

# **Merit System Protection Board Annual Report FY2012**

**Members:**

**Bruce Ervin Wood, *Chair***  
**Rodella E. Berry, *Vice Chair***  
**Julie Martin-Korb, *Associate Member***

***Executive Director:***

**Kathleen J. Taylor**

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**FY 2012**  
**ANNUAL REPORT OF THE**  
**MONTGOMERY COUNTY**  
**MERIT SYSTEM PROTECTION BOARD**

**COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD**

The Merit System Protection Board (Board) is composed of three members who are appointed by the County Council, pursuant to Article 4, Section 403 of the Charter of Montgomery County, Maryland. Board members must be County residents and may not be employed by the County in any other capacity. One member is appointed each year to serve a term of three years.

The Board members in 2012 were:

Bruce Ervin Wood - Chairperson  
Rodella E. Berry - Vice Chair  
Julie Martin-Korb - Associate Member

**DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD**

The duties of the Merit System Protection Board are contained in: 1) Article 4, *Merit System and Conflicts of Interest*, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County; 2) Chapter 33, Article II, *Merit System*, of the Montgomery County Code; and 3) Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011).

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 defines the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the [B]oard 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 [B]oard granted herein shall be fully exercised by the [B]oard as needed to rectify personnel actions found to be improper. The [B]oard shall comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The [B]oard, subject to the appropriation process, shall be responsible for establishing its staffing requirements necessary to properly implement its duties and to define the duties of such staff.

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(c) *Classification standards.* . . .The [B]oard shall conduct or authorize periodic audits of classification assignments made by the [C]hief [A]dministrative [O]fficer and of the general structure and internal consistency of the classification plan, and shall submit audit findings and recommendations to the [C]ounty [E]xecutive and [C]ounty [C]ouncil.

(d) *Personnel regulation review.* The [M]erit [S]ystem [P]rotection [B]oard shall meet and confer with the [C]hief [A]dministrative [O]fficer and employees and their organizations from time to time to review the need to amend these regulations.

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

(f) *Retirement.* The [B]oard may from time to time prepare and recommend to the [C]ouncil modifications to the [C]ounty's system of retirement pay.

(g) *Personnel management oversight.* The [B]oard shall review and study the administration of the County classification and retirement plans and other aspects of the merit system and transmit to the [C]hief [A]dministrative [O]fficer, [C]ounty [E]xecutive and the [C]ounty [C]ouncil its findings and recommendations. The [B]oard shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the [C]ounty [C]ouncil. All [C]ounty agencies, departments and offices and [C]ounty employees and organizations thereof shall cooperate with the [B]oard and have adequate notice and an opportunity to participate in any such review initiated under this section.

(h) *Publication.* Consistent with the requirements of the Freedom of Information Act, confidentiality and other provisions of law, the [B]oard shall publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

(i) *Public forum.* The [B]oard shall convene at least annually a public forum on personnel management in the [C]ounty [G]overnment to examine the implementation of [C]harter requirements and the merit system law.

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

(a) 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.

(b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate action as set forth in Section 3-2 of 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, Section 35-4 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011) requires that an employee file a simple notice of intent to appeal a removal, demotion or suspension. In accordance with MCPR Section 35-3, the employee must file the notice of intent to appeal within ten (10) working days after the employee has received a notice of disciplinary action involving a demotion, suspension or removal. Once the notice of intent to appeal has been filed, the Board's staff provides the employee with an Appeal Form to be completed within 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

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

After receipt of the Appeal Form, the Board sends a notice to the parties, requiring each side to submit a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which the parties' lists of witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision on the appeal.

No disciplinary cases were decided by the Board during fiscal year 2012.

# **APPEALS PROCESS**

## **DENIAL OF EMPLOYMENT**

Montgomery County Code Section 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 Section 6-11 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, and July 12, 2011), 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 nonmerit factors, or that the announced examination and scoring procedures were not followed.

Section 35-3 of the MCPR specifies that the employee or applicant has ten (10) working days to file an appeal with the Board in writing after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position. The employee or applicant need only file a simple written statement of intent to file an appeal. Upon receipt of the notice of intent, the Board's staff will provide the employee or applicant with an Appeal Form which must be completed within 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

Upon receipt of the completed Appeal Form, the Board's staff notifies the County of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. 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 oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the denial of employment or promotion.

During fiscal year 2012, the Board issued the following decisions on appeals concerning the denial of employment.



