB reduce the Appellants' original (February 19, 2015) request for \$32,397.55 in attorney's fees and expenses to a total of \$11,810.01. County Response at 8. Thus, the County appears to contend that Appellants are only entitled to \$21,624.30 in attorney's fees and expenses rather than the total of \$48,894.30 sought by Appellants.

The County argues that although the County Code controls how the Board must determine the appropriate amount of attorney's fees to award, the Board should nevertheless consider the fee agreement between Appellants' attorneys and the FOP in determining the appropriate rate. County's Supplemental Response at 4-5. The County contends that there should only be compensation for the actual costs incurred, and that "Appellants' attorneys should not be entitled to a windfall and receive higher fees than their clients would pay." *Id.* at 5.

The County has also challenged the number of hours billed by the firm. Appellants' February 19, 2015, petition sought a total of 113.75 hours of attorney and paralegal time. Appellants' Petition at 2. In its March 2, 2015, response the County challenged the number of hours and argued that for work performed prior to June 25, 2015, the firm is only entitled to a total of 54.75 hours, 48 hours by attorneys at an hourly rate of \$210 (\$10,080) and 6.75 hours by paralegals at an hourly rate of \$100 (\$675). County's Response at 8. The County requested the reduction of 29.25 hours due to the nature of the charges and the alleged excessive time billed. County's Response at 5. Some of the specifics of the County's request are outlined below.

The County argued that the firm improperly billed for communications with the FOP, a non-party to this case. County's Response at 2-3. The County contends that it is inappropriate for the firm to receive reimbursement for time spent in communications with the FOP because, "[a]lthough the FOP agreed to pay the legal expenses associated with this matter, the FOP itself was not a party to the proceeding, the FOP did not appear before the Board, the FOP was by law prohibited from serving as the certified representative for the retirees, and the FOP did not represent any of the Appellants during the appeal." *Id.* at 2. Because the challenged items that mention the FOP listed several other services, the County was unable to determine exactly how much of the time the firm spent in communication with the FOP. The County proposed an estimate of the time spent communicating with the FOP that it suggests would justify a reduction of 2.0 hours from 3.5 hours of billing items. *Id.* at 3.

Further, the County disputed Appellants' position that this case required "extensive legal research and analysis" because it presented "a novel and complex question of statutory interpretation." County Response at 3. Rather, the County argued, given the expertise of the firm, "the number of hours spent on this single issue case is unreasonable." *Id.* The County notes that several documents prepared and filed by the firm at different stages of the litigation involved the same issue.

For costs incurred before June 25, 2015, the County also requests the following reductions:

- The County argues that the 49.25 hours billed in connection with Appellants' initial brief before the MSPB are excessive for attorneys with experience and expertise in employee benefits and because substantial time had already been spent by the firm in preparing a similar argument to the Chief Administrative Officer. The County thus requested a reduction of 29.25 hours. County's Response at 4-5.
- With regard to 27.5 hours related to preparation of the Appellants' reply brief before the MSPB, the County would subtract one hour involving communication with the FOP and, because of time spent on the same issue drafting earlier pleadings, 16.5 hours due to excessive time spent on the same issue. County's Response at 5.
- For time spent on the Unopposed Motion to Extend Stay of Appeals and the Joint Motion to Extend Stay of Appeals, as they were similar to the initial Motion to Stay, the County requests subtracting 2.0 hours from the billed total of 3.25 hours. County's Response at 5-6.
- The subtraction of 9.25 hours from 13.75 hours of paralegal time billed due to excessive and duplicate hours, pointing out that the same administrative tasks are itemized several times and performed by different staff. County's Response at 6.
- Appellants' messenger expenses be reduced by \$50.00 for February, 2015, because "less expensive methods of delivery were used previously." *Id.*

The County also addressed costs incurred on or after June 25, 2015. The County requested that the MSPB award \$9,814.29 in attorney's fees and expenses based on 35.5 hours at an hourly rate of \$210 (\$7,455.00), 1.75 hours by paralegals at an hourly rate of \$100 (\$175.00), and expenses of \$2,184.29. County's Supplemental Response at 5-6.

