

# **Merit System Protection Board Annual Report FY2016**

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**Charlotte Crutchfield, *Vice Chair***  
**Angela Franco, *Associate Member***

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**FY 2016**  
**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 2016 were:

Michael J. Kator	Chair
Charlotte Crutchfield	Vice Chair
Angela Franco	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, §§ 33-7 and 35-20.

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

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a

court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

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

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

\* \* \*

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

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

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

\* \* \*

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

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

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

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

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

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

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

# **APPEALS PROCESS** **DISCIPLINARY ACTIONS**

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. 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), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), § 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 2016 the Board issued the following decisions on appeals concerning disciplinary actions.



# **DEMOTION AND SUSPENSION**

## **CASE NO. 15-27**

### **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 Director of the Montgomery County, Maryland, Department of Correction and Rehabilitation (DOCR), to impose a thirty (30) day suspension and demote Appellant from the rank of Lieutenant to the rank of Corporal. The appeal was considered and decided by Board Chairperson Michael J. Kator and Vice Chairperson Charlotte Crutchfield.<sup>1</sup>

### **FINDINGS OF FACT**

At the time of all incidents relevant to this appeal Appellant was a Correctional Shift Commander Lieutenant on the midnight or #1 shift (10:30 p.m. to 7:00 a.m.) at the Montgomery County Detention Center (MCDC). County Exhibit (CX) 3. MCDC is a maximum security facility operated by the County for the temporary detention of individuals arrested and charged with criminal offenses. MCDC is the initial point of intake for those arrested for criminal offenses and it contains the County's Central Processing Unit (CPU), through which all adult arrestees are booked and processed. September 30, 2015 Hearing Transcript (Tr.) 210; CX 1. MCDC houses inmates during the first 72 hours of their detention, understandably a critical and stressful time. In addition to the stress anyone would typically undergo under such circumstances, at the time of their arrest and admission to MCDC many new inmates are under the influence of drugs or alcohol, and may be seriously and persistently mentally ill. Tr. 94-95.

Appellant has been a correctional officer with DOCR since December 19, 1988. He was promoted to the rank of Master Correctional Officer/Sergeant on August 17, 1997, and then to the rank of Lieutenant on January 26, 2003. CX 3; Tr. 206. As a Lieutenant, Appellant directly supervised the work of correctional officers assigned to MCDC. According to the Class Specification for Correctional Shift Commander Lieutenant, the primary function of a Lieutenant is to maintain security, safety, and control within the facility, and the incumbent's work "impacts the safety and well being of inmates, staff, visitors, volunteers, and, ultimately the community." CX 1. A Correctional Shift Commander Lieutenant is responsible for such duties as directing and monitoring the operations of the CPU; conducting and supervising the conduct of inmate counts, inspections, shakedowns, and security measures; supervising the work of between fourteen (14) to eighteen (18) correctional officers; and handling disciplinary and other personnel related matters. CX 1. Among the specific job duties is the responsibility to visit each post at least twice per shift to observe and monitor implementation of security and safety procedures, compliance with post

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<sup>1</sup> Former Board Chairperson 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.

requirements, and the application of direct-supervision methods and techniques. CX 1. Additionally, a Correctional Shift Commander Lieutenant “[m]aintains ongoing awareness of the make up of the inmate population and potential for problems within the unit; observes and monitors inmate behavior and movement; advises subordinates as necessary to respond to inmate behavior/disciplinary problems; reviews written and verbal reports (e.g., pass-on log, incident reports, grievance reports) from previous day/shift; advises officers of current status, problems, situations, etc.” CX 1; Tr. 101-02.

RG, then Warden of MCDC and currently the DOCR Director, testified that there are two Lieutenants on duty at MCDC during the midnight shift. Tr. 100-01.<sup>2</sup> Consistent with his position’s job specifications, Appellant was responsible for supervising correctional employees at MCDC and, as part of his specifically assigned duties, making rounds. Making rounds required Appellant to visit each post in the facility twice during the course of a shift to observe and monitor implementation of security and safety procedures, and to record each such visit in the logbook maintained at each post. Tr. 158-59; CX 1. If Appellant found that such procedures were not being implemented properly, Appellant was responsible for taking any action necessary to address the situation. Appellant freely acknowledged this job related obligation, but also said that he did not always remember to sign the logbooks. Tr. 212, Tr. 257.

During the midnight shift, when inmates are in their cells for the night, staffing levels at MCDC are reduced. Unlike other shifts, there are no civilian employees on duty and upper management is generally not present. Consequently, the Correctional Shift Commander Lieutenants are the highest level of supervision for the entire facility. Because there are only two lieutenants on duty, one is responsible for the CPU. Although a sergeant is on duty in the CPU to supervise routine operations, critical decisions, such as planned use of force, were the responsibility of the Appellant. Tr. 211. Appellant acknowledged that during the midnight shift he was “responsible for the entire facility,” which includes the CPU. Tr. 247.

Warden RG testified that he had considered assigning an additional task to the Correctional Shift Commander Lieutenants on the midnight shift. Tr. 106. The added duty would be for the lieutenants to assist in the review of the records of inmates scheduled to leave the facility in order to, for example, verify that there were no detainers (requests filed by criminal justice agencies) or outstanding court orders that would otherwise require the inmate’s continued detention. The Warden met with certain MCDC staff, including the lieutenants on the midnight shift, to discuss the proposed assignment of the additional tasks. *Id.* One of the lieutenants, other than Appellant, advised the Warden that the lieutenants on the midnight shift were too busy to take on the additional task. *Id.*

The Warden was skeptical that the Correctional Shift Commander Lieutenants on the midnight shift were actually too occupied with other duties to conduct the record checks. Tr. 106-07. Shortly after he met with the lieutenants, and in apparent response to the claim that they were too busy, another unidentified staff member made a comment to the Warden that the lieutenants “need to get out of their offices.” Tr. 107. The Warden took that comment as a suggestion that the

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<sup>2</sup> Former Director AW was the Director of the DOCR until March, 2015. Tr. 188. Then Director AW approved and issued the Statement of Charges on January 23, 2015, and the Notice of Disciplinary Action on February 19, 2015. CX 3 & 4; Tr. 189. In this decision we will refer to them as “Warden ” and “Director”

midnight shift Correctional Shift Commander Lieutenants were not as fully engaged in other duties as they claimed. Given his preexisting skepticism concerning the inability of the Correctional Shift Commander Lieutenants on the midnight shift to take on additional tasks, the Warden became concerned that the lieutenants might instead be spending an inordinate amount of time in their office and on the Internet engaged in activity unrelated to their official duties. Accordingly, Warden RG sought authorization from Director AW to have the County Department of Technology Services (DTS) research and evaluate the Internet access usage for the Correctional Shift Commander Lieutenants on the midnight shift. Director AW approved that request. Tr. 107, 109.

Warden RG asked that DTS provide comprehensive reports of Appellant's Internet usage for the time period from May through November 14, 2014, and, for comparison purposes, for a period of time in 2013. Tr. 111. In response to that request, DTS Senior Information Engineer BD, a Certified Information Systems Security Professional, utilized the County's iBoss technology platform to determine Appellant's Internet activity.<sup>3</sup>

DTS Senior Information Engineer BD testified that iBoss is "the enforcement arm of the County's Internet acceptable use policy." Tr. 7. The County's servers maintain all raw data of Internet usage by County employees in a cloud storage system. The iBoss solution is a comprehensive tool that "monitors every single Internet transaction by every single device in the county and logs it to a database, and it can be used to generate forensic court-ready documentation on the use of the County's Internet pipe for individuals, machines, destinations on the Internet, both foreign and domestic." Tr. 8.

The iBoss platform has the capacity to take the raw data for a specified user account and generate a report that categorizes and organizes that information. According to DTS Senior Information Engineer BD, "an iBoss report is a court-ready, 100 percent forensic raw data output of every single place a user or machine has been on the Internet." Tr. 17. testified that iBoss is able to identify and compare active Internet usage with passive Internet usage, and that someone with his technical expertise can translate and explain to laypersons when the account holder's Internet usage is active and when it is passive. Tr. 18-19. DTS Senior Information Engineer BD explained that iBoss measures "active time" on the Internet as the time when there is a data stream related to a user actively browsing or interacting with the Internet, as opposed to machine generated activity unrelated to the user's actions. After 90 seconds of inactivity by the user, the Internet connection is considered by iBoss to be idle and is not counted for purposes of the iBoss analysis and report as "active time" on the Internet. Tr. 67, 69.

DTS Senior Information Engineer's expert testimony was that because after 90 seconds of inactivity by the user the Internet connection is considered idle and is not counted as "active time" on the Internet, the iBoss report affords a reliable measure of actual or "active time" on the Internet. Tr. 46-47; Tr. 66-67, 69. According to the iBoss reports for May through November, 2014, Appellant spent 66 hours, 54 minutes or 66.9 active hours on the Internet in May, CX 15; 61.65 active hours in June, CX 16; 37.82 active hours in July, 17; 59.37 active hours in August, CX 18; 87.57 active hours in September, CX19; 56.12 active hours in October, CX 20; and 48 active hours

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<sup>3</sup> At the hearing DTS Senior Information Engineer BD was qualified as a forensic expert in information security. Tr. 12-15.

from November 1 through 14, 2014. CX 21.<sup>4</sup> According to the iBoss reports, among the websites Appellant visited most frequently during his actual time on the Internet were those related to business, technology, entertainment, and sports. CX 15 - 21.

After Warden RG received the iBoss reports of Internet usage Deputy Warden SM was assigned to conduct an investigation into Appellant's use of County-provided Internet services and, as part of that investigation, interviewed Appellant. Tr. 110, Tr. 161. In addition, Appellant was advised that his Internet privileges were suspended. CX 4; Tr. 116, Tr. 251. Nevertheless, Appellant continued to access the Internet for a short time. Tr. 251-52. Appellant explained that he did so out of habit and did not provide management with false information about having done so. Tr. 252.

Deputy Warden SM interviewed Appellant and advised him that the County had been monitoring his use of the Internet and believed that he had been spending excessive time on the Internet based on iBoss reports prepared by the County's Department of Technology Services. Tr. 161, Tr. 232-33. Appellant denied using the Internet to the extent described by the iBoss reports and advised Deputy Warden SM that he believed the reports did not accurately reflect his actual time spent on Internet while at work. CX 4; Tr. 233-34. Appellant makes no claim, however, that another individual could have logged in to his account and used his identity to access the Internet. Tr. 256.

Following the interview with Deputy Warden, Appellant sent her an email requesting clarification concerning the amount of time spent on the Internet which would be considered reasonable for County employees. CX 9. Deputy Warden SM chose not to respond to Appellant's request because she said believed that as a long time County employee and supervisor he already understood the policy regarding personal use of the Internet. Tr. 160-61.

As a result of the County's investigation Appellant was placed on Administrative Leave with Pay status on January 22, 2015. CX 2. On January 23, 2015, the County served Appellant with a Statement of Charges delineating the nature of the claims made against him and advising him that he faced discipline, including the possibility of dismissal from employment. CX 3. On February 19, 2015, the County issued the Notice of Disciplinary Action. CX 4. Appellant was suspended for thirty (30) days, demoted to the rank of corporal, and rendered ineligible to receive a competitive promotion for two (2) years. CX 4.<sup>5</sup>

The Notice of Disciplinary Action, CX 4, stated that the disciplinary actions were being imposed due to Appellant's violations of County Administrative Procedure 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services, CX 13 and MCDC Policy No. 3000-61 on the same topic. CX 11. Employees are subject to discipline for violation of those policies through Montgomery County Personnel Regulation, § 33-5 and DOCR Policy No. 3000-7, which require adherence to all laws and policies. It appears that Appellant was not specifically charged

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<sup>4</sup> The numbers of hours and minutes in the iBoss reports of total time usage on the Internet have been converted to numbers with decimals to reflect the percentage of an hour the minutes actually constitute. For example, 61 hours, 39 minutes is the equivalent of 61.65 hours since 39 divided by 60 equals .65.

<sup>5</sup> Appellant's suspension was to be taken as a fifteen (15) day forfeiture of annual leave and a fifteen (15) day suspension without pay.

with neglect of duty, unsatisfactory performance, providing false information, or making untruthful statements.

As part of the Notice of Disciplinary Action and the Statement of Charges the County provided charts indicating the number of days and hours Appellant worked from May through November 14, 2014, as well as the hours the iBoss reports show he was active on the Internet. CX 3 & 4. The charts also contain a column purporting to reflect the percentage of time Appellant was on the Internet. However, the Board is unable to determine how those percentages were calculated. For example, the row for May, 2014, indicates that Appellant worked 20 days for a total of 170 hours and spent 66 hours and 54 minutes on the Internet. CX 4. Dividing 66.9 hours on the Internet by 170 hours worked, the percentage of work time on the Internet would be 39.4%, yet the County calculated the percentage of time on the Internet as 9%. For June, 61.65 hours of Internet use divided by 127.5 hours of work is 48.4%, not the County's figure of 8%. For July, 37.82 hours of Internet usage divided by 153 hours is 24.7%, not 4%.

The calculations for August through November, however, appear accurate. In August, 2014, Appellant worked 161.5 hours while purportedly spending 59.37 hours or 36.8% of that time on the Internet. For September, Appellant worked 153 hours, of which, according to the iBoss report, he spent 87.57 hours or 57.2% on the Internet. In October, he worked 144.5 hours, and, DOCR asserts, he spent 56.12 hours or 38.8% of that time on the Internet. Finally, during the first two weeks of November, the charts indicate that Appellant worked 93.5 hours while spending 48 hours or 51.3% on the Internet.

The County's determination to discipline Appellant was based on the information reflected in the iBoss Internet usage reports prepared by the County's DTS and a review of Appellants time records and work schedules by Deputy Warden. CX 3 & 4; Tr. 166-67, 170. Direct evidence of Appellant's underlying time records showing how many hours Appellant worked during the time periods covered by the iBoss reports was not introduced, although Deputy Warden SM testified that she reviewed Appellant's work schedules and incorporated that information into the charts contained in the Statement of Charges and the Notice of Disciplinary Action. Tr. 166-67.

Appellant and the other Correctional Shift Commander Lieutenants were provided with an office and access to a computer with an Internet connection. Tr. 103, 105. However, Appellant admitted that the responsibilities of a Correctional Shift Commander Lieutenant on the midnight shift do not require use of the Internet. Tr. 246. Appellant acknowledged that he received training on the Internet policy and was "very aware" that personal use of County Internet access was only allowed on a limited and reasonable basis, and that other employees had been disciplined for excessive use. Tr. 217-18, Tr. 255, Tr. 259.

Appellant testified that it was his understanding that personal use of County-provided Internet services was permissible for brief periods of time during his shift when he was otherwise caught up on his work and had completed his required rounds. Tr. 217-18. Appellant admitted, however, that being on the Internet for two to three hours a night would be excessive:

I know small amount of times add up big. So if I do 20 minutes here, 15 minutes there, 45 minutes and it's all in the course of one night, you can get up to two or

three hours. I'm very aware. I'm very aware. I know they've disciplined other people in the past. So I was very aware of my conduct on the computer, very aware.

Tr. 255. Indeed, Appellant also seemed to acknowledge that personal Internet usage for lesser periods of time, such as a little over an hour, might be considered excessive:

Like I said, I was just using it during -- what I, what I'm, the word I'm using is downtime, when there was no work to be done, but even in doing it when there was no work to be done, I knew not to be on it like an hour and a half, an hour and 45 minutes, an hour and 10 minutes. I knew that, so I didn't do that.

Tr. 259.

Appellant testified that some of the time he spent on the Internet was related to Spanish language classes, and that he viewed such activity as useful since a number of Inmates are Spanish speakers. Tr. 218-20. Appellant admitted that he understood that he was not authorized to engage in Spanish language coursework while on the job, Tr. 243-44, nor was he given permission by any of his supervisors to conduct any work unrelated to his position. Tr. 245-46. Deputy Warden SM and Director AW also testified that Spanish language coursework was unrelated to Appellant's assigned job duties. Tr. 162, Tr. 199.