# **EMPLOYMENT DECISIONS**

## **CASE NO. 12-01**

### **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 Appellant's nonselection for the position of Manager, in the Department of Finance (Finance). The County filed its response (County's Response) to the appeal on September 15, 2011, which included several attachments.<sup>1</sup> Appellant filed a response (Appellant's Reply) with ten exhibits.<sup>2</sup>

### **FINDINGS OF FACT**

Appellant, a Program Specialist in Finance, submitted Appellant's application for the Manager position on July 25, 2011. The Office of Human Resources (OHR) received seventeen applications for this position. County's Response at 1. OHR reviewed the applications and determined that only fourteen of the applicants, including Appellant, met the minimum qualifications for the position.<sup>3</sup> *Id.* at 1-2.

Those applications which met the minimum qualifications for the Manager position were referred to two subject matter experts chosen by Finance to rate the applications using the five preferred criteria listed in the job vacancy announcement.<sup>4</sup> County's Response at 2.

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<sup>1</sup> The County's attachments were: Attachment 1 – Vacancy Announcement for the Manager position; Attachment 2a – Selection Panel Consensus Evaluation Form for the Selectee; and Attachment 2b – Selection Panel Consensus Evaluation Form for Appellant.

<sup>2</sup> The exhibits are: Examiner Newspaper 2009 County salaries – Exhibit (Ex.) I; position description for another Manager vacant position – Ex. II; Compliment letter – Ex. III; Email introducing the Selectee and indicating the Selectee will rely on Appellant's expertise – Ex. IV; Email concerning Monthly Report – Ex. V; Denial of a refund claim letter – Ex. VI; the Selectee's prior job description – Ex. VII; Appellant's recent performance appraisal – Ex. VII; the Senior Financial Specialist vacancy announcement – Ex. IX; and Email from Manager J concerning the Manager's vacation – Ex. X. It should be noted that Appellant mislabeled Appellant's appraisal as Ex. VII instead of Ex. VIII. It will be referred to in this Decision as Ex. VIII.

<sup>3</sup> The minimum qualifications for the position were graduation from an accredited college or university with a Bachelor's Degree and five years of progressively responsible professional experience in the financial or business administration field. County's Response, Attachment (Attach.) 1.

<sup>4</sup> The five preferred criteria in the announcement were:

A total of three applicants, including Appellant, were rated as “Well Qualified.” Id. The three “Well Qualified” applicants were referred to Finance management. Id.

Finance determined to conduct structured interviews of the “Well Qualified” applicants by a three member panel, consisting of one female and two males.<sup>5</sup> County’s Response at 2. All of the panel members, according to the County, were managers. Id. All of the interviewees were provided with a copy of the questions to be asked by the panel prior to their interview and all were asked the same questions. Id. The three panel members individually rated each of the applicants based on their responses to the questions. Id. According to the County, the panel members then caucused and unanimously decided to recommend the Selectee for the Manager position. Id.

The County asserts it was the consensus evaluation by the panel that the Selectee performed considerably better during the structured interview than Appellant. County’s Response at 2. The County submitted the consensus rating sheets for both Appellant and the

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1. Experience managing a complex and large financial and/or tax operation with staff engaged in high volume, complex or technical work. Examples of such experience may include budgetary responsibility for an operation or managing a supervisory staff;
  2. Knowledge of Maryland tax laws and the Montgomery County Code as it pertains to all types of taxes which are part of the full scope of tax operations. Knowledge of administering various types of tax billing, collection, and reporting;
  3. Knowledge of property assessments and appeals procedures, tax billing, tax collection, and experience representing the County (or similar organization) in tax cases in front of established Boards and Courts;
  4. Experience using communication skills and writing ability in preparing and issuing letters, memoranda, and correspondence to citizens, customers, and (County) officials. Preference will be given to candidates who have experience communicating on behalf of the County Executive and/or Director of Finance or similarly situated persons; and
  5. Experience reevaluating, reengineering, and restructuring business processes, particularly with an emphasis on automation.

County’s Response, Attach. 1

<sup>5</sup> According to Appellant, the three panel members were: Supervisor A; Supervisor B; and Supervisor C. Appellant’s Reply at 4. Appellant indicates that Appellant has worked for Supervisor A for at least 12-14 years and had great respect for Supervisor A as a manager. Id. Therefore, Appellant was shocked that Supervisor A rated Appellant so low on Appellant’s interview. Id.