Specifically, the County disagrees with Appellants' contention that the judicial review by the Circuit Court required "extensive legal analysis." County's Supplemental Response at 3-4. The County argues that because this was judicial review on the administrative record, and the Appellants made the same statutory interpretation arguments on judicial review that they did during the administrative appeal, the time spent preparing Appellants' Circuit Court memorandum did not require new and extensive legal analysis. The County further observes that the firm's bills reflected substantial time drafting the memorandum by a junior attorney who was not involved in the case during the administrative proceedings, and contends that it would be unreasonable for the County to be required to pay for the time necessary for that attorney to become familiar with this case's facts and the applicable law. The County therefore requests a reduction of 20 hours from the 47.5 total hours billed for researching and writing the Circuit Court memorandum. *Id.*

For costs incurred on or after June 25, 2015, the County also requests a reduction from 4.25 hours to 2.5 hours for paralegal charges, which the County views as duplicative and excessive, as well as reducing the cost of the Appellants' messenger in July 2015, by \$30.00, because Appellants previously used less expensive methods of delivery. County's Supplemental Response at 4.

APPROPRIATE REIMBURSEMENT FORMULA

The Montgomery County Code, § 33-14(c), provides the Board with remedial authority to "[o]rder the County to reimburse or pay all or part of the employee's reasonable attorney's fees." *See Montgomery County v. Jamsa*, 153 Md. App. 346, 355 (2003). Pursuant to Montgomery County Code, § 33-15(c), Appellants are entitled to reimbursement for legal expenses when, as in this case, the County was the party seeking judicial review of a Board decision:

(c) 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.

In determining what constitutes a reasonable fee, § 33-14(c)(9) of 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 *Manor Country Club v. Flaa*, 387 Md. 297 (2005), the Court of Appeals considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The provisions of §27-7(k)(1) then in effect were identical to § 33-14(c)(9), which is controlling on the Board. The *Flaa* Court noted that the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds*, *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. 387 Md. at 313.³

In *Friolo v. Frankel*, 403 Md. 443, 460 (2008), the Court of Appeals cited 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's fees. *See* MSPB Case No. 00-13 (2000). In this case, the County does not seek to reduce the award of attorney's fees based on Appellants' degree of success.

Friolo also indicated that the Court of Appeals applies a lodestar analysis to calculate a fee award in cases involving fee shifting laws based on public policy considerations. *See Monmouth Meadows v. Hamilton*, 416 Md. 325, 335 (2010)(Distinguishing fee shifting by statute from contractually based obligations).

ANALYSIS AND CONCLUSIONS

Appropriate Hourly Rate

Normally the Board looks to the United States District Court for the District of Maryland Local Rules for guidance in determining an appropriate hourly rate for attorney's fees, as well as considering the nature and complexity of the case.⁴ *See* MSPB Case No. 14-17 (2014); MSPB Case No. 13-07 (2013); MSPB Case No. 13-04 (2013); MSPB Case No. 13-02 (2013); MSPB Case No. 11-03 (2011); MSPB Case No. 11-04(2011); MSPB Case No. 10-19 (2010); MSPB Case No. 07-17 (2008); MSPB Case No. 06-03 (2010). Those guidelines are "intended solely to provide practical guidance." United States District Court for the District of Maryland Local Rules, Appendix B at 127.⁵ Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

Appellants argue that Maryland courts determine the reasonable hourly rate for attorney's fees by reference to the prevailing market rates in the community, citing *U.S. Health, Inc. v. State*, 87 Md. App. 116, 131 (1991), and note that in determining the relevant market rates the Board

³ The 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.

⁴ Appendix B of the United States District Court for the District of Maryland Local Rules (July 1, 2016), is available at: <http://www.mdd.uscourts.gov/publications/forms/LocalRules.pdf>.

⁵ Under those guidelines, the suggested rates for lawyers admitted to the bar for twenty years or more are \$300 - \$475; the suggested rates for lawyers admitted to the bar for fifteen to nineteen years are \$275 - \$425; the suggested rates for lawyers admitted to the bar for nine to fourteen years are \$225 - \$350; the suggested rates for lawyers admitted to the bar for five to eight years are \$165 - \$300; the suggested rates for lawyers admitted to the bar for less than five years are \$150 - \$225; and, the suggested rates for paralegals are \$95 - \$150. United States District Court for the District of Maryland Local Rules, Appendix B at 127.