Appellant's job performance evaluations have been uniformly satisfactory, and Appellant has never previously been the subject of a formal complaint or discipline. Tr. 146, Tr. 174, Tr. 208, Tr. 245.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Appellant is entitled to a 30-minute meal period and it is during that meal break that he was allowed to access the Internet for personal reasons.
- The County produced evidence that Appellant's Internet use exceeded 30-minutes per workday and was thus neither limited nor reasonable.
- Appellant was aware of the County's Internet policy and admitted receiving training on the policy.
- The websites Appellant visited on the Internet were unrelated to the duties and responsibilities of a Correctional Shift Commander Lieutenant.
- Because of extensive Internet usage, Appellant neglected his duties.
- During the investigation, Appellant was not entirely truthful concerning his Internet use.
- Appellant continued to access the Internet after being advised in writing that his Internet access had been suspended.
- Progressive discipline, as defined by MCPR §33-2 (c)(2), does not require the County to apply discipline in a particular order, or to always begin with the least severe penalty.

Appellant:

- Appellant's Internet usage occurred during his 30-minute meal break and during down time when his work related tasks were current or completed.
- At no time did Appellant neglect his job, as demonstrated by his satisfactory performance appraisals and the absence of any formal complaints.
- The discipline against Appellant was based entirely upon the iBoss reports, which are flawed and internally inconsistent.
- The iBoss reports show Appellant using the County Internet access on days when he was not on the job.
- The iBoss reports do not fairly and accurately depict Appellant's actual Internet usage
- The policy regarding employee use of County supplied Internet access while at work is vague, and the County did not show that his use was not reasonable under Administrative Procedure 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services, or MCDC Policy No. 3000-61.
- Appellant has an unblemished record with no prior discipline of any sort.
- The discipline imposed upon Appellant was not fair and in line with the nature of the conduct charged

**ISSUE**

Whether, assuming that the County can prove sufficient facts to support a finding that Appellant failed to adhere to Departmental rules and regulations, the penalty of a thirty-day suspension and demotion from Lieutenant to Corporal is appropriate.

**APPLICABLE LAWS, REGULATIONS, AND POLICIES**

**Montgomery County Charter, Article 4, § 408, Work During Official Hours**, which states:

All officers and employees of the Executive or Legislative Branches who receive compensation paid in whole or in part from County funds shall devote their entire time during their official working hours to the performance of their official duties.

**Montgomery County Code, §19A-14**, which provides, in relevant part:

(c) A public employee must not use any County agency facility, property, or work time for personal use or for the use of another person, unless the use is:

(1) generally available to the public; or

(2) authorized by a County law, regulation, or administrative procedure.

**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 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.

\* \* \*

(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:

\* \* \*

(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;
- (e) fails to perform duties in a competent or acceptable manner;
- (f) behaves insubordinately or fails to obey a lawful direction from a supervisor;
- (g) knowingly makes a false statement or report in the course of employment;
- (h) is negligent or careless in performing duties;

\* \* \*

**Montgomery County Administrative Procedure 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services**, dated September 2, 2010, which provides, in relevant part:

- 3.2 A County employee may use County-provided Internet, intranet, or email services for personal purposes on only a limited, reasonable basis, and in accordance with this administrative procedure. However, employees must act reasonably to minimize personal use of County-provided Internet, intranet, and email services. Personal use of County Internet, intranet or email services by employees should mainly be during personal time (before and after work or during lunch time). Such use must be kept to a minimum, must not increase or create additional expense to the County and must not disrupt the conduct of service or performance of official duties.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct/Code of Ethics**, effective March 26, 2007, which states in applicable part:

**VII. Department Rules for Employees**

\* \* \*

E. Specific Departmental Rules:

1. Conformance to Law:

Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public.

\* \* \*

9. Conduct Unbecoming:
  - a. No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, civil, dishonest or improper conduct.
  - b. Examples of conduct unbecoming include falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, misuse of a county owned radio, and the failure to cooperate with an internal investigation.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-61**, effective November 5, 2012, which states in applicable part:

- C. A County employee may use County-provided Internet, intranet, or email services for personal purposes on only a limited, reasonable basis, and in accordance with this policy. However, employees must act reasonably to minimize personal use of County-provided Internet, intranet, and email services. Such use must be kept to a minimum and must not disrupt the conduct of service or performance of official duties.

### **ANALYSIS AND CONCLUSIONS**

The gravamen of the County's charges against Appellant is that while on duty he spent significant amounts of time on the Internet instead of attending to his supervisory responsibilities. The County alleges that in some months the time Appellant spent on the Internet for personal reasons exceeded 50% of his work time, an amount that was so excessive as to shock the conscience. The County argues that for an experienced corrections supervisor holding a position of trust and responsibility, Appellant's behavior was inexcusable.

County employees are not totally prohibited from accessing County provided Internet services for personal reasons. Under Montgomery County Administrative Procedure 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services, §3.2, County employees are permitted to use the Internet for personal purposes on a limited basis. The policy does not provide precise guidelines as to what is limited and reasonable, suggesting that "employees must act reasonably to minimize personal use of County-provided Internet, intranet, and email services," and that "[p]ersonal use of County Internet, intranet or email services by employees should mainly be during personal time (before and after work or during lunch time)." *See* MSPB Case No. 07-13 (2007) ("The County's policy only allows employees to use the Internet and email for personal purposes on a limited, reasonable basis.").

In support of its contention that Appellant used the Internet for personal purposes on more than a limited, reasonable basis, the County relied exclusively on the iBoss reports generated by the County's expert witness, the DTS Senior Information Engineer. For September, 2014, for

example, the iBoss Report shows that Appellant was on the Internet for 87 hours, 34 minutes. CX19. According to the investigation by the Deputy Warden, Appellant worked a total of 153 hours that month. CX 4. Thus, the County asserts, during September, 2014, Appellant was on the Internet for more than 57% of his total work time. Similarly, CX 21 reflects that from November 1 to 14 Appellant used the Internet for 47 hours, 59 minutes, 52 seconds, while working 93.5 hours that same two weeks. Thus, according to the iBoss Report, in the first two weeks of November, 2014, Appellant spent over 51% of his work time on the internet.

If proved, such a degree of Internet usage could not be characterized as limited. *See* MSPB Case No. 07-13 (2007)(40% of work time spent on Internet by a Correctional Shift Commander Lieutenant is not limited or reasonable); MSPB Case No. 09-04 (2008)(“in some cases a violation of the County’s Internet policy is obvious such as in MSPB Case No. 07-13, wherein the appellant during one week spent more than 40% of his work time on the Internet.”).

Because of one glaring inconsistency, however, the Board in this case cannot credit the iBoss report for November, 2014, and doubt has been created as to the reliability of the other iBoss reports. While Appellant called no expert witness challenge DTS Senior Information Engineer’s analysis and opinion, Appellant has questioned the validity of his findings and the reliability of the iBoss reports that he generated. Appellant argues that the iBoss reports were inconsistent and unreliable. Appellant points out that according to the iBoss report prepared for May, 2014, Appellant spent both 66 hours of work time using County-provided Internet services and 554 hours using online search engines. CX 15; Appellant’s Proposed Findings of Fact and Conclusions of Law, p.6. Appellant also notes that the iBoss report for June, 2014, indicates that Appellant spent 292 hours utilizing County-provided Internet services to view websites in the “Business” category, and suggests that even if Appellant worked eight hours on every day of the month without taking a single day off he would only have worked 240 hours for the month. CX 16; Appellant’s Proposed Findings of Fact and Conclusions of Law, p.6. Further, Appellant notes the iBoss report for July, 2014 indicates that Appellant spent 401 hours viewing “Business” websites via County-provided Internet services. CX 17. Appellant asserts that in order to work 401 hours for the month of July, he would have been required to work 13 hours per day on each of the 31 days of the month, and would have been required to spend every one of those hours online. Appellant’s Proposed Findings of Fact and Conclusions of Law, p.6.

Appellant’s arguments, however, mischaracterize the technical explanations given by the County’s expert witness. DTS Senior Information Engineer BD did not suggest that the large amounts of time Appellant was recorded as being on search engines or business websites was a measure of “real time.” Tr. 45-46. Rather, the website category time numbers reflect the combined time of multiple categories, so that certain websites could be counted multiple times. In any case, the specific categories of websites that Appellant visited is of no moment since Appellant has admitted that he really had no job-related reason to be on the Internet. Tr. 246. Thus, it may fairly be said that all the time Appellant spent on the Internet was attributable to his personal business, not his job.

Accordingly, the critical numbers in the iBoss reports would be those that reflect the actual time Appellant spent on the Internet while at work. DTS Senior Information Engineer’s un rebutted expert testimony was that the iBoss report affords a “normalized view of time,” providing a “real-

time view of a linear time spent on the web.” Tr. 46-47. This is purportedly a reliable measure of actual or “active time” on the Internet because, after 90 seconds of inactivity by the user, the Internet connection is considered idle and is not counted as “active time” on the web. Tr. 66-67, 69. DTS Senior Information Engineer BD specifically addressed the iBoss report prepared for May, 2014, which indicates that Appellant spent both 66 hours, 54 minutes of time on the Internet and 554 hours using online search engines, and explained that the 554 hour number does not represent the actual, real time Appellant spent on the Internet that month. CX 15; Tr. 44-45. He further testified that the iBoss report figure of 66 hours, 54 minutes of time on the web, however, is a reflection of the actual time Appellant spent actively engaged on the Internet. Tr. 46-47.

As noted above, neither party introduced direct evidence of Appellant’s underlying time records to show how many hours Appellant worked during the time periods covered by the iBoss reports. As a result, it is not possible to verify the exact percentage of work time Appellant spent on the Internet.

Appellant asserted that the iBoss reports were inaccurate because they indicated Internet usage on days he did not work. In particular, Appellant testified that he did not work on November 9, 2014, yet that was one of the dates cited in the iBoss report reflecting the greatest amount of internet usage. Specifically, Appellant testified that he “ha[d] the schedules” and that they did not “show any time for him logged on November 9<sup>th</sup>.” Tr. 236. Appellant initially sought to introduce these work logs to impeach the County’s expert witness. The County objected, however, complaining that Appellant had not designated these logs as exhibits. Tr. 64. The Board sustained the objection on other grounds. Tr. 65. Perhaps in light of the County’s objection, Appellant did not subsequently seek to introduce these documents to corroborate his testimony. More significantly, however, neither did the County, which had the documents in question, seek to introduce the logs to refute Appellant’s testimony. Thus, Appellant’s testimony that he checked the work logs and those logs did not reflect his attendance on November 9, 2014, stands un rebutted.

The Board need not speculate why it is that neither party sought to introduce the work logs - documents that would presumably have confirmed or refuted Appellant’s assertion that he was not at work on November 9, 2014. The Board credits Appellant’s testimony that he had checked the work logs and that he was not at work that day and, as noted above, that testimony remains un rebutted. Nor did the County offer any explanation as to how the iBoss Report could catalogue substantial internet usage on a day when Appellant was not at work. In light of this significant inconsistency, the Board cannot rely on the November, 2014 iBoss Report to justify discipline imposed here. Moreover, although Appellant did not specifically challenge any other iBoss Report, the unreliability of the November, 2014 report casts doubt on the accuracy of the reports for other months. We conclude that while it is more likely than not that the iBoss Reports for August, September, and October, 2014, do provide evidence of excessive internet usage, we cannot with confidence determine the precise level of that usage.

The iBoss Report was not, however, the only evidence in the record concerning Appellant’s computer usage. In fact, Appellant essentially admitted that he used the internet in contravention to the County’s policies. Specifically, Appellant testified that he used the computer for personal reasons during “down time” while at work. Appellant acknowledged that limited and sporadic use of the internet could add up to significant amounts of time, but he did not testify that his usage was

*de minimus* or insignificant. Accordingly, while we do not find that Appellant used the internet for the full amount of time represented in the iBoss reports, we do find that the record evidence establishes that Appellant spent excessive duty time on the Internet. Such conduct warrants discipline. As we held in MSPB Case No. 07-13 (2007):

The County's Charter expressly requires that all employees who receive compensation from the County shall devote their entire time during their official working hours to the performance of their official duties. A Government employer has the right to expect an employee to devote their work hours to official duties. "To conduct personal business when the agency presumes you are performing the official duties of your position violates the trust that the agency has placed in its employee. Such conduct destroys the confidence established in the employer-employee relationship." *Cohen v. Internal Revenue Service*, 7 M.S.P.R. 57, 61 (1981). . . .

*See also* MSPB Case No. 09-04 (2008)("[T]he County has the right to expect an employee to devote their work hours to official duties.").

As this Board found in MSPB Case No. 07-13, non-job related Internet usage that is so excessive as to obviously exceed the bounds of reasonableness merits discipline. The County has proven a violation of the County Internet usage policy by a preponderance of the evidence. However, unlike MSPB Case No. 07-13, where the County was able to provide evidence that the appellant not only spent too much time on the Internet conducting his personal affairs, but was also guilty of dereliction of duty, conducting a private business on County time and with County resources, and of providing demonstrably false information during an investigation, such extreme aggravating factors are absent here.

In cases involving non-job related Internet usage Board normally examines whether the employee's excessive Internet use may have impacted the employee's performance of official duties. Here the County asserted that Appellant was negligent in performing his duties as a Correctional Shift Commander because, while Appellant was on the Internet, he was necessarily neglecting his responsibilities. Tr. 199. The County argues that "common sense" and Appellant's job specifications indicate that a Correctional Shift Commander Lieutenant cannot properly perform the job sitting in his office.

However, it is unquestionable that some amount of administrative work in the office is expected and consistent with a lieutenant's job duties. The issue is how much time spent in the office is unacceptable. Appellant alleged that he did perform his duties, such as conducting rounds, and the County introduced little evidence of his failure to complete his rounds or of any other specific task which Appellant failed to perform. This lack of evidence is in contrast to the appellant in MSPB Case No. 07-13, who was also charged with neglect of his duties as a Correctional Shift Commander. In that case, the County demonstrated that the appellant failed to visit posts as required. Here, the County relied on a more general assertion that because Appellant was spending such extensive time on the Internet, it follows that he could not have been properly performing his responsibilities. Interestingly, the Warden's suspicions concerning the Internet activities of the lieutenants on the midnight shift was triggered, in part, by his impression that they were not actually too busy. It is, therefore, possible that the workload of the midnight shift Correctional

Shift Commanders was not onerous and that there was, as Appellant claimed, at least some “downtime.”

While Appellant’s excessive Internet usage undoubtedly had some level of impact on his ability to perform his duties, and was contrary to the County Internet usage policy, the County produced no evidence concerning how Appellant’s Internet use specifically disrupted the operation of MCDC or resulted in Appellant’s failure to perform his official duties. It is presumably for this reason that the County did not charge Appellant with neglect of duty or unsatisfactory performance.

The Board has previously found that County employees are free to use the Internet without concern about limited use during their meal break or when they are not on official time. *See* MSPB Case No. 09-04 (2008). As this Board noted in MSPB Case No. 09-04, p. 20, n. 20, (2008) and MSPB Case No. 09-03, p. 19, n. 24, (2009), nothing prevents DOCR from limiting all supervisors to personal usage of the Internet only during the employee’s thirty-minute meal period. However, the County presented no evidence that MCDC employees, including Appellant, were provided with notice that personal Internet usage was strictly limited to a thirty-minute meal period. On the contrary, the County presented testimony that it is “impossible” for management to provide employees with a precise amount of time on the Internet that would be considered reasonable, and acknowledged that some amount of time over the 30 minutes might be acceptable, just not “hours at a time.” Tr. 161-62.