Selectee. County's Response, Attach. 2a and 2b. The County indicates that during the structured interview process, all three applicants were asked questions relating to their experience managing a complex and large financial and/or tax operation, working in an automated environment, knowledge of State, County, and municipal codes that impact the billing and collection of various tax revenues, experience with property tax assessments and the appeals process, knowledge and experience in reevaluating, reengineering and restructuring business processes, strategic planning, winning customers over to new technologies, and leadership style. County's Response at 2. The Selectee received a consensus rating of "Above Average" in all but one of the twelve questions asked, with an "Average" rating in the one question. Id. In contrast, Appellant received a consensus rating of "Average" in four of the questions asked, and a "Below Average" rating in the remaining eight questions.<sup>6</sup> Id.

On August 17, 2011, Supervisor A announced that the Selectee had been chosen for and accepted the position of Manager. See Documentation accompanying Appellant's appeal. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant has provided over twenty years of excellent service to the County, has seniority and was well qualified for this career opportunity.
- Appellant has a BS degree.
- Appellant has been running the Office since 2001 and has overseen the collection of County taxes. Appellant has supervised up to nine employees as well.
- Appellant's performance in the structured interview was phenomenal. Appellant questions how Appellant could have been rated "Below Average" in eight questions and only "Average" in four, when Appellant was rated "Highly Successful" in Appellant's work.<sup>7</sup>
- Because the Selectee is not from Montgomery County but from another Maryland county, the laws and regulations the Selectee will be enforcing are completely different. The Selectee will have to come to Appellant for guidance and it will take many years to train the Selectee.
- The Selectee served on the interview panel for the Tax Supervisor position along with Supervisor A. This demonstrates that the selection process for the

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<sup>6</sup> The County notes that the third "Well Qualified" applicant received a consensus rating of "Below Average" in all twelve of the questions asked. County's Response at 2 n.1.

<sup>7</sup> Appellant submitted a copy of Appellant's FY2011 performance appraisal to support this assertion. See Appellant's Reply, Ex. VIII. Appellant's overall rating was "Highly Successful". Id.

- Manager position was unfair and that a special relationship exists between Supervisor A and the Selectee.
- The Selectee served as a manager for ten years in the other county’s treasury department and supervised six employees. This represents many years less experience than Appellant has.
  - Finance wanted a white individual for the Manager, which is why they chose the Selectee instead of Appellant, who is an African American female. This is wrong.<sup>8</sup>

County:

- The Personnel Regulations provide that a selecting official may choose any individual from the highest rating category for a position. The Selectee was rated “Well Qualified”.
- While it is true that Appellant has a BS degree, the Selectee also has a BS degree, as well as an Associate of Arts degree in Data Processing/Computer Science. The Selectee also served as a manager for ten years in another county’s treasury department.
- The Selectee performed significantly better than Appellant and the other “Well Qualified” applicant in the structured interview process, receiving a rating of “Above Average” in all but one of the questions asked. Appellant only received a rating of “Below Average” for eight of the questions asked and a rating of “Average” for the remaining four questions.
- Appellant has failed to cite to any specific flaws or irregularities in the selection process.<sup>9</sup> Instead, Appellant contends that Appellant should have been selected for the position based on Appellant’s seniority, experience,

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<sup>8</sup> In Appellant’s appeal, Appellant alleged that Appellant’s nonselection was “illegal”, “arbitrary”, “capricious” and due to discrimination against Appellant for “standing up for my rights and because I am an African American female.” Appellant was notified by the Board’s Executive Director that, pursuant to Section 33-9 of the Montgomery Code, allegations of discrimination based on race and sex are to be filed with the Human Relations Commission and not with the Board. Appellant was informed that if Appellant chose to pursue Appellant’s appeal with the Board, the Board would not address Appellant’s allegations of discrimination but, rather, review Appellant’s nonselection to determine if it was illegal, arbitrary or capricious as Appellant alleged. Appellant subsequently indicated to the Board that Appellant wished to pursue Appellant’s nonselection challenge with the Board and not the Human Relations Commission. Accordingly, the Board will not address further Appellant’s allegations of discrimination.

<sup>9</sup> Actually, in Appellant’s Reply, Appellant did allege that there was an irregularity in the selection process, as the Selectee had served with Supervisor A on an interview panel for another position in Finance the week before Supervisor A rated both the Selectee and Appellant for the Manager position. Although Appellant believes this demonstrates unfair practices, Appellant points to nothing in the Personnel Regulations which would preclude the Selectee serving on a separate interview panel for another position in Finance.