normally refers to the United States District Court for the District of Maryland guidelines. Appellants' Amended Petition at 4. In light of those guidelines, Appellants request that fees be awarded at an hourly rate of \$400 for attorney L because he has more than twenty years of experience (admitted to the Maryland bar in 1992 and the Washington, D.C bar in 1984); \$300 for attorney C (admitted in Maryland in 2013 and Washington, D.C in 2002); \$210 for attorney I (admitted in Maryland in 2012 and Washington, D.C in 2014); and \$110 for paralegals. *Id.*

In this case, however, the firm's fees and expenses were paid by the FOP under the terms of a fee agreement under which the firm billed the FOP at a blended hourly rate of \$210 for all attorneys and \$100 per hour for all paralegals. Appellants' Amended Petition at 5. Appellants argue that the Board should disregard the rates actually billed to the FOP and award fees based on the prevailing market rate, citing *U.S. Health, Inc. v. State*, 87 Md. App. At 129, for the proposition that when a statute authorizes payment for a reasonable attorney's fee instead of fees incurred, "it is not unreasonable to base the fee on 'prevailing market rates' in the community, whether the prevailing party is represented by retained counsel, in-house counsel or non-profit counsel." Appellants also cite *Shapiro v. Chapman*, 70 Md. App. 307, 316 (1987), for the proposition that the prevailing party in a civil rights action is entitled to attorney's fees even if they "were represented by a publically funded, nonprofit law office," arguing that the firm charges labor organizations reduced rates "due to public-spirited considerations." Appellants' Amended Petition at 5. The burden of proving that an adjustment to the billing rate the firm actually charged the FOP is necessary to the calculation of a reasonable fee is on the Appellants. *Blum v. Stenson*, 465 U.S. 886, 898, 901-02 (1984). *See also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010).

As the County has conceded, the County Code and not the fee agreement between the firm and the FOP controls how the Board must determine the appropriate amount of attorney's fees to award. County's Supplemental Response at 4-5. Nevertheless, the Board agrees with the County that it should consider the fee agreement between Appellants' attorneys and the FOP in determining the appropriate rate. "The presence of a pre-existing fee agreement may aid in determining reasonableness." *Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989) (Fee arrangement is a consideration but not a dispositive factor in determining a reasonable fee). Thus, the Board must independently evaluate reasonableness of the requested fees, taking into account the fee agreement as a factor under § 33-14(c)(9).⁶

The billing rate actually charged by an attorney pursuant to a representation agreement is credible evidence that the contractual rates are consistent with the local market rate because the client freely agreed to pay that rate. *Willis v. U.S. Postal Service*, 245 F.3d 1333, 1340 (2001). Where attorneys and the client have agreed upon a specific fee for legal services rendered on behalf of an appellant in a Board case, we presume that the amount agreed upon represents a reasonable fee. *See Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, 160-61 (2001); *Gensburg v. Department*

⁶ Because the FOP retained private attorneys to represent the Appellants, for purposes of determining attorney's fees the union may be viewed as standing in the Appellants' shoes. *Jennings v. Department of the Navy*, 45 M.S.P.R. 615, 616 n. 1 (1990).

of *Veterans Affairs*, 85 M.S.P.R. 198, 206 (2000). Nevertheless, this presumption is rebuttable by convincing evidence that the requested fees reflect the prevailing community rate. *Id.*

Appellants have pointed to the United States District Court for the District of Maryland guidelines discussed above as evidence that their requested fees are reasonable and consistent with the prevailing market. We are nevertheless persuaded that the blended rate of \$210 an hour for attorneys and the rate of \$100 an hour for paralegals are not unreasonable given that the firm entered into a fee agreement with the FOP for those rates and generally charges those same rates to most of its clients. Furthermore, the billing rate for attorneys is not significantly different from those at the lower range of the U.S. District Court guidelines when taking into account the fact that the firm and the FOP agreed to a blended rate of \$210 an hour. The blended rate is a reasonable approach to balancing fees among different attorneys with varying skill and experience levels. Under this approach, the relatively inexperienced attorney I's time was billed at \$210 an hour when, under the guidelines, his billing rate could reasonably be as low as \$150 per hour. That means that attorney I's time was billed to the FOP at a rate up to \$60 above the lower end of the rate suggested in the guidelines. Under the guidelines, the more experienced attorney C's billing rate could be as low as \$225, only \$15 less than the blended rate charged to the FOP.