As we have found in prior cases, the County’s Internet policy is imprecise about what constitutes limited, reasonable use of the County-provided Internet and thereby creates room for misunderstanding. “The Board has had the opportunity to previously review the County’s Internet policy recently and found it unduly vague and readily subject to various interpretations. *See* MSPB Case No. 09-04. Unfortunately, DOCR’s policy on Internet use is just as vague as the County’s and provides no further guidance on what “reasonable” use is.” MSPB Case No. 09-03, p. 18 (2009).

This is not to say that the County Internet policy is so vague as to be meaningless. Unlike MSPB Case No. 09-03, where the County did not introduce evidence that the appellant was trained as to what was acceptable personal use, here there was ample evidence that Appellant was trained as to the County’s expectations concerning Internet usage. CX 14; Tr. 139. Indeed, Appellant admitted that he received training on the Internet policy and was “very aware” that personal use was only allowed on a limited and reasonable basis, that other employees had been disciplined for excessive use, and that such use for several hours a day would be excessive. CX 14; Tr. 217-18, Tr. 255, Tr. 259. Moreover, Appellant’s own Witness testified that appropriate Internet usage was discussed at MCDC team leader meetings where supervisors were told to be “careful on the Internet use, not to abuse it, to be mindful how we use the Internet.” Tr. 265-66.

We have held in the past that law enforcement and correctional supervisors are held to a high standard of conduct. Appellant served as a Correctional Shift Commander Lieutenant, which is a law enforcement supervisory position. This Board has previously found that a Correctional Shift Commander Lieutenant must be held to a higher standard of conduct and a higher degree of trust. MSPB Case No. 07-13 (2007), *citing Crawford v. Department of Justice*, 45 M.S.P.R. 234,

237 (1990); *Cantu v. Department of Treasury*, 88 M.S.P.R. 253 (2001); *Hanker v. Department of Treasury*, 73 M.S.P.R. 159, 167 (1997); *Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 13 (1997); *Fischer v. Department of Treasury*, 69 M.S.P.R. 614, 619 (1996); *Luongo v. Department of Justice*, 95 M.S.P.R. 643 (2004). See also MSPB Case No. 09-11 (2009)(Employee in a public safety agency with an “impeccable” 28 year County employment record may be held to a higher standard as a supervisor in a position of trust and responsibility); MSPB Case No. 05-07 (2006)(“The County is allowed to hold a supervisor to a higher standard as a supervisor holds a position of trust and responsibility and should be a role model for the supervisor’s subordinates.”); *Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 13 (2006) (“Agencies are entitled to hold supervisors . . . to a higher standard of conduct than non-supervisors because they occupy positions of trust and responsibility.”), *aff’d*, 224 Fed.Appx. 974 (Fed.Cir. 2007).

The County argues that Appellant is a correctional supervisor in a position of trust and responsibility and must be held to a high standard. They further assert that despite Appellant’s clean record, under the County’s Personnel Regulations progressive discipline may be bypassed in situations involving egregious misconduct or a serious violation of policy. MCPR §33-2(c)(2).

The principles of fundamental fairness demand that all employees of the County, including law enforcement and correctional supervisors, have fair warning as to what constitutes a serious violation of the Internet policy before progressive discipline is bypassed and they are subject to discipline as severe as termination or demotion. While Appellant here was on notice that excessive Internet use was prohibited and “very aware” of that policy, what constitutes a serious violation of the policy is ambiguous. Although the amount of Appellant’s personal Internet usage while on the job was unreasonable and in violation of the policy, we hesitate to say that his behavior constituted such a serious violation of the policy that it justified such severe discipline as a demotion from lieutenant to corporal. In light of the lack of specific evidence concerning Appellant’s failure to perform his duties, the uncertainty as to the exact amount of time Appellant was on the internet for personal reasons, and in recognition that the County Internet policy is ambiguous and fails to adequately put employees on notice as to what constitutes a serious violation, it is not our view that Appellant’s misconduct was so egregious that it justified casting aside the principles of progressive discipline.

Despite Appellant’s misconduct, there are other mitigating factors that must be considered in determining the appropriate level of discipline. The Board notes that in 27 years of County service Appellant has no record of any prior formal complaint or discipline, and there was no indication that any of his supervisors counseled him about his use of County-provided Internet services. Appellant also has apparently received satisfactory performance evaluations. While it is true that MCPR §33-2(c)(2) does not require that the County to apply discipline in a particular order or to begin with the least severe penalty when an employee has engaged in serious misconduct or a serious violation of policy or procedure, under the circumstances of this case where there is doubt as to whether Appellant’s excessive Internet use may properly be characterized as “serious,” more consideration for the principles of progressive discipline was warranted.<sup>6</sup>

Accordingly, weighing the nature of Appellant’s misconduct together with the foregoing

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<sup>6</sup> See MSPB Case No. 09-10 (2009).

mitigating factors, the Board has determined that consistent with the concept of progressive discipline, the appropriate penalty for Appellant's misconduct is a thirty (30) day suspension.

**ORDER**

Based upon the foregoing analysis the Board hereby **ORDERS**

1. That the thirty (30) day suspension is upheld.
2. That the appeal be sustained with regard to the demotion, which shall be rescinded, with Appellant restored to the rank of Lieutenant effective March 24, 2015, with back pay.
3. That within thirty (30) days of this Order the County shall complete the actions ordered by the Board and provide written certification of full compliance to the Board.

The penalty having been mitigated, the County must pay reasonable attorney fees and costs. *See Shelton v. OPM*, 42 M.S.P.R. 214, 224 (1989) (mitigation of penalty makes the appellant a prevailing party). Appellant shall submit a detailed request for attorney fees to the Board, with a copy to the Office of the County Attorney, within ten (10) calendar days from the date of this Final Decision. The County Attorney will have ten (10) calendar days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, § 33-14(c)(9).

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  
May 16, 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), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015), an employee or an applicant may file an appeal directly with the Board alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

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

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

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

During fiscal year 2016, the Board issued the following decisions on appeals concerning the denial of employment.

# **EMPLOYMENT DECISIONS**

## **CASE NO. 15-30**

### **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 based on the results of a medical evaluation, which included a psychological examination. The County filed its response to the appeal (County's Response) on June 15, 2015. Appellant declined to make any additional statements regarding his appeal. The Board requested that the County provide further information regarding its decision. The County provided the requested information (County's Supplemental Response) on October 14, 2015. On October 27, 2015 Appellant submitted a reply (Appellant's Reply) to the County's Supplemental Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant applied for the position of Public Safety Communication Specialist I and, on January 22, 2015, was given a conditional offer of employment with the Montgomery County Fire and Rescue Service (FRS).<sup>1</sup> The offer of employment was contingent upon Appellant's successful completion of a medical and psychological examination.

On February 5, 2015, Appellant was given a psychological examination at the Special Psychological Services Group (SPSG) in Fairfax, Virginia. SPSG is an independent contractor for the County. County Response, p. 2. Based on the Special Psychological Services Group's examination of Appellant, Doctor of SPSG advised the County that Appellant was "recommended with reservation." County Supplemental Response, Attachment A. In Doctor's cover letter to the County transmitting Appellant's psychological examination results, Appellant was characterized as having "high-average intellectual potential and low-average stress tolerance." Doctor further indicated that Appellant "appears to have below-average psychological suitability."

The County's Employee Medical Examiner (EME), Dr. SS, reviewed the results of Appellant's medical examinations and advised the County FRS on March 23, 2015, that Appellant was physically fit for duty and, with regard to the psychological evaluation, "Recommended w. Reservation." County Supplemental Response, Attachment B. The County's Supplemental Response, p. 3, and the EME's affidavit, Attachment C, ¶5, indicate that the EME did not feel that he was permitted to "second guess" the psychological evaluations of SPSG. The County's Supplemental Response, at p. 3 and Attachment C, ¶5, thus assert that "Dr. S did not make a determination whether Appellant was psychologically fit to perform the duties of a 911 Call-Taker." However, Dr. S's March 23, 2015 memorandum clearly indicates that the result of

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<sup>1</sup> It is the Board's understanding that a Public Safety Communication Specialist is primarily a 911 Call Taker.

Appellant's psychological evaluation is that he was recommended with reservation. Attachment B. Whether or not the EME felt constrained in exercising his professional judgment, the Board finds that his March 23, 2015, memorandum constitutes endorsement of the findings stated therein.

On April 28, 2015, the OHR Director notified Appellant that "the Medical Review Officer determined that you do not meet the applicable medical requirements" for the Public Safety Communication Specialist I position, and the conditional offer of employment was withdrawn.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The reason given by OHR for withdrawing the conditional offer is clearly wrong as the results of the medical and psychological examinations indicate that Appellant met the medical standards for the position
- Having received passing ratings on both the medical and psychological examinations it is evident that an error was made when OHR determined that Appellant was not qualified.
- Appellant requests that his name be returned to the eligibility list.

#### **County:**

- A 911 Call-Taker position is stressful and requires timely and appropriate responses to incoming calls from the public in emergency situations which can be potentially life-threatening.
- The report of the psychologist specifically makes reference to Appellant's "unusual high energy score, which can reduce attention and concentration," his "difficulties concentrating," his disclosure that, "he finds his thoughts are racing and that his speech becomes stuttered because he cannot keep up with them," and his acknowledgement that, "I have had attacks in which I could not control my movements or speech."
- The psychological evaluation also found that Appellant "is estimated as having below average psychological suitability."
- The County EME concurs with the OHR Director's decision to withdraw the conditional offer of employment based on the reservations enumerated by SPSG.
- County management should be afforded substantial latitude to assess the impact of a candidate's particular medical or psychological condition on their fitness for the duties of a specific position.<sup>2</sup>

### **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,

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<sup>2</sup> The County's Response, p. 2, n. 1, recounts the apparent confusion regarding Appellant's correct address and suggests that Appellant was responsible for not updating his address on iRecruitment. The County does not, however, appear to suggest that the appeal in this matter was untimely under MCPR §35-3(b), presumably because Appellant filed his appeal within 10 days after actual receipt of the letter from the OHR Director informing him that the conditional offer of employment had been rescinded.

(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 October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015), Section 8, Medical Examinations and Reasonable Accommodation,** which states in applicable part:

**8-3. Medical requirements for employment.**

(a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position.

**8-6. Required medical examinations of applicants; actions based on results of required medical examinations.**

(a) *Medical and physical requirements for job applicants.*

(1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class.

\* \* \*

(7) The County may use the results of a pre-placement medical evaluation to:

(A) determine the individual’s current ability to perform essential functions of the offered position without significant threat to the health and safety of the individual or others;

\* \* \*

(8) The EME must base the determination of whether an individual is medically fit for a position on the medical history and findings that directly reflect on the individual’s ability to perform the essential job duties under the expected conditions. The EME must consider only medical findings that:

(A) affect the individual’s current ability to perform the essential job duties under the expected conditions; or

(B) indicate that the individual poses a direct threat to the health or safety of the individual or others

#### **8-8. Medical reports on applicant or employee fitness.**

After a required medical examination, the EME must:

- (a) prepare a written report of the medical findings and a determination of the individual's fitness for the position;
- (b) maintain this report as part of the individual's official medical record; and
- (c) advise the applicant or employee in writing if the EME finds the individual to be medically unqualified, the reason for the disqualification, and the manner in which the individual may appeal the decision.

#### **8-11. Appeals by applicants and grievance rights of employees.**

- (a) A non-employee applicant or employee applicant who is disqualified from consideration for a position or rated as medically unfit for appointment to a position may file an appeal directly with the MSPB under Section 35 of these Regulations.

### **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). Moreover, as noted by the County, prior Board decisions have determined that the County should be afforded "substantial latitude" when it is deciding whether a medical or psychological condition impacts an applicant's ability to perform a job. *See, e.g.*, MSPB Case No. 03-01 (2003); MSPB Case No. 13-01 (2012).

A Public Safety Communication Specialist performs public safety communications work in an emergency communications center. *See* Class Specification, County Response, Attachment 6. The Board does not deny that the nature of public safety communications work as a 911 Call Taker is stressful. MSPB Case No. 13-01 (2012).<sup>3</sup>

Contrary to the County's assertion that Appellant's psychological test results were "incompatible with the work of a Public Safety Communication Specialist I," the Board finds that both the County's outside contractor for psychological evaluations (SPSG) and the County

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<sup>3</sup> The Board suggests that the County consider whether it would be appropriate to revise the classification specifications for this position to more explicitly reflect that the job requires a significant tolerance for stress.

Employee Medical Examiner (EME) effectively concluded that Appellant was fit for duty, albeit with certain reservation as to his psychological fitness. County Response, p. 2; County Supplemental Response, Attachments A and B. Unlike MSPB Case No. 13-01, the OHR Director's decision to rescind the conditional offer of employment was not premised on the County EME's professional opinion that Appellant was unfit for duty.<sup>4</sup>

The EME is required by County regulations to make a determination as to an individual's fitness for duty. *See* MCPR §8-6(a)(8); §8-6. The March 23, 2015, memorandum thus reflected the EME's determination that Appellant was fit for duty. It is also significant that at no time did the EME advise Appellant that he was unfit for duty. Had the EME made such a determination he would have been required to advise Appellant in writing that he had been found medically unqualified. MCPR §8-8(c).

Thus, the OHR Director's April 28, 2015 conclusion that "the Medical Review Officer determined that you do not meet the applicable medical requirements" for the Public Safety Communication Specialist I position was unsupported by the medical findings and the determinations of the EME. The opinion of the medical professionals that Appellant was recommended with reservation is certainly not the same as a determination that Appellant failed to meet medical requirements or was unfit for duty. Moreover, the County has not provided the Board with any precedential support for the proposition that a conditional offer of employment may appropriately be rescinded for medical reasons when the County's EME has not found that the applicant is medically unfit for duty.<sup>5</sup>

Accordingly, the Board finds that Appellant has carried his burden of proof and that the decision of the County to rescind the conditional offer of employment was inconsistent with County regulations, unsupported by the facts, and must be considered arbitrary and capricious.

### **ORDER**

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **GRANTS** Appellant's appeal from his nonselection for the position of Public Safety Communication Specialist I and hereby **ORDERS** that the County:

1. Reinstate Appellant to the eligible list for Public Safety Communication Specialist I;
2. Give Appellant priority consideration for the next Public Safety Communication Specialist I vacancy.

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<sup>4</sup> The County's Supplemental Response, p. 3, n. 1, advises that "OHR is the process of establishing a practice whereby the EME is contractually required to make a determination on an applicant's psychological fitness for duty for a job in addition to the applicant's medical fitness." The Board strongly urges OHR to carefully review its pre-employment medical and psychological evaluation process with both medical experts and the Office of the County Attorney, and to implement any appropriate reforms with dispatch. The Board suggests that the review by OHR pay particular attention to any current or proposed policy or procedure's compliance with State and Federal antidiscrimination laws.

<sup>5</sup> The Board notes that any new employee's ability to effectively perform the duties of a Public Safety Communication Specialist I will normally be addressed as part of the training and evaluation process that takes place during the new employee's probationary period. In that way, probationary status acts a safeguard for the County, allowing it a timely opportunity to confront and resolve genuine performance issues exhibited by any new hire.

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 24, 2015

## **CASE NO. 16-01**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the decision of the Department of Environmental Protection (DEP) not to select him for a position as an Office Services Coordinator. The County filed its response (County's Response) to the appeal on August 11, 2015, asserting that the County appropriately hired a better qualified employee.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

On May 18, 2015, Appellant applied for the position of Office Services Coordinator (vacancy announcement IRC17450) with DEP. County's Response at 1; County's Response, Attach. 1. The 110 applications received for the position were reviewed by EP, a member of the Montgomery County Office of Human Resources Recruitment and Selection Team. Ms. P determined that Appellant and 94 other applicants satisfied the minimum qualifications for the position. Those applications were then reviewed, using the preferred criteria in the job vacancy announcement, by two subject matter experts at DEP. Appellant and 87 other candidates were rated as "qualified" while only seven applicants were rated as "well qualified". The applicant who was ultimately selected was rated "well qualified" and had a veteran's preference. *Id.* On July 8, 2015, Appellant was notified that he had not been selected. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant believes that the County is refusing to employ him in retaliation for his previous complaints of anti-Semitism, workplace harassment, and as political retaliation.
- Appellant has unsuccessfully applied for over 125 positions in the past two and a half years.
- As relief, Appellant requests appointment to a full time position with DEP at a grade 16 or equivalent.