- expertise, and education.
- In assessing a challenge to a selection decision, the Board generally does not substitute its judgment for that of the selecting official unless an appellant demonstrates that the appellant’s qualifications were plainly superior to those of the individual selected for appointment. This Appellant has failed to do.

### APPLICABLE LAW AND REGULATIONS

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

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

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

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

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

### ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other nonmerit factors?

### ANALYSIS AND CONCLUSIONS

The MCPR provides that a selecting official may choose any individual from the highest rating category. Thus, management was free to select anyone on the “Well Qualified” list, including Appellant, as long as the selection process was consistent with law or regulation and not otherwise improper. See MSPB Case No. 06-02 (2006); MSPB Case No. 09-01 (2009); MSPB Case No. 10-11 (2010).

Appellant challenges how Appellant was rated during the structured interview process,<sup>10</sup> as Appellant received a “Highly Successful” performance appraisal. The courts have long recognized that where, as here, the selection process involves a managerial position, the use of subjective criteria, such as performance during a structured interview, is generally acceptable. Casillas v. U.S. Navy, 735 F.2d 338, 344-45 (9<sup>th</sup> Cir. 1984); Bauer v. Bailar, 647 F.2d 1037, 1046-47 (10<sup>th</sup> Cir. 1981). The Board notes that subjectivity in the selection of a manager is inevitable, as the qualities of a good manager are not readily susceptible to quantification. See Hamilton v. Thompson, EEOC Appeal No. 01996946 (Apr. 4, 2002); Taips v. Herman, EEOC Appeal No. 01993712 (Mar. 17, 2000). The Board has reviewed the subject matter of the interview questions<sup>11</sup> and finds the questions are relevant to the managerial position at issue and designed to ascertain the management skills of the applicants, skills which are not readily measurable by objective means. Liu v. Caldera, EEOC Appeal No. 01981085 (Nov. 13, 1998).

There is no doubt that Appellant has considerable experience and expertise, but so does the Selectee. Both individuals have college degrees and many years of experience. The courts have consistently held that where there are equally desirable candidates, absent a prohibited reason, a trier of the fact should not substitute its judgment for the legitimate exercise of managerial discretion. Bauer v. Bailar, 647 F.2d at 1048. An employer has the discretion to choose among equally qualified candidates. See Canham v. Oberlin College, 666 F.2d 1057, 1061 (6<sup>th</sup> Cir. 1981), cert. denied, 456 U.S. 977 (1982). Moreover, an employer has greater discretion when filling a management level position. Wrenn v. Gould, 808 F.2d 493, 502 (6<sup>th</sup> Cir. 1987). In assessing a challenge to a selection decision as arbitrary and capricious, the Board will not substitute its judgment for that of the selecting official unless the Appellant demonstrates that Appellant’s qualifications were plainly superior to those of the Selectee. MSPB Case No. 06-02 (2006); MSPB Case No. 09-01; MSPB Case No. 10-11; see also Bauer v. Bailar, 647 F.2d at 1048. Appellant has failed to do this.

Appellant asserts that Appellant has far more experience than the Selectee, i.e., over twenty years as opposed to the Selectee’s ten. However, greater years of experience do not automatically make one candidate more qualified than another. See, e.g., Diamond v. Colonial Life & Accident Insurance Co., 416 F.3d 310, 319 (4<sup>th</sup> Cir. 2005) (holding that even if the appellant had more management experience than the selectee, that was but one factor to

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<sup>10</sup> Appellant argues that the County deliberately did not submit the notes taken by each of the panelists during the interview process but only the consensus evaluation form. Appellant’s Reply at 3. The Board finds that the consensus rating forms submitted, with the signatures of all three panel members, are sufficient.

<sup>11</sup> The County indicated in its Response that the questions asked of the candidates included their experience managing a complex and large financial and/or tax operation, working in an automated environment, knowledge of State, County, and municipal codes that impact the billing and collection of various tax revenues, experience with property tax assessments and the appeals process, knowledge and experience in reevaluating, reengineering and restructuring business processes, strategic planning, winning customers over to new technologies, and leadership style. County’s Response at 2.

be considered in awarding a promotion); Childs v. Department of Veterans Affairs, EEOC Appeal No. 01A13871 (Oct. 24, 2002); Taips v. Herman, EEOC Appeal No. 01993712 (Mar. 17, 2000); McGettigan v. Department of the Treasury, EEOC Appeal No. 01924372 (February 24, 1993). In the instant case, the vacancy announcement indicated that there were various criteria that would be considered in making a promotion decision. Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors.