For the above reasons, we hold that the blended rate of \$210 an hour for attorneys is reasonable and appropriate in this case. As the rate of \$100 for paralegals was also agreed to by the firm and the FOP and is within the range suggested in the guidelines, we find that it too is reasonable and appropriate.

Amount of Hours Billed

The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Casali v. Department of the Treasury*, 81 M.S.P.R. 347 (1999). 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 County did make an argument against the reasonableness of the hours sought in this matter. As discussed, Appellants are seeking an award for a total of 173.50 hours of attorney and paralegal time, which was billed by and paid to the undersigned counsel in this litigation, the firm. *See* Appellants' Amended Petition at 3; C Affidavit, ¶ 1.⁷

Appellants believe that the amount of time charged for attorneys and paralegals is reasonable given the complexity of the case, the required legal analysis, examination of legislative history, research of court and MSPB decisions, and preparation of briefs, motions, and stay and fee requests. Appellants' Amended Petition at 3. As discussed above, Appellants provided detailed billing records and an affidavit to support the fee request.

The County has challenged the number of hours billed by the firm. The County contends that it is inappropriate for the firm to receive reimbursement for time spent in communications

⁷ As also noted above, Appellants were represented by the firm pursuant to an agreement with the FOP. The FOP agreed to and did pay the costs and fees associated with pursuing this matter before the Board and the Circuit Court.

with the FOP because the FOP was not a party to the proceedings. Because the challenged items that mention the FOP listed several other services, the County was unable to determine exactly how much of the time the firm spent in communication with the FOP. Nevertheless, the County proposed an estimate of the time spent communicating with the FOP. We disagree, and find that there could be any number of reasonable and legitimate reasons for the firm to consult with the FOP during this litigation. For example, the FOP may have been able to help facilitate communication with the Appellants, provide information which made the firm's research more efficient, or simply suggest tactical approaches based on its knowledge and experience of the County.

The County disputed Appellants' position that this case required "extensive legal research and analysis" because it presented "a novel and complex question of statutory interpretation." County Response at 3. Rather, the County argued, given the expertise of the firm, "the number of hours spent on this single issue case is unreasonable." *Id.* The County notes that several documents prepared and filed by the firm at different stages of the litigation involved the same issue. It is the Board's view that the issues in this case were challenging, and justified the time the firm spent on its successful prosecution of the case.

The County argues that the 49.25 hours billed in connection with Appellants' initial brief before the MSPB are excessive and that substantial time had already been spent by the firm in preparing a similar argument to the Chief Administrative Officer. The County also argues that the 27.5 hours related to preparation of the Appellants' reply brief before the MSPB should be reduced because of the time spent on the same issue drafting earlier pleadings. The firm filed lengthy, well researched and reasoned memoranda, with multiple exhibits, on behalf of 14 clients in a difficult case. The Board therefore declines to reduce the amount of time spent on these pleadings.

For the time spent on the Unopposed Motion to Extend Stay of Appeals and the Joint Motion to Extend Stay of Appeals, the County requests subtracting 2.0 hours from the billed total of 3.25 hours as they were similar to the initial Motion to Stay. While it may be that these motions could have been drafted and finalized more efficiently, we do not find the amount of time spent on them to be excessive.

The County also requests a reduction from 4.25 hours to 2.5 hours for paralegal charges, which the County views as duplicative and excessive, as well as reducing the cost of the Appellants' messenger in July 2015, by \$30.00. County's Supplemental Response at 4. As the tasks performed by paralegals may often be labor intensive and certainly susceptible to sharing among several individuals, we can discern no strong justification for reducing these charges.

The County's argument that the time spent preparing Appellants' Circuit Court memorandum did not require new and extensive legal analysis because judicial review was on the administrative record, and the Appellants had made the same statutory interpretation arguments on judicial review that they did during the administrative appeal, has some merit. The Board therefore finds appropriate a reduction of 5 hours from the 47.5 total hours billed for researching and writing the Circuit Court memorandum.