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<sup>1</sup> The County's Response contained Attachment 1, an Affidavit of EP, Human Resources Specialist.

County:

- Appellant was in competition with nearly 100 other qualified applicants, including at least seven who were in a higher rating category (“well qualified”).
- The personnel regulations permit the agency to select an applicant from the highest rating category.
- The selected individual was not only in the highest rating category but was also entitled to priority consideration as a veteran.

**APPLICABLE LAW AND REGULATIONS**

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

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015), Section 6, Recruitment and Application Rating Procedures**, which provides, in pertinent part:

**6-11. Priority consideration for initial appointment to a County merit system position.**

(a) Definitions

(3) Veteran without a disability: A veteran who:

(A) was honorably discharged from a branch of the United States armed services; and

(B) has not already used veteran’s credit to receive priority consideration for appointment to a Montgomery County position.

(b) Subject to persons who must be given priority under Section 6-10, the OHR Director must give priority consideration in the following order to persons who apply for initial appointment to a County merit system position in a normal competitive process and who are rated and placed in the highest rating category on the eligible list:



- (1) a veteran with a disability;
- (2) an equal preference for a veteran without a disability and for a person with a disability.

**6-13. Appeals by applicants.**

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, 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.
- (b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.
- (c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.

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

## ISSUES

1. Does the Board have jurisdiction over the Appellant's appeal insofar as it alleges a human rights violation?
2. 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 is Limited to the Authority Granted by Statute**

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

### **The Board Lacks Jurisdiction Over Appeals That Allege Human Rights Violations**

The Board lacks jurisdiction over appeals that allege human rights violations. The County Code provides that an applicant may challenge the Chief Administrative Officer's decision regarding an application for employment. However, as the Board has previously informed the Appellant, the Code is explicit that appeals alleging discrimination prohibited by Chapter 27 of the Code must be filed with the Human Rights Commission. Montgomery County Code, § 33-9(c). Among the various forms of discrimination prohibited by Chapter 27 is discrimination based on religion. Montgomery County Code, § 27-1(a). To the extent that Appellant is alleging nonselection due to religious 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).

### **The County's Nonselection of Appellant Was Proper**

The County has offered a legitimate and compelling reason for selecting an applicant other than Appellant for the position of Office Services Coordinator with DEP. The individual hired was rated "highly qualified" and had a veteran's preference. Appellant was rated "qualified", a lower rating category. Selection of a higher rated candidate with a veteran's preference is consistent with the County personnel regulations. MCPR §6-11, §7-1.

Appellant's appeal is devoid of any specific factual allegations suggesting that the County's decision was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors. Appellant simply states a litany of generalized complaints against the County that he is unable to relate to this particular hiring decision. Appellant does not allege that he is better qualified than the applicant selected, nor does he allege that he is entitled to a hiring priority because of a disability or being a veteran with or without a disability. It is noteworthy that despite being provided with the opportunity, Appellant did not contest the County's Response.

Finally, while an applicant who alleges discrimination on the basis of political affiliation may file a direct appeal with the MSPB, MCPR §35-2(e), Appellant's allegation of political retaliation is a conclusory, unsupported by any factual allegations, and without any explanation of the basis for that claim. MSPB Case 15-31 (2015).

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**

To the extent Appellant's appeal is based on alleged human rights violations, the Board dismisses Appellant's appeal based on a lack of jurisdiction. Furthermore, as the Board has concluded that the County's decision was not arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, the Board denies Appellant's appeal of his nonselection for the position of Office Services Coordinator with DEP.

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 County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
October 6, 2015

# **APPEALS PROCESS GRIEVANCES**

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

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

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

During fiscal year 2016, the Board did not issue any grievance decisions.

## **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 2016, the Board issued the following dismissal decisions.

# **DISMISSAL FOR LACK OF JURISDICTION**

## **CASE NO. 15-28**

### **FINAL DECISION AND ORDER**

On May 18, 2015, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging an alleged improper involuntary transfer from the Montgomery County Department of Transportation (DOT) to the Department of Liquor Control (DLC).<sup>1</sup> On June 9, 2015, the County filed a response (County's Response)<sup>2</sup> to the appeal, asserting that the Board lacks jurisdiction over the appeal because (1) an involuntary transfer is not a form of discipline entitling and employee to appeal directly to the MSPB; and (2) if the appeal is treated as a grievance it was filed in an untimely manner. Appellant filed a reply to the County's Response on July 1, 2015, arguing (1) that filing a grievance with the County Chief Administrative Officer (CAO) would have been futile; and (2) the grievance was timely filed. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

On March 23, 2015, Appellant was orally advised by one of the County's Assistant Chief Administrative Officers that the CAO had decided to transfer him to be a Deputy Director of the DLC. Appellant's Final Comments (July 1, 2015), p.4.; Appellant's Letter dated May 15, 2015 and attached Grievance Statement. The next morning the Assistant Chief Administrative Officer provided confirmation of the transfer decision by email and indicated that the transfer was effective March 30, 2015. County's Response, Attachment 1.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant had been a Deputy Director in the DOT for approximately fourteen years.
- Appellant alleges that in February, 2015 the Acting Director of DOT asked the Appellant when he intended to retire, told Appellant that the Acting Director wanted him to retire, and offered a severance payment as an incentive for the Appellant to retire.
- Appellant further alleges that the Acting Director told Appellant that if he did not resign he would be transferred to another position in DOT or in another County agency.
- Appellant declined to resign.

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<sup>1</sup> Appellant filed his appeal using the Board's on-line appeal form on May 18, 2015. On Friday, May 15, 2015, Appellant had submitted an email to the Board's Chair, however as the Board's office is closed on Fridays, the first day of business for the Board after Appellant filed his appeal was May 18, 2015. Accordingly, that is the official date of receipt of Appellant's appeal. *See* MSPB Case No. 15-17 (2015), n.1.

<sup>2</sup> The County's Response contained one attachment, an email dated March 24, 2015, from Assistant Chief Administrative Officer to the Appellant.

- On March 23, 2015 Appellant was advised that he was being transferred to DLC.
- Appellant believes that the County involuntarily transferred him from DOT to DLC in retaliation for his refusal to resign or retire and based on his age, in violation of County, State, and federal antidiscrimination laws. Appellant’s Final Comments, pp. 3, 5, and Attachment A; Appellant’s Grievance Statement.
- Appellant asserts that because the transfer decision was made by the CAO, filing a grievance with the CAO would be “futile and nonsensical.” Appellant’s Final Comments, p. 5.
- Appellant argues that the grievance was timely filed because the position to which Appellant was transferred was not officially created until April 17, 2015 and the transfer did not actually officially occur until May 3, 2015, when the Director of the DLC was given authority to sign Appellant’s time card. Appellant’s Final Comments, p. 7.

County:

- The Board’s regulations only provide a right of direct appeal to the MSPB by an employee alleging demotion, suspension, termination, or involuntary resignation, and that there is no right of direct appeal over an involuntary transfer.
- The appropriate method for challenging the involuntary transfer was the grievance procedure.
- A grievance may not be filed directly with the MSPB.
- Even if the appeal to the MSPB is considered a grievance, because it was filed three months after Appellant was advised of his transfer and transferred, it is untimely.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code (MCC), Chapter 33, Personnel and Human Resources, Section 33-12, Appeals of disciplinary actions; grievance procedures**, which states in applicable part:

**33-12.**

(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: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process. . . . The county executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. In providing these procedures, the county executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution

after a fact-finding inquiry authorized by the board. Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended October 21, 2008 and June 30, 2015), Section 5, *Equal Employment Opportunity***, which states in applicable part:

**5-4. EEO complaints.**

(b) (1) An individual who believes this policy has been violated may not file a grievance under Section 34 of these Regulations or an appeal under Section 35, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 10, 2002, and June 30, 2015), Section 26, *Transfer***, which states in applicable part:

**26-1. Policy on transfer of employees.**

(b) An involuntary transfer of an employee is not an adverse action or disciplinary action.

**26-7. Appeal of transfer.** An employee with merit system status may file a grievance over an involuntary transfer under Section 34 of these Regulations. The employee must show that the action was arbitrary and capricious.

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

**34-3. Policy on grievances.**

(a) **Objectives.** The objectives of the grievance-resolution process are to:

- (1) resolve grievances at the lowest level and provide an opportunity for resolution at each step;
- (2) provide for review and resolution of grievances by the immediate supervisor, department director, and CAO; and
- (3) provide specific and reasonable time limits for each level or step in the review of a grievance.

**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.

**34-9. 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; or

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

**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.

**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.**

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

...

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

**35-3. Appeal period.**

(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 over an involuntary demotion, suspension, or dismissal;
- (2) receives a notice of termination;
- (3) receives a written final decision on a grievance;
- (4) resigns involuntarily; or
- (5) knows or should have known of a personnel action.

## ISSUE

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

### Appellant failed to comply with and exhaust the County grievance procedure

To the extent Appellant's direct appeal in this case may be considered an attempt to challenge his involuntary transfer as discipline it is beyond the Board's jurisdiction. The Board's regulations provide that an employee may file a direct appeal with the Board over discipline, *i.e.*, a demotion, suspension, termination, dismissal, or involuntary resignation. MCPR § 35-2(a). However, an involuntary transfer is not discipline. MCPR §26-1. The appropriate method to challenge an involuntary transfer is through the grievance procedure. MCPR §26-7.

Appellant filed a grievance form directly with the Board. Appellant's Letter dated May 15, 2015 and attached Grievance Statement; Appellant's Final Comments, p. 5. Appellant argues that doing so was proper because filing his grievance at a lower level would have been "futile and nonsensical" since the CAO, the second step decision maker, had made the transfer decision Appellant challenges. Appellant's Final Comments, p. 5.

The Montgomery County Code requires that the County establish a grievance procedure that that allows and encourages resolution of grievances "at the lowest possible level." MCC §33-12(b). The County grievance procedure is established by regulation and is designed to promote dispute resolution "at the lowest level" under "specific and reasonable time limits for each level or step". MCPR §34-3(a). Step one of the grievance procedure provides that an employee shall initially file a grievance with the employee's immediate supervisor, while step two requires that "within 10 calendar days after receiving the department's response" an employee may file the grievance with the CAO. MCPR §34-3(e). A grievance appeal to the MSPB must be filed within 10 working days after the CAO's step two decision is received by the employee. MCPR §34-3(e); §35-3(a)(3). Appellant did not avail himself of either of the first two steps of the grievance procedure but, rather, is attempting to go directly to step three, an appeal to the MSPB.

It is a well-established principle of labor law that an employee must normally exhaust any contractual or administrative grievance procedures. *Republic Steel Corp. v. Maddox*, 379

U.S. 650, 652-53 (1965) (employee must attempt to exhaust contractual grievance procedures before bringing suit in court). *See Teale v. Dep't of Navy*, 26 F.3d 139 (Fed. Cir. 1994) (MSPB had no jurisdiction to review grievance decision where there was no final decision on the grievance and employee failed to exhaust administrative remedies under grievance procedure); *Farol v. Office of Pers. Mgmt.*, 43 M.S.P.R. 606 (1990) (MSPB has jurisdiction only after OPM has issued a final decision); *Parks v. Smithsonian Inst.*, 39 M.S.P.R. 346 (1988) (No MSPB jurisdiction where grievant fails to exhaust grievance procedure through final decision); *Martinez v. Dep't of Air Force*, 12 M.S.P.R. 251, 253 (1982) (Grievant must exhaust administrative remedies under grievance procedure prior to MSPB appeal).

An employee's failure to exhaust the grievance procedure may be excused if the employer has repudiated the grievance procedures or if exhausting the procedures would be futile. *See, e.g., Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969) (excusing failure to follow grievance procedure as doing so would be futile); *Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 370 U.S. 524, 262-63, 266-67 (1962) (exhaustion of grievance procedure excused due to employer repudiation of grievance procedures).

Since there is no indication in this case that the County has repudiated the grievance procedure, the only exception to the principle of exhaustion that Appellant claims is futility. Appellant's argument that exhausting the grievance process would have been futile rests entirely on the fact that the CAO made the decision to transfer Appellant and is the final decision maker at step two. Without more, such as evidence that the CAO has suggested that he is unwilling to or incapable of evaluating Appellant's grievance on the merits, we cannot conclude that pursuing the grievance procedure would be a pointless exercise. As the Maryland Court of Special Appeals held in *Dearden v. Liberty Med. Ctr., Inc.*, 75 Md. App. 528, 534 (1988), the fact that an employee's complaint is against the official in the highest leadership position in the organization does not excuse a failure to invoke and exhaust the grievance procedure. As Judge Wilner explained:

This "futility" exception is indeed a narrow one that must be pled with precision and established at each level of the grievance mechanism. *See Sosbe v. Delco Electronics*, 830 F.2d 83 (7th Cir.1987). As held in *Transport Wkrs. U. of Amer. v. Amer. Airlines, Inc.*, 413 F.2d 746, 751 (10th Cir.1969), "The futility of the contractual or administrative remedy must clearly appear beyond mere conclusionary language in a complaint, for otherwise the doctrine of exhaustion would be dissipated by mere form and the door to the courts could be opened by prediction rather than by jurisdictional fact." 75 Md. App. at 534. *See Diaz v. United Agr. Employee Welfare Ben. Plan & Trust*, 50 F.3d 1478, 1485-86 (9th Cir. 1995) ("bare assertions of futility are insufficient to bring a claim within the futility exception, which is designed to avoid the need to pursue an administrative review that is demonstrably doomed to fail.").

Indeed, many grievances involve challenges to decisions made by managers, and the procedure is designed to allow the parties to address and resolve those grievances at the lowest possible level with the officials who made the initial decisions. Under Appellant's theory every grievance concerning a policy approved by the CAO would be directly appealable to the

MSPB, a result contrary to the fundamental principles of the County grievance procedure. MCC §33-12(b); MCPR §34-3(a). Had Appellant followed the grievance procedure and provided the CAO with an opportunity to hear and decide the case the CAO may have (1) granted Appellant's request and rescinded the transfer; (2) denied the grievance and provided an explanation for the transfer decision, which Appellant could then have appealed to the Board; or (3) refused to hear the grievance, thereby establishing futility or repudiation. Since Appellant failed to properly invoke the grievance procedure we, like the court in *Dearden*, are left to speculate and have no basis to excuse Appellant's failure to exhaust the grievance procedure. 75 Md. App. at 535.

It is also undisputed that Appellant was orally advised on March 23, 2015 that a decision had been made to transfer him to DLC, and that he received written notice of that on March 24 that the transfer would be effective on March 30. Appellant's Final Comments p.4.; Appellant's Grievance Statement; County's Response, Attachment 1. Appellant thus knew he had an issue for complaint on March 23<sup>rd</sup> or March 24<sup>th</sup> at the latest, yet failed to file a grievance until 56 days later, on May 18. 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).

Appellant's argument that the grievance procedure's time limits did not commence when he was notified of the involuntary transfer but instead when the transfer "officially" occurred is to no avail. Even assuming that the transfer did not actually take place until May 3<sup>rd</sup>, as Appellant claims, the clock for the grievance procedure time limits nevertheless began when Appellant was advised of the decision to transfer him. Under MCPR §34-9(a)(1) Appellant was required to file a grievance within 30 calendar days after he knew that a grievable action had occurred. On March 23, 2015, when he received notice that he was being involuntarily transferred, Appellant possessed actual knowledge of all the information necessary for him to file a grievance over the alleged harm.

Accordingly, even if Appellant's grievance could properly have been filed directly with the Board, because it was filed 56 days after the date Appellant knew of his involuntary transfer, it is untimely and the Board lacks jurisdiction.