### **ORDER**

Based on the above, the Board denies Appellant's appeal from Appellant's nonselection for the position of Manager in the Department of Finance.

## **CASE NO. 12-02**

### **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 Appellant's rating of "Qualified" for the position of Manager III, in the Department of Health and Human Services (HHS). As Appellant did not receive a rating of "Well Qualified", Appellant was not selected for the Manager III position. The County filed its response (County's Response) to the appeal on September 13, 2011. Appellant filed a reply (Appellant's Reply) to the County's Response on October 5, 2011.

### **FINDINGS OF FACT**

Appellant, a Grade 24 Program Supervisor in HHS, submitted Appellant's application for the Manager III position on February 10, 2011, utilizing the County's Oracle iRecruitment software system.<sup>1</sup> According to Appellant, during the application submission process for the Manager III position, Appellant inadvertently attached an August 24, 2007 cover letter and resume which Appellant had previously submitted for the position of Manager II in HHS. Appellant's Reply, Attachment (Attach.) 4; County's Response, Attach. 1.

Despite the fact that Appellant had attached an old resume, OHR, upon reviewing

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<sup>1</sup> The Office of Human Resources (OHR) stopped accepting paper applications and resumes for County positions on July 1, 2008. County's Response at 1 n.1. Instead, OHR switched to the Peopleclick on-line recruitment system. Id. Subsequently, on January 1, 2011, OHR switched to the Oracle iRecruitment software system. Id. As the County acknowledges, the new Oracle system does not have all of the "bells and whistles" of the Peopleclick system, which was a highly customized system designed solely for recruitment. County's Response at 2.

Appellant's application, determined that Appellant met the minimum qualifications for the Manager III position. County's Response at 1; Appellant's Reply, Attach. 4. Accordingly, Appellant's application and resume were sent to subject matter experts for review and rating.<sup>2</sup> Id. at 2. At this stage of the process, Appellant received an overall rating of "Qualified", with the highest rating category being "Well Qualified". Id. Therefore, Appellant was not referred for interview for the Manager III position.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant has provided twenty-two years of excellent service to the County and was well qualified for this career opportunity.
- Appellant should have been contacted by OHR when OHR discovered that Appellant had inadvertently submitted the wrong cover letter and resume for the Manager III position. Instead, upon receiving confirmation from OHR that Appellant met the minimum qualifications for the Manager III position, Appellant believed that Appellant's application was proceeding successfully through the recruitment process.
- Appellant should not be penalized because the County chose to switch from Peopleclick to Oracle. Peopleclick allowed an applicant to review all documents attached to an application before submission; Oracle does not. Therefore, Appellant had no way of knowing that Appellant had inadvertently attached the wrong resume and cover letter.
- Appellant previously served on a rating panel and encountered a similar situation to Appellant's. Specifically, the applicant submitted a resume not related to the position being rated. Appellant notified management of the discrepancy and the applicant was permitted to submit an updated resume and received an interview. Appellant should be accorded the same right.

#### County:

- The County has moved from a highly customized Peopleclick software, designed for recruitment, to Oracle, which does not have as many "bells and whistles" but still does permit an applicant to review the content of the application. Many applicants provide the necessary information as part of the Qualifications section of the application, rather than attaching a resume.
- It was Appellant's responsibility to review Appellant's application prior to submission. While Oracle does not permit an applicant to review any

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<sup>2</sup> The subject matter experts, upon reviewing Appellant's application, did note that the cover letter did not seem to apply to the posted job and notified OHR of the discrepancy. Appellant's Reply, Attach. 4. OHR advised the subject matter experts to proceed with the rating of Appellant's application based on the materials submitted. Id.