With the exception of approximately 10% of the time spent preparing the memorandum on judicial review in Circuit Court noted above, the Board finds the requested number of hours to be reasonable. Further, the Board finds that the time spent was adequately documented and reasonably necessary to achieve the successful outcome. Accordingly, with the exception of a reduction of 5 hours from the time spent preparing the Circuit Court memorandum, the Board denies the County's requests and declines to reduce the number of billable hours sought by the Appellants.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** the following:

1. A total of 148.25 hours of attorney's fees be reimbursed at a rate of \$210 per hour, for a total of \$31,132.50;
2. A total of 20.25 hours of paralegal time be reimbursed at a rate of \$100 per hour, for a total of \$2,025; and
3. Total expenses of \$3,319.30 be reimbursed.

Accordingly, the County is hereby ordered to reimburse Appellants for attorney's fees and costs in the amount of \$36,476.80.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
August 16, 2016

CASE NO. 15-27

ORDER

Appellant is a Correctional Officer who was disciplined by being suspended for thirty (30) days and demoted in rank. After a hearing, the Board issued a Final Decision and Order upholding the suspension of Appellant but sustaining Appellant's appeal challenging his demotion. The Board found that because the penalty had been mitigated, the County would be required to pay reasonable attorney fees and costs. On May 26, 2016, Appellant filed a request for attorney fees with the Board. The County responded to the request on June 6, 2016, challenging the hourly billing rate requested as well as the number of hours billed. The County's opposition argued that because Appellant only prevailed with regard to part of the penalty against him, compensation for attorney's fees should be reduced to reflect that partial success.

Subsequently, on June 20, 2016, Appellant filed petition for judicial review of the Board's Final Decision in this matter with the Circuit Court for Montgomery County. Given that the final

disposition of the pending judicial review may have an impact on the determination of the appropriate attorney's fees, in the interest of judicial economy the Board will stay the issuance of any decision on Appellant's attorney's fee request until this matter has been decided by the Circuit Court.

Accordingly, the Board hereby stays its consideration of Appellant's request for attorney's fees. The parties are hereby ordered to inform the Board within 15 calendar days after final disposition of the petition for judicial review and to provide a copy of any court decisions and orders. Appellant or the County may then request permission to supplement the fee request or the opposition thereto.

For the Board
July 28, 2016

The Circuit Court for Montgomery County upheld the Board's decision on May 9, 2017. (Civil Action No. 422211-V).

OVERSIGHT

Classification and Compensation Audit

Under § 404 of the Montgomery County Maryland Charter, the Merit System Protection Board is required to, "...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 County Council appropriated funding in the Fiscal Year 2017 and 2018 budgets to allow the MSPB to hire a consultant to conduct an independent analysis of the County's classification and compensation plan and procedures. *See* Montgomery County Personnel Regulation § 9-3(h)(2)(A) ("At least once every 5 years, the MSPB must have a consultant who is a specialist in the field and independent of the County government conduct an objective audit of the entire classification and compensation plan and procedures").

In October 2016, Board entered into a contract with CPS HR Consulting to design and conduct a comprehensive review and audit of the County's classification and compensation program and procedures. The objective of the review is to: 1) ensure the accuracy, equity, validity and integrity in the administration of the classification and compensation program and execution of its procedures; and, 2) determine the effectiveness of the current classification and compensation models and methodologies. The audit will determine whether the present classification and compensation program and procedures are administered properly and fairly, assuring equitable treatment of employees, coupled with meeting the needs of the County to attract and retain a quality work force.

The Board anticipates that the audit report will be finalized in the second quarter of Fiscal Year 2018. When the independent review and audit is complete, the Board will submit the audit report to the County Council, County Executive, and the Chief Administrative Officer.

Creation of New Classifications

Pursuant to statute, the Board performs certain oversight functions. Section 33-11 of the Montgomery County Code provides in applicable part that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service

Based on the above-referenced provision of the Code, § 9-3(b)(3) of the Montgomery County Personnel Regulations, 2001 (as amended October 22, 2002, April 27, 2004, July 12, 2005, June 27, 2006, December 11, 2007, October 21, 2008, July 12, 2011, and June 30, 2015), provides that the Office of Human Resources Director shall notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class.

In fulfilling this mandate during fiscal year 2017, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) ERP Change Management Specialist
- 2) Police Cadet
- 3) EMS Educator
- 4) Transportation Contract Compliance Inspector II
- 5) Fiscal and Policy Analyst (Series)
- 6) Performance Management and Data Analyst (Series)
- 7) Information Technology Supervisor