### **The Board has no jurisdiction over appellant's age discrimination claim**

Appellant's Grievance Statement and Final Comments explicitly allege that he was involuntarily transferred from DOT to DLC based on his age and in retaliation for his refusal to resign or retire. Appellant's Final Comments, pp. 3, 5, and Attachment A; Appellant's Grievance Statement, pp. 2 and 4. Such claims are outside of the Board's jurisdiction as the Board lacks the authority to adjudicate claims of discrimination. *See* MCC §27-19; MCPR §35-2(d). *Cf.*, MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance "employment matters for which another forum is available to provide relief." MCC §33-12(b). Appellant unquestionably had available to him other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights.

See MSPB Case No. 93-25 (1993) (Interpreting §33-12(b)'s "another forum available" limitation as applying to discrimination claims). See also MCPR §5-4(b)(1) (An employee alleging discrimination "may not file a grievance under Section 34 of these Regulations or an appeal under Section 35, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation." ).<sup>3</sup>

### **Conclusion**

Accordingly, the Board lacks jurisdiction over the instant appeal and that it must therefore be dismissed.

### **ORDER**

For the reasons discussed above, the Board dismisses Appellant's appeal based on lack of jurisdiction.

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

For the Board  
September 10, 2015

## **CASE NO. 15-29**

### **FINAL DECISION AND ORDER**

On May 26, 2015, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging an alleged forfeiture of annual leave by his employer, the Montgomery County Department of Police. On that same date the Board sent a response to the Appellant informing him that because the alleged discipline does not involve a demotion, suspension, or dismissal the Board lacks jurisdiction over a direct appeal. Appellant was provided with the applicable regulations and a copy of the appropriate grievance form. The Board has heard nothing further from the Appellant or the County. The appeal was considered and decided by the Board.

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<sup>3</sup> MCPR §5-4(b)(2) provides that if an employee "files an EEO complaint and a grievance over the same action, such as an involuntary transfer or failure to be promoted, but the grievance does not allege discrimination or harassment in violation of this Section, the OHR Director must ensure that: (A) the complaint is processed first; and (B) the grievance is held and processed only after the complaint is investigated and decided by the EEO Officer or County Attorney's Office." The Board notes that Appellant made no allegation that he had filed a complaint with the Office of Human Rights, therefore it need not address how that provision should be interpreted. More importantly, the Board has determined that Appellant did not properly file a timely grievance.

## APPLICABLE LAW AND REGULATIONS

**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.***

- (1) With the exception of an oral admonishment, an unrepresented (nonbargaining unit) employee may file a grievance under Section 34 of these Regulations over any disciplinary action and the penalty associated with the disciplinary action, such as the length of the suspension, the amount of leave or compensatory time taken from the employee, or the salary reduction associated with a demotion or within-grade salary reduction.
- (2) A bargaining unit employee may file a grievance over a disciplinary action by using the grievance procedure in the appropriate collective bargaining agreement.

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

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

**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.**

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

## ISSUE

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

MCPR § 33-9(b)(1) and § 35-2(a) permit direct appeals of disciplinary actions to the Board in cases of demotion, suspension, or dismissal. Appellant's complaint concerning an alleged disciplinary loss of leave qualifies instead as a grievance under MCPR § 33-9(a)(1), and may only be considered by the Board after Appellant exhausts the appropriate steps of the grievance process. Accordingly, the Board concludes that it lacks jurisdiction over the instant appeal, which must thus be dismissed.

## ORDER

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

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §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 County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
September 11, 2015

## CASE NO. 15-31

### FINAL DECISION AND ORDER

On June 16, 2015, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging an alleged determination by the Montgomery County Department of Liquor control (DLC) not to select Appellant for the position of Warehouse Worker. On June 29, 2015, the County filed a response (County's Response)<sup>1</sup> to the appeal, asserting that the Board lacks jurisdiction over the appeal as the Appellant met the minimum qualifications for the position, on June 15, 2015, was placed on the eligible list, and no selection had yet been made. Appellant did not file any reply to the County's Response.

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<sup>1</sup> The County's Response contained two attachments. Attachment 1 was a printout of the County's Recruitment vacancy announcement. Attachment 2 was an Affidavit of Ms. C, Human Resources Specialist.

The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

On May 30, 2015, Appellant applied for the position of Warehouse Worker (vacancy announcement IRC17695) with DLC, a part-time merit position. County's Response at 1; County's Response, Attach. 2. At the outset, the 322 applications received for the position were reviewed by Ms. C, a member of the Montgomery County Office of Human Resources Recruitment and Selection Team. *Id.* Ms. C determined that Appellant satisfied the minimum qualifications for the position and he was placed on the eligible list. *Id.* As of the date of the County's response no interviews had begun and the vacancy had not been filled. *Id.*

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant believes that the County is refusing to employ him in retaliation for his previous complaints of anti-Semitism, workplace harassment, and as political retaliation.<sup>2</sup>
- Appellant has unsuccessfully applied for over 115 positions in the past two and a half years.
- As relief, Appellant requests appointment to a full time position with DLC.

#### **County:**

- The Board's regulations provide that an applicant may file an appeal directly with the MSPB over a denial of employment.
- At the time Appellant filed the instant appeal he had not been denied employment. Rather, he met the minimum qualifications and had been placed on the eligible list.
- Therefore, as Appellant has not been denied employment, the Board lacks jurisdiction over the instant appeal.
- The Board has previously informed Appellant that his appeals were premature in that he had not yet been denied employment. Accordingly, the Board is urged to refuse to process appeals by Appellant that lack documentation of a denial of employment.<sup>3</sup>

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<sup>2</sup> While the Board has determined it lacks jurisdiction over the instant appeal, as discussed *infra*, the Board notes that it has previously ruled that it lacks the authority to adjudicate claims of discrimination on the basis of religion. *See, e.g.*, MSPB Case No. 14-40 (2014); MSPB Case 15-04 (2015). Moreover, while an applicant who alleges discrimination on the basis of political affiliation may file a direct appeal with the MSPB, Montgomery County Personnel Regulations (MCPR) §35-2(e), Appellant's allegation of political retaliation does not state a claim as it is a bald allegation without explanation of the basis for that claim and is unsupported by any factual allegations.

<sup>3</sup> The Board has previously informed the Appellant that it lacks jurisdiction over appeals where Appellant has not yet been denied employment, *see, e.g.*, MSPB Case Nos. 15-16, 14-41 and 14-14. Although it is unnecessary for the Board to decide the issue in this case, as this appeal was filed prior to the effective date of various amendments to the Montgomery County Personnel Regulations, the relief requested by the County may



**APPLICABLE LAW AND REGULATIONS**

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

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. . . . Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010 July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

- 6-13. Appeals by applicants.** Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual’s application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, 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.

**ISSUE**

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

**ANALYSIS AND CONCLUSIONS**

As this Board has ruled in numerous cases, the Board’s jurisdiction is not plenary but

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be provided under newly promulgated MCPR §35-4(d)(“an employee or applicant must include the following documentation with the appeal: (3) If the employee or applicant is contesting a nonselection/nonpromotion decision, a copy of the notification of nonselection/nonpromotion must be provided.”).

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. *C.f.*, *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *C.f.*, *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The County Code provides that an applicant for a merit system position may challenge the Chief Administrative Officer's (CAO's) decision regarding an application for employment. Montgomery County Code, § 33-9(c). As the Board's regulations indicate, Appellant may file an appeal with the Board over a denial of employment. MCPR, 2001, § 35-2(c). However, in the instant case, Appellant was determined to be qualified for the position of Warehouse Worker and was placed on the eligible list. County's Response at 1. Thus, based on OHR's actions at the time this appeal was filed, there has been no hiring decision and thus Appellant cannot be deemed to have denied employment in the position of Warehouse Worker with DLC. Accordingly, the Board concludes it lacks jurisdiction over the instant appeal and will dismiss it.<sup>4</sup>

### **ORDER**

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

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

For the Board  
August 31, 2015

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<sup>4</sup> Appellant may file a new appeal with the Board should he ultimately not be selected for the Warehouse Worker position.

# **CASE NO. 16-02**

## **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the alleged refusal of the Office of Human Resources (OHR) to select him for unpaid internships and volunteer opportunities.<sup>1</sup> The County filed its response (County's Response) to the appeal on August 11, 2015, asserting that the Board lacks jurisdiction over the appeal as Appellant is not challenging a failure to select him for a merit system position. Appellant did not file any reply to the County's Response. The appeal was considered and decided by the Board.

## **FINDINGS OF FACT**

Appellant alleges that he has applied, to no avail, for various unpaid internships and volunteer opportunities. Appellant's Appeal at 3; County's Response at 1. Appellant does not identify any specific internships or volunteer opportunities.

## **POSITIONS OF THE PARTIES**

### Appellant:

- Appellant alleges that OHR employees have refused to assist him in obtaining internship opportunities, and that one OHR employee “treats Appellant with great disdain due to Appellant's past assertion that she has a vendetta against the Appellant. . .”. Appellant's Appeal at 2.
- Appellant further suggests that he has suffered from a denial of any employment due to anti-Semitism.

### County:

- The Board lacks jurisdiction over this appeal because the County Code only provides that a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB.
- The Appeal only concerns unpaid internship and volunteer opportunities, which are non-merit positions.

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<sup>1</sup> Appellant's Appeal names the “Office of Human Rights” as the department that took action or made the decision he is appealing. Appellant's Appeal at 1. As the Appeal alleges various improper actions by the Office of Human Resources, seeks relief against that agency, and contains no allegations concerning the Office of Human Rights, we assume that “Office of Human Rights” is a typographical error and will treat this appeal as concerning the Office of Human Resources.

## APPLICABLE LAW AND REGULATIONS

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

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . .

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

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

. . .

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

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015), Section 6, Recruitment and Application Rating Procedures**, which provides, in pertinent part:

**6-13. Appeals by applicants.**

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual’s application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, 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.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

**ISSUE**

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

**ANALYSIS AND CONCLUSIONS**

**The Board's Jurisdiction is Limited to the Authority Granted by Statute**

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

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

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

The unpaid internship and volunteer positions Appellant seeks are patently not career positions in the merit system. Accordingly, the Board finds that it lacks jurisdiction over the appeal.

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

In the alternative, the Board would dismiss the instant appeal as it lacks jurisdiction over appeals that allege human rights violations. The County Code provides that an applicant may challenge the Chief Administrative Officer's decision regarding an application for employment. However, as the Board has previously informed the Appellant, the Code is explicit that appeals alleging discrimination prohibited by Chapter 27 of the Code must be filed

with the Human Rights Commission. Montgomery County Code, § 33-9(c). Among the various forms of discrimination prohibited by Chapter 27 is discrimination based on religion. Montgomery County Code, § 27-1(a). To the extent that Appellant is alleging nonselection due to religious 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).

### **ORDER**

Accordingly, the Board dismisses Appellant's appeal of non-selection for unpaid, non-merit system positions based on 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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
October 6, 2015

## **CASE NO. 16-04**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the decision of the Montgomery County Office of Human Resources (OHR) to terminate her employment during her probationary period. The Board has reviewed and considered the submissions of the parties.

On October 6, 2015, Appellant filed an appeal with the Board alleging that the County acted improperly when it issued a Notice of Termination during Probationary Period on September 30, 2015. On October 23, 2015, the County issued an Amended Notice of Termination during Probationary Period, altering Appellant's termination date from September 30 to October 23, 2015, and correcting certain errors in the original Notice of Termination. In response to the County having amended her termination date, Appellant filed an Amended Appeal on October 28, 2015, seeking back pay for the period from September 30 to October 23, 2015. The County filed a Motion to Dismiss the appeal for lack of jurisdiction on November 5, 2015, and Appellant filed an initial response on November 16, 2015. On November 30, 2015, the County filed Exhibits 5 and 6, an affidavit of the Director of OHR and documents purporting to verify that the County had paid Appellant for the period from September 30 to October 23, 2015. Finally, on December 8, 2015, Appellant filed a Supplemental Reply with additional argument, a copy of a vacancy notice for what Appellant alleges is her former position, and a summary of Appellant's job accomplishments. Appellant Exhibits 3 and 4.

## **FINDINGS OF FACT**

Effective May 5, 2014, Appellant was hired by the Montgomery County Office of Human Resources as a Human Resources Specialist II. County Exhibit 1.<sup>1</sup> On April 6, 2015, before the expiration of her 12 month probationary period, the Director of OHR extended Appellant's probationary period for an additional six months, until November 4, 2015. County Exhibit 3. The memorandum extending the probationary period explained that since the Director was newly appointed she wished to have additional time to assess Appellant's performance before deciding to approve merit system status. The memorandum further stated that OHR was in the process of hiring a new manager to supervise the labor relations team to which Appellant was assigned, and the extension of probation would provide the new supervisor with time to review and assess Appellant's performance.

There is no indication in the record that Appellant was a substandard or unsatisfactory employee, or that she had received unfavorable performance evaluations. On the contrary, it appears that Appellant performed at a satisfactory or "successful" level, as reflected in her evaluation for the period July 1, 2014 to June 30, 2015. Appellant Exhibit 2. Appellant also submitted two emails that praised her work. The first was an August 22, 2014, laudatory email from then OHR Deputy Director S concerning the "excellent and professional way" that Appellant had performed up to that date and the initiative she had demonstrated with regard to certain assignments. Appellant Exhibit 1. The second was an April 10, 2015, email from an employee who had attended a training session conducted by Appellant to the OHR Director. The employee indicated that Appellant had done "a fantastic job!" The OHR Director replied to the email, copying Appellant, thanking the sender for his feedback, and adding that Appellant "is definitely one of our stars!"

Prior to the expiration of her extended probationary period, Appellant was terminated. Notice of Termination during Probationary Period, September 20, 2015. The Notice of Termination, signed by the OHR Director, stated that Appellant was "being terminated because this Office has decided to move in a different direction with this position."

Subsequent to Appellant's October 6, 2015, appeal of her termination the County amended Appellant's termination date from September 30 to October 23, 2015. County Exhibit 4. The Amended Termination Notice also provided as the reason for Appellant's termination that OHR had "decided to move in a different direction" with Appellant's position. The October 23 notice and termination occurred prior to the expiration of Appellant's probationary period.

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<sup>1</sup> Appellant's classification is referenced as a Human Resources Specialist III in the September 30, 2015, Notice of Termination, but was corrected in the October 23, 2015, Amended Notice of Termination to reflect Appellant's actual job classification as a Human Resources Specialist II. County Exhibit 4. Additionally, the payroll records submitted by the County as Exhibit 6 reference Appellant's position as being that of a Human Resources Specialist III, which is at the Grade 25 salary level. However, those same payroll records also indicate that Appellant was paid as a Grade 22, which is the correct salary level for a Human Resources Specialist II. These apparent clerical errors do not impact the outcome of this case as the Amended Notice of Termination corrected the errors and it is undisputed that Appellant was serving as a probationary employee at the time of her termination.

By affidavit the Director of OHR provided a more detailed explanation of what was meant when the termination notice said that OHR was moving in a different direction with Appellant's position:

The Office of Human Resources reevaluated the duties and responsibilities of all Human Resources Specialist incumbents on the Labor and Employee Relations Team. OHR determined that for Appellant's particular position, it required primarily Labor Team administrative support duties including updating case tracking, updating and evaluating labor contract language, compiling and preparing packages for submission to County departments and agencies, and the development and updating of standard operating procedures relating to Labor Team duties and functions with other OHR divisions and all County agencies and departments in general. Based on the foregoing, OHR needed to amend the essential functions of Appellant's position and therefore, move in a different direction as the best allocation of its resources.

In conjunction with the amended termination date, Appellant was provided with back pay for the period from the first termination date of September 30, 2015 to October 23, 2015, the amended termination date. County Exhibits 5 and 6.