- attachments, Appellant still would have been able to review everything else on Appellant’s application. If Appellant was unsure about the contents of a document attached to Appellant’s application, Appellant simply could have hit cancel and started over. Appellant also could have reviewed any documents Appellant attached, once Appellant submitted Appellant’s application.
- If Appellant had done even a cursory review of Appellant’s application before submitting it, Appellant would have noticed that Appellant submitted the wrong resume, as the on-line screen of Appellant’s application submission indicates that the document Appellant had attached was named “Resume.doc.Program Mgr. II Position.doc.”<sup>3</sup>
  - While Appellant could not make any changes on-line once Appellant applied, Appellant could have contacted OHR before the closing date of the vacancy announcement to make any changes after submitting Appellant’s application. However, Appellant waited until the last day to submit Appellant’s application.
  - In accordance with the Personnel Regulations, OHR does not accept any information after the closing date for the vacancy announcement.
  - The previous incident that Appellant cites to occurred while the vacancy announcement was still open. Accordingly, once the mistake was flagged by Appellant, the applicant was given the opportunity to submit additional information during the open period.

### **APPLICABLE LAW AND REGULATIONS**

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

...

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

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

**6-3. Employment application deadline.**

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<sup>3</sup> The County submitted a copy of the screen as Attach. 2 to its Response.

- ...
- (c) The OHR Director must not accept an application submitted after an announced application deadline.

### ISSUE

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

### ANALYSIS AND CONCLUSIONS

The County asserts that it has a "longstanding policy" of not accepting additional information or documentation after the application deadline, pursuant to MCPR, Section 6-3(c). It notes that OHR received 27,119 job applications in FY 2010. County's Response at 3. Given this volume of applications, it is not possible to treat an application as incomplete and allow the applicant a second opportunity to submit information after the deadline date. Id. Instead, the County argues that it is the responsibility of the applicant to read and follow the instructions of the on-line application system.<sup>4</sup> Id.

The County also cites to the Board's decision in MSPB Case No. 10-03, in support of its position that the instant appeal should be denied. Id. In that case, an applicant failed to submit the applicant's resume as an attachment to the applicant's on-line application. The applicant subsequently appealed the applicant's nonselection and argued that OHR should have permitted the applicant to submit the applicant's resume after the application deadline. As the County correctly notes, the Board denied the appeal, finding that it was the applicant's responsibility to review the applicant's application before submitting it. We agree with the County that MSPB Case No. 10-03 is applicable to the facts of the instant case. Appellant had the responsibility to review Appellant's application before submitting it to ensure it was complete. As the County notes, had Appellant done so, Appellant's review of the application screen would have indicated to Appellant that Appellant had attached the wrong resume. Accordingly, the Board finds that the failure to select Appellant for the Manager III position in HHS is not arbitrary, capricious, illegal, or based on any nonmerit factor.

### ORDER

Based on the above, the Board denies Appellant's appeal from the determination that Appellant was only "Qualified" for the Manager III position, based on Appellant's application.

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<sup>4</sup> The County also notes that there is a Resume Tips section on the OHR website. This section counsels applicants to review their submission to ensure all information has been submitted and notes that information is not accepted after the closing date. County's Response at 3; County's Response, Attach. 3.

# **CASE NO. 12-11**

## **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging Appellant's nonselection for the position of Work Force Leader IV, in the Department of Transportation (DOT). The County filed its response (County's Response) to the appeal on January 10, 2012, which included several attachments.<sup>1</sup> Appellant filed a response (Appellant's Reply) on January 18, 2012 and then emailed additional comments to the Board<sup>2</sup> on that same day. The Board subsequently requested the County provide all of the Individual Panel Evaluation Forms for the Selectee and Appellant, as well as the Selection Panel Consensus Evaluation Form for the Selectee. The Board also requested that, if any notes had been retained from the structured interview process, the Board be provided with the notes for both the Appellant and the Selectee. On January 25, 2012, the County provided a supplemental response (County's Supplemental Response), with copies of the Selection Panel Consensus Evaluation Form and the Selection Panel Individual Evaluation Forms for both Appellant and the Selectee. In addition, the County filed solely for the purposes of *in camera* review<sup>3</sup> by the Board copies of the notes taken during the structured interview process by the individual Selection Panel members for both Appellant and the Selectee.

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<sup>1</sup> The County's attachments were: Attachment 1 – Vacancy Announcement for the Work Force Leader IV position; Attachment 2a – Email from Mr. B to Staffing Specialist, dated 12/08/11, subject: Rating Sheet-WFLIV-IRC6952.doc; Attachment 2b – Email from Mr. A to Staffing Specialist, dated 12/09/11, subject: RE: Resume ratings; Attachment 3a – Selection Panel Individual Panel Evaluation Form for the Selectee, signed by Mr. C; Attachment 3b – Selection Panel Consensus Evaluation Form for Appellant; and Attachment 4 – Training and Experience Rating Form for the position of Work Force Leader IV – IRC6952.