### **POSITIONS OF THE PARTIES**

#### County:

- Appellant's probationary period was extended until November 4, 2015.
- Appellant was terminated prior to the expiration of her probationary period.
- The Montgomery County Code and Personnel Regulations do not permit the appeal or grievance of a probationary employee's termination.
- After the County amended Appellant's termination date from September 30 to October 23, County Exhibit 4, Appellant was provided with back pay for the period ending October 23, 2015. County Exhibits 5 and 6.

#### Appellant:

- While the Personnel Regulations do not permit a probationary employee to appeal or grieve disputes related to job performance and evaluations, the basis for Appellant being terminated did not involve performance issues.
- OHR never told Appellant that her performance was unsatisfactory and Appellant received a satisfactory performance evaluation for the 2015 fiscal year. Appellant's Exhibit 2.
- The September 30 Notice of Termination was defective because Appellant's name was misspelled and her job title was incorrectly referenced.
- Although the October 23 Amended Notice of Termination corrected the errors concerning Appellant's name and job title, by stating that she was "being terminated because this Office has decided to move in a different direction with this position" it provided a false explanation for her termination.



- The Personnel Regulations do not foreclose an appeal to the MSPB by a probationary employee when there is a defective notice of termination or the reason given for termination is invalid.

**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.**

**(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.

\* \* \*

**(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.**

(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.

**34-6. 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.<sup>2</sup> 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 with regard to 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 does not challenge the County’s authority to terminate a probationary employee for performance issues and, indeed, Appellant readily concedes that “the County Council never intended for the MSPB to resolve disputes relating to performance during the probationary period.” Appellant’s November 16, 2015 Reply, p. 1. She instead argues that the failure of the County to give performance as a reason for her termination means that the County’s decision may be challenged before this Board. Appellant misconstrues the jurisdiction of the Board.

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.”). By specifying that it is also not grounds for a grievance or appeal if the County has failed to inform a probationary employee that there were performance issues, the regulations do not somehow by

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<sup>2</sup> The Montgomery County Charter is the foundational law for the County, analogous to a state or national constitution. *Maryland State Admin. Bd. of Election Laws v. Talbot County*, 316 Md. 332, 341 (1988).

implication vest the Board with jurisdiction over all other types of challenges to a probationary termination. 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, e.g.*, MSPB Case No. 91-14 (1991) (probationary employee has no right to appeal to the Board); MSPB Case No. 88-10 (failure to give a reason for termination does not give the Board jurisdiction); MSPB Case No. 87-57 (1987) (probationary employee lacks merit system status and therefore, notwithstanding allegations of procedural violations, does not have the right to appeal a termination action). As the Board stated in MSPB Case No. 88-10, "While it may appear to be unfair to a probationary employee, the Courts have sustained the validity of the County's position and this Board lacked the authority to overturn or amend the law, as written." *C.f., Gaxiola v. U.S. Dep't of Air Force*, 6 M.S.P.R. 515, 519 (1981) (Federal probationary employee has no statutory right of appeal); *Sampson v. Murray*, 415 U.S. 61, 80-81 (1974) (probationary employees are not entitled to the substantive and procedural protections of permanent government employees).

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 concludes that it lacks jurisdiction over Appellant's appeal of the termination of Appellant's probationary employment.

### **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 County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board  
December 24, 2015

## **CASE 16-05**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on an appeal by Appellant challenging the improper placement of certain documents in her DOCR personnel file. Appellant filed her appeal on October 13, 2015

(Appeal). The County filed a motion seeking to dismiss the appeal on November 16, 2015 (County's Motion to Dismiss). Appellant immediately filed a response, which was followed by a reply from the County on November 23, 2015, and finally by Appellant's final response on December 8, 2015 (Appellant's Final Response).<sup>1</sup> The Board has reviewed and considered the submissions of the parties.

### **FINDINGS OF FACT**

Appellant is employed by the Montgomery County Department of Correction and Rehabilitation as a Correctional Officer. Appellant alleges improper conduct by the County Department of Correction and Rehabilitation (DOCR), the Office of Human Rights, and her exclusive bargaining representative, the United Food and Commercial Workers Local 1994, Municipal and County Government Employees Organization (MCGEO or union). The improper conduct Appellant appears to be alleging involves the interpretation of certain policies concerning documentation that may properly be maintained in personnel files.

Appellant's dispute with the County and the union appears to have begun with a September 3, 2014, Notice of Intent to Terminate from County Employment (NIT) issued by the then-Director of DOCR to Appellant. A.X. 1 and 25. On September 24, 2014, MCGEO, as Appellant's representative, wrote to the Director of DOCR opposing the NIT and requesting that it be rescinded. A.X. 16. Subsequently, Appellant apparently inspected her DOCR personnel file and discovered that it contained both the NIT and a June 30, 2014, memorandum from Appellant's supervisor to the DOCR human resources manager via the Warden and others in Appellant's chain of command. This second document stated that Appellant's performance in fiscal year 2014 could not be evaluated because she had missed substantial time from work due to medical illness and a work related injury. A.X. 25 and 28. On December 9, 2014, Appellant's MCGEO Field Services Representative wrote to the DOCR human resources manager objecting to a copy of the NIT being maintained in Appellant's DOCR personnel file. A.X. 27. On December 22, 2014, MCGEO filed a formal grievance (No. 2014-45) seeking the removal of the NIT, and the June 30, 2014, memorandum regarding Appellant's performance evaluation, from Appellant's DOCR personnel file. A.X. 31. In December, 2014, Appellant also filed an EEO complaint with the Office of Human Resources concerning the same issues. A.X. 29.

The Director of DOCR denied Grievance No. 2014-45 on January 23, 2015, and declined to remove the two documents from Appellant's file. A.X. 34. Appellant appealed to Step 2 of the grievance procedure, and on February 3, 2015, a designee of the County Administrative Officer (CAO) conducted a Step 2 grievance meeting with MCGEO and Appellant. Although the CAO denied Appellant's grievance on February 20, 2015, asserting that the documents were appropriate for Appellant's DOCR personnel file, by March 4, 2015, MCGEO was able to tell Appellant that the County, "under the guidance of the EEO Office", had agreed to remove the documents from her file. A.X. 38 and 40. As a result of this settlement providing Appellant with the relief she requested, MCGEO advised Appellant that the matter

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<sup>1</sup> Appellant's December 8 Final Response contained 47 documents, numbered as Document #00 through Document #46. We shall identify the documents as Appellant Exhibits (A.X.) while leaving the numbering (00 through 46) unchanged.

was resolved. A.X. 38. The MCGEO Field Services Representative also advised Appellant that her EEO complaint would be withdrawn as resolved. However, Appellant changed her mind and decided to rescind the withdrawal of her EEO complaint. A.X. 39. Nevertheless, according to a MCGEO field representative, even though Appellant “reversed . . . [her] agreement to withdraw the EEO complaint . . . the department agreed to remove the Notice of Intent to Terminate from [Appellant’s] . . . file anyway.” A.X. 40.<sup>2</sup> The DOCR human resources manager wrote Appellant on April 29, 2015, confirming that DOCR was rescinding the NIT and removing the document from her DOCR personnel file. A.X. 41.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Appellant may not file a direct appeal to the MSPB as she has not been removed, demoted, or suspended.
- Appellant has identified no adverse personnel action against her, so no relief may be granted.
- The documents Appellant claimed should not be in her file were removed from that file as part of a settlement to resolve her grievance.

#### **Appellant:**

- The County and the union placed unauthorized documents in employee personnel files because of their incorrect interpretation of the County records policy.
- Appellant seeks “a proper ruling rendered as requested in a grievance that was never filed.”
- “The union refused to file a grievance on the true issues.”
- Appellant was never advised that she could appeal to the MSPB and within what time frame.

### **APPLICABLE LAW AND REGULATION**

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

#### **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.**

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<sup>2</sup> It is unclear whether Appellant currently has an EEO complaint pending with the Office of Human Rights. To the extent that Appellant’s Appeal to this Board is alleging discrimination under the purview of the Human Rights Commission, the Board lacks jurisdiction over the appeal. The Board has ruled on numerous occasions that the Montgomery County Code explicitly provides that appeals alleging discrimination prohibited by Chapter 27 of the Code must be filed with the Human Rights Commission and not the Board. Montgomery County Code, § 33-9(c). *See, e.g.*, MSPB Case No. 16-01 (2015).

**Appeals of disciplinary actions; grievance procedures**, which states in applicable part,

- (b) *Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.
  
- (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. The determination of the board as to what constitutes a term or condition of employment shall be final. Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process. A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the event of such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal. The county executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. In providing these procedures, the county executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution after a fact-finding inquiry authorized by the board. Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

**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.**

- (c) A bargaining unit employee may not file a grievance under this section over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.



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

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

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

(b) An employee with merit system status 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 employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

\* \* \*

**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; . . . or

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

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, (July, 2013), Article 10, Grievances, and Article 46, Records,** which state in applicable part:

10.2 Definition

A grievance is any complaint by the certified employee organization arising out of a violation or misinterpretation of any provision of the collective bargaining Agreement. . . .

#### 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.

#### 46.3 Department Operating Record

(a) A department director may maintain employee records necessary for program level operations. . .

(d) The documents in the departmental operating record are limited to:

- (1) home address and phone number;
- (2) current job information, which may include the job description and location;
- (3) employee emergency contact information;
- (4) training records;
- (5) timesheet and leave data necessary to verify payroll;
- (6) leave records from the last 5 years;
- (7) performance evaluations and supporting documentation from the last 5 years;
- (8) commendations from the last 5 years;
- (9) disciplinary actions, excluding written reprimands, from the last 5 years;
- (10) documents from health care providers concerning medical appointments,
- (11) light duty, or return to work; and
- (12) written reprimands for 12 months

### ISSUES

Does the Board have jurisdiction over Appellant's grievance?

### 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 it by statute. *See, e.g.,* MSPB Case No. 10-09 (2009); MSPB Case No. 10-12; MSPB Case No. 10-16 (2010). *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 jurisdiction 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 Appellant's Grievance***

### ***Appellant Is No Longer Aggrieved***

In order for an appellant to have standing to challenge a matter before the Board, the appellant must be “aggrieved”; *i.e.*, the appellant must have actually suffered an injury. MSPB Case No. 10-09 (2009); MSPB Case No. 10-12. Specifically, the appellant must have been personally adversely affected by the matter. Even if Appellant could be considered to have been aggrieved by the placement of the two documents in her DOCR personnel file, after filing a grievance and an EEO complaint, and at the urging of the union and the County Office of Human Rights, the County agreed to remove the offending documents from Appellant’s file. Thus, Appellant can no longer be deemed to be aggrieved. Accordingly, the Board lacks jurisdiction over the appeal. *See* MSPB Case No. 10-12.

Although Appellant continues to complain about the incorrect interpretation of County policy and the MCGEO collective bargaining agreement that led to the documents improperly being placed in her file, with the assistance of MCGEO and the County Office of Human Rights she appears to have successfully vindicated her rights through an agreement by the County to remove the offending documents from her file. The Board is unable to discern a remaining dispute between Appellant and the County, and Appellant has not requested nor identified a remedy that is within the Board’s authority.<sup>3</sup>

As Appellant is no longer aggrieved, the Board lacks jurisdiction over the appeal.

### ***The Board Lacks Jurisdiction Over Grievances Covered By Collective Bargaining Agreements***

The Montgomery County Personnel Regulations indicate that a bargaining unit employee may not file a grievance under the administrative grievance procedure but must instead file a grievance under the applicable collective bargaining agreement (CBA). MCPR § 34-2(c) (“A bargaining unit employee may not file a grievance . . . over a matter covered in the collective bargaining agreement . . .”).

The record evidence establishes that as a member of the bargaining unit represented by MCGEO, Appellant initially sought the assistance of MCGEO in obtaining a remedy. Pursuant to the MCGEO CBA with the County, its CBA grievance procedure is the exclusive forum for grievances. *See* CBA, § 10.4. The CBA further defines a grievance as encompassing any

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<sup>3</sup> Appellant also alleged that DOCR, MCGEO, and Office of Human Rights have engaged “in a conspiracy to have me fired.” Appeal, ¶4. While DOCR did send Appellant the NIT, Appellant has provided absolutely no evidence indicating that MCGEO or the County Office of Human Rights have conspired to seek her removal from County employment. Moreover, the County Labor Relations Administrator, not the Board, has jurisdiction over duty of fair representation disputes between County employees and their exclusive bargaining representatives. *See* Montgomery County Code, § 33–104(a)(2), (c); § 33–109(b), (c). Furthermore, even if the Board had jurisdiction over Appellant’s claims that MCGEO failed to “file a grievance on the true issues” in February and March of 2015, that claim appears untimely. *See* § 33–109(e); *Fontell v. MCGEO UFCW Local 1994*, Civil Action No. AW–09–2526, 2010 WL 3086498, at \*10 (D. Md. 2010) *aff’d*, 410 F. App’x 645 (4th Cir. 2011) (duty of fair representation charges against County union are subject to a six month limitations period).

violation of a provision of the CBA, and Appellant's claim regarding documents in her DOCR personnel file is a matter addressed under Article 46 of the CBA. Therefore, any grievance by Appellant concerning what documents were properly in her DOCR personnel file may only be pursued through the grievance procedures set forth in the CBA.

The Board lacks jurisdiction to hear an appeal by Appellant, an MGCEO bargaining unit employee, over an issue covered by the CBA grievance procedure. MSPB Case No. 14-07 (2013); MSPB Case No. 11-37 (2011); MSPB Case No. 10-16 (2010).

*The Board Lacks Jurisdiction Over Direct Grievance Appeals*

The Appeal states that Appellant seeks "a proper ruling rendered as requested in a grievance that was never filed," and goes on to claim that MCGEO "refused to file a grievance on the true issues." To the extent that Appellant seeks to raise a new grievance unrelated to her grievance seeking removal of the offending documents from her DOCR personnel file, she is attempting to file a direct Board appeal of a grievance without exhausting her administrative remedies. Such direct appeals are not within the Board's jurisdiction.

The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 11-08. *See* MCPR § 35-2(b) ("An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO.").<sup>4</sup>

Accordingly, based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant's appeal.

***Appellant's Appeal is Moot***

Although the County initially refused to remove the objectionable documents from Appellant's DOCR personnel file or rescind the NIT, after further negotiations with the union and the Office of Human Rights the County agreed to take exactly those actions.

This Board has held that an appeal must be dismissed as moot where the County has completely rescinded the action appealed. MSPB Case No. 14-11 (2014). *See Hodge v. Dep't of Veterans Affairs*, 72 M.S.P.R. 470 (1996). It is undisputed that the County agreed to remove the two offending documents from Appellant's DOCR personnel file and rescind the NIT. There is no allegation by Appellant or indication in the record that the County has failed to abide by its agreement.

Accordingly, the Board also hereby dismisses the appeal as moot.

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<sup>4</sup> The Appeal contains no allegations of an adverse personnel action (*i.e.*, demotion, suspension, termination, dismissal, or involuntary resignation) that would permit Appellant to file an appeal directly with the MSPB. MCPR § 35-2(a).

## 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 **GRANTED** and that the appeal be, and hereby is, **DISMISSED**.<sup>5</sup>

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 County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board  
December 30, 2015

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<sup>5</sup> Since Appellant's appeal is being dismissed due to a lack of jurisdiction and as moot the Board need not address the issue of whether the appeal is also untimely.

# **DISMISSAL FOR FAILURE TO PROSECUTE**

## **CASE NO. 15-09**

### **ORDER**

On September 10, 2014, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging an alleged one-day disciplinary suspension by her employer, the Montgomery County Department of Health and Human Services. On that same date the Board sent a response to the Appellant informing her that because she had not yet been issued a Notice of Disciplinary Action (NODA) processing of her appeal would be stayed until she received a NODA. On October 31, 2014 Appellant responded to the Board and claimed that she had received a NODA on October 17, however a copy of the document was not provided. On March 24, 2015, the Board again wrote to Appellant requesting that she provide the Board with a copy of a NODA. After receiving no reply, on August 19, 2015 the Board again wrote to Appellant requesting a copy of the NODA and informing her that if the Board did not receive a copy of the NODA by August 27, 2015, her appeal would be dismissed. As of this date the Board has heard nothing further from the Appellant.

Montgomery County Personnel Regulation § 35-4(d)(1) requires that an employee contesting a disciplinary action provide a copy of the Notice of Disciplinary Action to the MSPB. Appellant has been given a year to comply with this requirement and, despite being advised three times of that obligation, has failed to do so.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 15-09 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 County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
September 11, 2015

# DISMISSAL FOR MOOTNESS

CASE NO. 16-14

CASE NO. 16-16

## ORDER OF DISMISSAL

On May 9, 2016, the Appellant filed a letter with the Merit System Protection Board (Board or MSPB) asking to withdraw his appeals in the above-captioned cases. On May 10, 2016, the County filed a Motion to Dismiss the appeals as moot. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot.

The above captioned appeals involved Appellant's claims that the County Office of Human Resources (OHR) applied screening criteria for "professional experience" in a manner that improperly disadvantaged individuals whose work experience was primarily with the County. This alleged bias resulted in Appellant initially being determined to be ineligible for two posted positions: IRC 21442 (Manager III, Equipment Maintenance Section Chief) and IRC 21443 (Fleet Analyst).

Subsequent to the filing of his appeals, the County OHR revised its assessment of Appellant's qualifications. Appellant's status was changed from "Did not meet screening criteria" to "Rater review" and he was placed on the eligible list for both positions. Both the County and the Appellant agree that this action has fully resolved both appeals.

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 if the appellant fails to prosecute the appeal). The Board has also long found that when the County provides the relief sought by the Appellant the appeal should be dismissed as moot. MSPB Case No. 89-52 (1990); MSPB Case No. 89-15 (1989); MSPB 89-45 (1989). *See* MCPR §35-7(d)(Board may dismiss if the appeal becomes moot).

Accordingly, the Board concludes that the appeals in Case Nos. 16-14 and 16-16 are moot, and hereby **ORDERS**, that they 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 County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board  
May 12, 2016

# **MOTIONS**

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-7(c), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to dismiss a party and substitute another, motions to quash subpoenas, motions *in limine* (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions may be filed at any time during a proceeding. The opposing party is given ten (10) calendar days to respond. MCPR § 35-11(a)(4). The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning or end of the hearing, rule on the motion.

During fiscal year 2016 the Board issued the following decision on various motions filed during the course of an appeal proceeding.



# MOTION TO COMPEL TESTIMONY

## CASE NO. 16-03

### ORDER

On November 23, 2015, Appellant filed a Motion to Compel the Testimony of Ms. K. Ms. K, the Associate County Attorney representing the County in this matter filed an opposition on behalf of the County on December 7, 2015. Appellant contends that because Associate County Attorney K was co-author of an August 25, 2015 transmittal memorandum to the Director of the County Office of Human Resources, which recommended Appellant's dismissal (Appellant's Exhibit 9), she should be required to testify. The County opposed Appellant's Motion, arguing that Associate County Attorney K has no direct knowledge of the facts in this case and was not a decision maker. The County also contends that the memorandum is already in evidence and speaks for itself.

Having reviewed and considered the Appellant's Motion to Compel the Testimony of Associate County Attorney K and the County's opposition, and it appearing to the Board that Associate County Attorney K would not provide testimony relevant to this case, it is hereby **ORDERED** that the Motion be, and hereby is, **DENIED**.

For the Board  
December 31, 2015

# MOTION TO STRIKE

## CASE NO. 16-08

### ORDER

During Appellant's testimony at the June 9, 2016 hearing in this matter the Board asked whether Appellant had testified to the same effect in his criminal trial in Baltimore City Circuit Court. Appellant indicated that he had not been asked the same questions during the trial. On redirect Appellant's counsel then read certain excerpts from the trial transcript and obtained confirmation from Appellant as to the accuracy of the quotes. At the conclusion of that portion of Appellant's testimony the County objected to the excerpts and moved that they be stricken from the record, arguing that they were out of context without the rest of the transcript being introduced. Neither party had a copy of the trial transcript available at the hearing. The Board decided to hold a decision on the admissibility of the excerpts, or whether to admit the entire transcript, in abeyance.

It is the Board's view that because the Board opened the door to the issue of Appellant's testimony at the criminal trial it would not be appropriate to strike Appellant's testimony regarding the criminal trial transcript. As a result, the Board has also decided to offer the County the opportunity to supplement the record by introducing the full transcript from the criminal trial, or appropriate portions thereof, into evidence. Pursuant to Montgomery County Code, §2A-8(b)(3) and (h)(8), as well as Montgomery County Personnel Regulations, §35-10(f)(10), the Board is empowered to request, receive, and introduce into the record additional documentary or other evidence. Should the County submit the criminal trial transcript for inclusion in the record, the parties may address any issues they may have concerning the transcript in their post hearing briefs and as part of their proposed findings of fact and conclusions of law.

It is hereby **ORDERED** that the County's motion to strike and Appellant's objection to admission of the criminal trial transcript are **DENIED**. If the County wishes to include a copy of the transcript of Appellant's criminal trial in the record, it shall file that document with the Board within ten (10) days from receipt of this Order.

For the Board  
June 15, 2016

# **MOTION TO CONSOLIDATE**

**CASE NO. 16-09**

**CASE NO. 16-11**

**CASE NO. 16-12**

## **ORDER CONSOLIDATING APPEALS**

On December 20, 2015, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a decision by the County Administrative Officer (CAO) to uphold a decision by the County unit denying her grievance. That appeal was designated MSPB Case No. 16-09. In that appeal, Appellant alleges that the unit improperly and in violation of the Merit System law: (1) reduced her performance appraisal rating from “Highly Successful Performance” to “Successful Performance”; (2) conducted a “secret investigation” of Appellant’s behavior and maintained a copy of records relating to that investigation in Appellant’s supervisory file; and (3) engaged in a pattern and practice of intimidation, harassment and retaliation against Appellant by attempting to have Appellant move her office in violation of the unit’s past practice, making inappropriate comments about Appellant in front of other unit staff, and seeking to have Appellant change her work schedule, hours and duty assignments. Grievance Appeal, MSPB Case No. 16-09, December 20, 2015.

On April 4, 2016, Appellant filed two new appeals, both of which also challenged decisions by the CAO to uphold the unit’s denials of Appellant’s grievances. One of those appeals, docketed as MSPB Case No. 16-11, involved Appellant’s grievance alleging that the unit head improperly permitted the posting of information concerning the Appellant’s first grievance (the subject of MSBP Case No. 16-09) onto the unit’s electronic recordkeeping system to which all unit staff has access.

According to Appellant, making such confidential personnel information concerning Appellant’s grievance available to all employees in the unit constitutes a form of retaliation, harassment, and intimidation against Appellant. The relief requested by Appellant includes a Board order requiring the unit to remove information concerning the first grievance from the electronic recordkeeping system or, alternatively, limiting access to unit personnel assigned to defend the case. Grievance Appeal, MSPB Case No. 16-11, April 4, 2016. Appellant’s requested relief also includes a Board order directing unit management to “cease and desist in its harassment, retaliation, and intimidation” of Appellant. *Id.*

The other April 4 appeal, MSPB Case No. 16-12, involves an appeal of the CAO’s decision denying Appellant’s grievance alleging that the unit improperly obtained electronic records of Appellant, such as virtual private network (VPN) log-in information and emails. Appellant contends that the unit obtained the electronic records as part of an effort to justify terminating Appellant’s employment and as part of its continuing retaliation, harassment, and

intimidation against Appellant. Appellant also alleges that unit officials sought the electronic data regarding Appellant in order “to satisfy their prurient interest about Grievant’s private life.” Grievance Appeal, MSPB Case No. 16-12, April 4, 2016. Appellant’s requested relief includes a Board order directing unit management to “cease and desist in its harassment, retaliation, and intimidation” of Appellant. *Id.*

On April 11, 2016, Appellant filed a Motion to Consolidate all three appeals. The County has opposed consolidation. The Board has carefully considered the Motion to Consolidate, the County’s opposition to the motion, the Appellant’s reply to the opposition, and the County’s surreply, and concluded that the interests of judicial economy would best be served if the merits of all of Appellant’s claims are addressed together.

Under the Montgomery County Administrative Procedures Act, Montgomery County Code, §2A-8(h)(7), the Board may dispose of procedural requests, specifically including motions to consolidate. *See* Montgomery County Personnel Regulation (MCPR), §34-1(c)(consolidated grievance means two or more grievances filed by one employee and processed as one grievance if they concern the same subject and request the same or similar relief).

Appellant claims “harassment, retaliation, and intimidation” and requests a Board order in each case that the unit cease that alleged behavior. It appears from the voluminous pleadings received to date that the various workplace matters in dispute are at least arguably interrelated. Moreover, there is no indication that handling the three appeals together would be prejudicial to the interests of either party. It is thus the Board’s determination that it would be in the interests of judicial economy to address the merits of all of Appellant’s claims and requests for relief together. MSPB Case No. 07-17 (2007). *See Doe v. Pension Ben. Guar. Corp.*, 117 M.S.P.R. 579 (2012), *review denied* 120 M.S.P.R. 363 (2013)(joinder “appropriate when doing so would expedite processing of the cases and not adversely affect the interests of the parties,” and given the “interrelatedness of the subject matter and the similar procedural posture of both appeals”); *Fitzpatrick v. Dep’t of Justice*, 91 M.S.P.R. 556 (2002)(appeals that concern related issues of fact and law should be joined); *West v. United States Postal Service*, 44 M.S.P.R. 551, n.1 (1990)(appeals that involve the same parties and some identical issues should be joined for consideration in the interests of judicial economy).

The Board hereby grants Appellant’s motion to consolidate her three grievance appeals, and accordingly **ORDERS** that MSPB Case Nos. 16-09, 16-11, and 16-12 be, and hereby are, consolidated.

The Board also finds that Appellant’s March 4, 2016, Request to Hold in Abeyance shall be **Denied** as moot.

For the Board  
May 26, 2016

# **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 FY16, the Board issued a decision concerning a petition to enforce a settlement agreement and three agreements were entered into the record.

# **CASE NO. 16-06**

## **DECISION CONCERNING ENFORCEMENT OF SETTLEMENT AGREEMENT**

On November 4, 2015, Appellant filed a Motion to Interpret and Enforce the Terms of a Settlement Agreement (Appellant's Enforcement Request) with the Merit System Protection Board (Board or MSPB), alleging that the County had failed to comply with the September 25, 2015, Settlement Agreement filed with the Board by the parties in MSPB Case No. 15-24. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15, the Board issued an Order accepting the Settlement Agreement into the record and retaining jurisdiction over any disputes concerning the interpretation or enforcement of the Settlement Agreement. *Appellant v. Montgomery County*, MSPB Case No. 15-24 (September 30, 2015).

### **FINDINGS OF FACT**

Appellant was employed by the Montgomery County Police Department in the Management and Budget Division as a Manager 3 at the M-3 salary level. For reasons not pertinent to this enforcement action, the County dismissed Appellant from County employment. Appellant appealed her dismissal and, on July 20 and 21, 2015, an evidentiary hearing was held by the Board. Subsequent to the hearing but before a decision was rendered Appellant and the County entered into a settlement. At the request of the parties the Board accepted the Settlement Agreement and retained jurisdiction over any disputes concerning the interpretation or enforcement of the Settlement Agreement. MSPB Case No. 15-24.

The Settlement Agreement provides, in part:

- A. Appellant will be placed in a Grade 25 position within the Department of Finance as a Program Manager II with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years, from October 19, 2015 to October 19, 2019. The COLA for FY16 is to be implemented as though Appellant had been continuously employed during the period of her separation. The parties intend that the Settlement Agreement results in no break in service for Appellant. Moreover, the parties agree that the "redline freeze" acts as a floor for salary and benefits, but Appellant is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to.
- B. After four (4) years on October 19, 2019, Appellant's salary shall be the top of grade for the position she occupies if the position she occupies is below an M-3. However, at the conclusion of 4 years, on October 19, 2019, if Appellant occupies an M-3 position, her salary shall not be less than her former M-3 salary on October 19, 2019.
- C. The Employer agrees to pay Appellant back pay from February 26, 2015 through October 19, 2015. Appellant will receive the FY 16 COLA effective July 12, 2015.

The employer will deduct all applicable payroll deductions (including local, state and federal taxes). Retirement contributions and Health benefits coverage at the time of her separation. The Employer will make the employers retirement contributions, as well as investment earnings on the employee and employer contributions retroactively to February 26, 2015. The Employer will perform under this subsection within two weeks of the final signature on the Settlement Agreement.

- D. Appellant will provide documentation to the Employer of the date of commencement of her COBRA health benefits and the exact monthly premium that she has paid since her termination on February 26, 2015. The Employer agrees to reimburse Appellant the entire amount Appellant paid for COBRA.
- E. The Employer agrees to issue a written reprimand for unsatisfactory performance. Said written reprimand will remain in her personnel file until February 26, 2016. On February 26, 2016 the written reprimand will be removed from Appellant's personnel file. The employee is entitled to file a written rebuttal which shall also remain in the personnel file until February 26, 2016.
- F. The Employer agrees to pay attorney's fees in the amount of \$12,130.00. No further action will be sought for reimbursement of any additional attorney's fees related to this matter.

Pursuant to the Settlement Agreement Appellant was reinstated to County employment on October 19, 2015. Appellant's Enforcement Request, p. 2. As agreed, Appellant was placed in a Grade 25 Program Manager II position with the County Department of Finance with a work location in the Executive Office Building (EOB). County Opposition to Motion to Interpret and Enforce (County Opposition), p. 1 and County Exhibit C.

Appellant alleges that because ¶A of the Settlement Agreement provides that she is to receive "her former M-3 salary and benefits" she is entitled to parking in the EOB garage. In support of her position Appellant points to the County parking policy for the Rockville Core and quotes an email from LM, Controller, Department of Finance to the Appellant, which states that "the County Attorney instructed me not to try to have you receive the same parking benefit as an M-3. They want it to be clear that outside of the specific provisions of the settlement agreement you are to be treated just like any other Grade 25 employee." Paragraph 11 of Appellant's Enforcement Request, p. 3. Appellant did not, however, provide a copy of the email to the Board.

As a County employee with a primary work location in the Rockville Core, Appellant is guaranteed free parking.<sup>1</sup> County Opposition, County Exhibit D, Email from JB, Director of the Department of Finance (November 2, 2015). The County parking policy for employees working in the Rockville Core provides that employees "will be assigned parking, subject to

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<sup>1</sup> According to §2.0 of the County parking policy the Rockville Core consists of government facilities in downtown Rockville, including the Judicial Center Building, Executive Office Building, Council Office Building, 255 Rockville Pike, and 51 Monroe Street.

availability, at the facility closest to the employee's work, with order of priority given to handicap, carpools, Grade 27 and above and seniority calculated by length of total County service." Appellant's Enforcement Request, p. 3-4, quoting subsection 15.0 of the parking policy.

No evidence in the record indicates that every M-3 level employee assigned a work location in the EOB is guaranteed parking in the EOB. Indeed, as noted above, the County parking policy expressly states that parking in a particular location is "subject to availability" and that an employee's grade level being a factor when deciding "order of priority." Employees at Grade 27 and above qualify for EOB parking and may be given priority, but such parking is not assured. County Exhibit D.

Appellant has been assigned free parking in the Council Office Building (COB) garage. County Opposition, p. 2 and County Exhibit D. The Board takes official notice that the COB garage is located a block away from the EOB, across East Jefferson Street. APA, §2A-8(e).

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The County agreed in the Settlement Agreement to place Appellant in a Grade 25 Program Manager II position within the Department of Finance with her former M-3 salary and benefits.
- EOB garage parking is a benefit for purposes of the Settlement Agreement.
- The County lists "free parking" as part of its benefit package, and the parking policy for the Rockville Core provides that employees "will be assigned parking, subject to availability, at the facility closest to the employee's work, with order of priority given to handicap, carpools, Grade 27 and above and seniority calculated by length of total County service."

#### **County:**

- The County has not failed to comply with the Settlement Agreement. Appellant began her new assignment as a Grade 25 Program Manager II for the Department of Finance on October 19, 2015 and was assigned free parking at the Council Office Building (COB) garage.
- The Settlement Agreement did not include parking or a specific parking assignment as a benefit. Parking was not a topic of discussion in any settlement negotiations.
- Even if parking is considered a "benefit" for purposes of the Settlement Agreement, Appellant bears the burden of proof that there has been a breach.
- Appellant cannot demonstrate a breach of the Settlement Agreement as she has been provided with free parking, albeit not at the location she prefers.
- Appellant has been advised of the method and manner by which she may request a parking reassignment to the G2 level of the EOB garage but has made no effort to do so.



**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Merit System Law, Section 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.

**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:

**35-15. MSPB may enforce settlement agreements.**

- (a) If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.
- (b) If the parties settle a case while in proceedings before the MSPB, the parties may agree to enter the settlement agreement into the record. If requested to enter the agreement into the record, the MSPB will retain jurisdiction to enforce the terms of the agreement.

**35-16. MSPB decisions.**

- (a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB*. The MSPB may order appropriate relief, which includes but is not limited to the following:
  - (2) change in position status, grade, work schedule, working conditions, and benefits;  
  
\* \* \*

- (8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale;
- (9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.

### ISSUE

Is the parking assignment provided to Appellant by the County in compliance with the Settlement Agreement?

### 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 it by statute and regulation. *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 jurisdiction 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 Administrative Procedures Act (APA), which governs Board proceedings, provides that an appeal may be resolved through a settlement. Montgomery County Code, Chapter 2A, §2A-10(g). Such was the case with Appellant's appeal in MSPB Case No. 15-24. On September 25, 2015, the parties entered into a Settlement Agreement seeking to resolve the case that had been pending before the Board. County Exhibit A. On September 30, 2015, the Board issued an Order accepting the Settlement Agreement into the record and retaining jurisdiction over any disputes concerning the interpretation or enforcement of the Settlement Agreement. MSPB Case No. 15-24.

Montgomery County regulations specifically provide that the MSPB may interpret and enforce a settlement agreement. MCPR §35-15(a). Indeed, Appellant and the County appear to have contemplated that a dispute might arise over interpretation of the Settlement Agreement, and that the Board would retain jurisdiction to resolve any such dispute. Specifically, the Settlement Agreement provided:

M. The parties agree to jointly submit the settlement agreement to the MSPB for the purpose of entering a final order "referring to and incorporating the settlement agreement" into said order as the final resolution of this case. Said Order will provide that the MSPB retain jurisdiction over all aspects of the settlement agreement requiring administration by the County and action by Appellant.

Accordingly, the Board finds that it has jurisdiction over Appellant's Enforcement Request and the authority to interpret and enforce the Settlement Agreement. MSPB Case No. 10-01 (2009) ("As the Settlement Agreement resolved a case that had been pending before the Board, the Board finds that it has jurisdiction over Appellant's instant grievance."). *See Coe v. U.S. Postal Serv.*, 101 M.S.P.R. 575, 579, *aff'd*, 208 F. App'x 932 (Fed. Cir. 2006) ("The Board has the authority to enforce a settlement agreement which has been entered into the record in the same manner as any final Board decision or order.").

### ***Appellant Has the Burden Of Proof***

It is well established that a settlement agreement is a contract between the parties. MSPB Case No. 10-01 (2009); MSPB Case No. 08-14 (2008). *See also Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988) (law of contracts applies to settlement agreements in Federal Merit System Protection Board cases); *Rivas v. United States Postal Service*, 72 M.S.P.R. 383 (1996). In construing and enforcing the Settlement Agreement this Board must thus apply basic principles of contract law.

It is a settled principle of Maryland contract law that the party seeking to enforce a contract has the burden of proof. *Bd. of Trustees, Cmty. Coll. of Baltimore Cty. v. Patient First Corp.*, 444 Md. 452, 471-72 (2015); *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001); *Glen Alden Corp. v. Duvall*, 240 Md. 405, 422 (1965); *The Fischer Org., Inc. v. Landry's Seafood Restaurants, Inc.*, 143 Md. App. 65, 75 (2002). Federal Merit System Protection Board cases also adhere to the principle that an action to enforce a settlement agreement is analogous to an action for breach of contract, and therefore the burden of proving a breach by a preponderance of the evidence is on the party seeking to enforce the agreement. *Leeds v. U.S. Postal Serv.*, 108 M.S.P.R. 113 (2008); *Kolassa v. Department of the Treasury*, 59 M.S.P.R. 151, 154 (1993).

Thus, the Appellant, as the party claiming a breach of the Settlement Agreement, has the burden of proving by a preponderance of the evidence of record that there was a contractual obligation and that there was a material breach of that duty. APA, §2A-10(b).<sup>2</sup>

### ***Appellant Has Failed to Demonstrate a Breach of the Settlement Agreement***

It is undisputed that Appellant has been offered free parking in a garage near her office. Her claim is that the Settlement Agreement guaranteed her parking in the same building, *i.e.*, the EOB garage, and that the failure to provide her with EOB garage parking breached the agreement. Other than the failure to provide her with parking in the EOB garage, Appellant makes no allegation that the County failed to fulfill any of its obligations under the Settlement

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<sup>2</sup> While Federal Merit System Protection Board regulations require the agency to provide evidence of compliance with a settlement agreement, *Perry v. Department of the Army*, 992 F.2d 1575, 1578 (Fed. Cir. 1993) (even though appellant alleging agency breach of a settlement agreement bears the burden of proof, under 5 C.F.R. § 1201.183 agency bears the burden to produce relevant evidence regarding its compliance), neither the Montgomery County Code nor any governing regulations contain a comparable requirement that applies to matters before the Board. In any case, the County provided sufficient evidence in its response to meet a burden of production.

Agreement or that any other provision of the Settlement Agreement was breached by the County.

While the Settlement Agreement provides that Appellant will maintain “her former M-3 salary and benefits,” it is silent on the specific topic of parking. That is unfortunate, as under the Settlement Agreement Appellant’s agency employer and work location changed from the County Police headquarters on Edison Park Drive in Gaithersburg to the EOB in Rockville. Had it occurred to the parties that the parking arrangements for Appellant could generate a controversy they could have easily addressed the issue with sufficient specificity. However, it appears that they did not anticipate the potential for misunderstanding and differing expectations over parking, and certainly did not specifically agree that Appellant would be guaranteed parking in the EOB garage.

Since the Settlement Agreement does not address the parking location dispute it is necessary to determine whether the general term “benefits” in ¶A of the Settlement Agreement encompasses parking privileges and, if so, to what extent. Contrary to the County’s position that the term “benefits” does not include parking, the Board finds that the term “benefits” does include parking privileges, which currently include free parking for County employees working in Rockville. *See* MSPB Case No. 85-467 (1985). However, it is not evident that the term encompasses a specific parking lot or an assigned parking space.

There is no evidence in the record that all M-3 employees are guaranteed parking in the EOB garage. While, as noted above, the parties could have expressly provided that Appellant would be assigned parking in the EOB garage, the Board finds that nothing in the Settlement Agreement or evidence submitted by the parties suggests that it was the intent of the parties to make that guarantee or to otherwise override existing parking policies.

With regard to County parking policies, there is no proof in the record that an employee classified at the M-3 level would be guaranteed the desired parking assignment in the EOB garage, given competing priorities and availability. The evidence of record does not demonstrate that being treated as an M-3 level employee for purposes of determining parking priorities would have resulted in Appellant being assigned parking in the EOB garage.

Although Appellant does not expressly say so, she appears to suggest that the Controller email provides proof that Appellant would have received EOB garage parking had she been treated as an M-3 employee. However, the language quoted in her pleading merely says that Controller was “instructed . . . not to try” to have Appellant receive the same parking benefit as an M-3 employee. It does not provide evidence of what parking benefit an M-3 employee would actually receive. Moreover, statements of a party’s representative in a pleading do not constitute evidence. *See, e.g., Wilhelm v. State*, 272 Md. 404, 443 (1974) (“opening statement by counsel is not evidence”). *See also Blue v. U.S. Postal Serv.*, 65 M.S.P.R. 370, 376 (1994) *aff’d sub nom. Blue v. Merit Sys. Prot. Bd.*, 65 F.3d 188 (Fed. Cir. 1995) (“the general rule regarding unsworn statements in a party’s pleading is that they do not

constitute evidence.”); *Fontanilla v. Dep’t of Navy*, 44 M.S.P.R. 312, 316 (1990) (statements of a party’s representative in a pleading do not constitute evidence).<sup>3</sup>

On the other hand, the email from the agency head, Director of the Department of Finance, was provided in its entirety by the County as County Exhibit D. The Director of the Department of Finance’s email sets out the County’s parking policy and its application in detail, and indicates that even were Appellant treated as an M-3 level employee there would be no guarantee of EOB garage parking.

The Board also finds that, even assuming that the failure to assign Appellant parking in the EOB garage could be considered a breach of the Settlement Agreement, it would not constitute a material breach. Since only a material breach of the Settlement Agreement would grant Appellant the right to enforce that agreement, Appellant would still not be entitled to the relief she seeks. See *Gilbert v. Dep’t of Justice*, 334 F.3d 1065, 1071 (Fed. Cir. 2003) (“A party breaches a contract when it is in material non-compliance with the terms of the contract.”).

Pursuant to the Settlement Agreement Appellant has received free parking in a garage no more than a block from her work location. Appellant’s dismissal was rescinded and she was reinstated with back pay. Appellant’s retirement benefits were restored, as was her health benefits coverage. She was reimbursed for COBRA health benefit expenses. The County has paid \$12,130.00 to cover Appellant’s attorney’s fees. And for the next four years she will be paid at her former M-3 salary level even though she will be employed in a Grade 25 position and working at that lower level of responsibility. Given the scope and nature of the benefits she obtained under the Settlement Agreement the Board finds that Appellant has not been deprived of the benefit which she reasonably could have expected from the Settlement Agreement by the failure to provide her with EOB garage parking. In light of the entirety of the agreement between the parties, the Board concludes that the difference between free parking in the COB garage as opposed to the EOB garage does not go to the “essence of the agreement” or constitute a matter of “vital importance.” *Munson v. Dep’t of Army*, No. SF-0752-13-1073-A-1, 2015 WL 4317097 (2015) (“A material breach is one that relates to a matter of vital importance and goes to the essence of the contract.”).

Having failed to carry her burden of proving that the County breached the Settlement Agreement by failing to provide her with a specific parking assignment in the EOB garage, Appellant’s motion must be denied.<sup>4</sup>

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<sup>3</sup> Even if the assertion concerning the Controller’s email in Appellant’s pleading is considered as admissible hearsay, Appellant’s failure to provide the Board with the entire actual document as best evidence detracts from the probative value and reliability of the evidence. APA, §2A-8(e). There simply is no evidentiary basis in the record to support the assertion of what that email may have said. Nor is there any reason why the email itself could not have been produced. Accordingly, even if the excerpt from the Controller email quoted in Appellant’s pleading is considered as admissible evidence, the Board gives it little weight.

<sup>4</sup> Appellant alleges that the Assistant County Attorney involved in this matter acted “in bad faith.” Appellant’s Enforcement Request, p. 4, ¶15. There is a presumption in law that public officials perform their duties fairly and in good faith, and that the presumption may be rebutted only with indisputable proof to the contrary. MSPB Case No. 06-03 (2010). As Appellant provided no credible evidence of bad faith it is the Board’s view that Appellant’s allegation is unfounded and entirely unjustified, and thus has no place in a pleading before this Board.

**ORDER**

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant's Motion to Interpret and Enforce the Terms of a Settlement Agreement be, and in its entirety is, hereby **DENIED**.

For the Board  
December 17, 2015

## CASE NO. 15-24

### ORDER ACCEPTING SETTLEMENT AGREEMENT

On September 28, 2015, the parties filed a settlement agreement with the Merit System Protection Board (Board or MSPB) in the above-captioned case. Under the terms of the agreement the parties agreed to jointly submit the settlement agreement to the MSPB for the purpose of the MSPB entering a final order referring to and incorporating the settlement agreement into an order. The parties requested that the order provide that the MSPB retain jurisdiction over the settlement agreement.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the parties to an MSPB appeal may agree to enter a settlement agreement into the record. If such a request is made, the MSPB may retain jurisdiction to interpret and enforce the terms of the settlement agreement. MCPR § 35-15.

This appeal involved the dismissal of Appellant. As this case involves a dismissal action, the Board finds that it has jurisdiction to accept the Settlement Agreement into the record. MCPR § 35-15; 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. The Board notes that the Settlement Agreement is lawful on its face, and freely entered into by the parties. *Id.*; *McGann v. Dep't 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. 15-24 be and is hereby **DISMISSED** as settled;
3. That the Board retain jurisdiction over any disputes that arise in this matter concerning the interpretation or enforcement of the Settlement Agreement.

For the Board  
September 30, 2015

## CASE NO. 16-03

### ORDER ACCEPTING SETTLEMENT AGREEMENT

On February 8, 2016, 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.

This appeal involved the dismissal of Appellant. As this case involves a dismissal action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; 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. Dep't 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. 16-03 be and is hereby **DISMISSED** as settled;
3. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board  
February 10, 2016

## **CASE NO. 16-10**

### **ORDER ACCEPTING SETTLEMENT AGREEMENT**

On May 3, 2016, 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.

This appeal involved the one day suspension of Appellant. 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. 16-03 (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. Dep't 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. 16-10 be and is hereby **DISMISSED** as settled, and the prehearing conference scheduled for May 18, 2016 is cancelled;
3. That within 45 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, including the restoration of Appellant's lost wages and benefits;
4. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board  
May 9, 2016

# **SHOW CAUSE ORDERS**

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to the grievance procedure, MCPR § 34-9(a)(3) (as amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, § 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a Show Cause Order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the Personnel Regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a Show Cause Order to determine whether the appeal is in fact timely.

Finally, the Board may issue a Show Cause Order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

During fiscal year 2016, the Board issued the following Show Cause Order.

# CASE NO. 16-20

## SHOW CAUSE 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 in *Appellant v. Montgomery County*, MSPB Case No. 12-13 (June 10, 2013) (Final Decision). *See* Appellant's Request, hereinafter Ex. 1. 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. Appellant asserts that, inconsistent with the Board's previous orders, the County has reduced his pension by an incorrect amount.

Before making a determination regarding the need to seek enforcement of the Final Decision in MSPB Case No. 12-13, the Board is providing the County with the opportunity to respond to Appellant's enforcement request. Accordingly, the Board hereby orders the County to provide an explanation of how that County has fully complied with the Board's Final Decision in MSPB Case No. 12-13, or a statement of such good cause as may exist for why the Board's Final Decision in MSPB Case No. 12-13 has not been complied with by the County. Any such explanation and statement shall be filed **on or before July 14, 2016**, with a copy served on Appellant. Appellant shall have the right to file a response **on or before July 28, 2016**. Thereafter, the Board will issue a written decision on the matter.

For the Board  
June 23, 2016

# **ATTORNEY FEE REQUESTS**

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In *Montgomery County v. Jamsa*, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance to respond. The Board then issues a decision based on the written record.

During fiscal year 2016, the Board did not issue any attorneys fee decisions.

# **OVERSIGHT**

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 2016, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) Senior Investment Analyst
- 2) Senior Transit Information Systems Technician
- 3) Public Safety Emergency Communications Specialist
- 4) Public Service Craftworker I
- 5) Public Service Craftworker II
- 6) Human Capital Oracle Analyst