<sup>2</sup> In Appellant's additional comments (Appellant's Reply II), Appellant noted that the County had only submitted one of the individual raters' evaluation forms and asked to see the written comments each rater wrote in response to the questions asked of Appellant during the interview.

<sup>3</sup> *In camera* review means the review of evidence in private by the court or adjudicator. See Ehrlich v. Grove, 396 Md. 550, 554-55 n.3 (2007). The County indicated that it wanted the Board to review the notes *in camera* because the fourteen questions asked during the structured interview are reused by the Department in other selection interviews. County's Supplemental Response at 1. Therefore, according to the County, turning over the notes to Appellant would give Appellant an unfair advantage over other applicants in future selection processes, as Appellant would have a copy of the Selectee's responses which were deemed to be the best responses to the questions. As the Board has not decided the instant appeal on the bases of the documents provided for *in camera* review, the Board grants the County's request that they not be turned over to the Appellant.

## FINDINGS OF FACT

Appellant, a Work Force Leader II, Grade 18 in DOT, submitted Appellant's application for the Work Force Leader IV position on October 23, 2011. Appellant's Appeal; County's Response at 1. The Office of Human Resources (OHR) received seventeen applications for this position. County's Response at 1. According to the County, OHR reviewed the applications and determined that only thirteen of the applicants, including Appellant, met the minimum qualifications for the position.<sup>4</sup> Id. at 1-2.

Those applications which met the minimum qualifications for the Work Force Leader IV position were referred to two subject matter experts chosen by DOT to rate the applications, using the five preferred criteria listed in the job vacancy announcement.<sup>5</sup> County's Response at 2. A total of six applicants, including Appellant, were rated as "Well Qualified." Id.; Appellant's Appeal.

According to Appellant, two weeks later, four additional candidates were added to the "Well Qualified" list. Appellant's Appeal. According to the County, when the thirteen applicants were notified of the rating categories into which they had been placed, the OHR

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<sup>4</sup> The minimum qualifications for the position were completion of high school or high school certificate of completion; and six years of experience in either highway general construction and maintenance work or specialty construction/maintenance work, such as bridge construction, road resurfacing operations or trees and forestry management, two (2) years of which must have been at the working leader/supervisory level. County's Response, Attachment (Attach.) 1. An equivalent combination of education and experience could be substituted. Id.

<sup>5</sup> The five preferred criteria in the announcement were:

1. Experience in leadership and supervision of a diverse workforce including managing in the collective bargaining environment as well as developing performance plans and evaluations;
2. Experience and knowledge of highway maintenance and/or highway construction to include: highways, streets, storm drains, and ancillary elements;
3. Experience developing weekly work plans, schedules, and resource allocation (personnel, equipment and materials);
4. Experience in the response of [sic] natural emergencies such as winter snow, ice storms, and other seasonal emergencies; and
5. Experience interacting with the public, community groups, government agencies, or other public entities both orally and in writing.

County's Response, Attach. 1

Staffing Specialist received complaints. County's Response at 2. The County alleges that the Staffing Specialist contacted the two subject matter experts and "discovered"<sup>6</sup> that they had rated the applications solely on the preferred criteria of the Job Vacancy Announcement and had not considered the entire contents of an applicant's resume. Id. The County further alleges that it is OHR's policy regarding the rating of "promotional" applications<sup>7</sup> that the entire contents of an applicant's resume and not just the portion of the resume addressing the preferred criteria identified in the announcement be reviewed. Id. Purportedly, because of this undocumented policy, the Staffing Specialist contacted the two subject matter experts to have them re-review the applicants in the "Qualified" rating category. Id. Based on this re-review, four additional candidates<sup>8</sup> were added to the "Well Qualified" rating category, to include the Selectee. Id. & Attachs. 2a & 2b.

The County alleges that all ten of the "Well Qualified" applicants were subsequently interviewed for the position. County's Response at 2. According to the County, the structured interviews were conducted at DOT by a three-member panel. Id. All of the candidates were given time to review a copy of the questions prior to their interview and all were asked the same questions. Id. The three panel members individually rated the applicants based on their responses to the questions. Id. The panel then purportedly caucused and unanimously recommended the Selectee rather than Appellant or any of the other "Well Qualified" applicants for the position. Id.

Appellant was notified of Appellant's nonselection for the position and this appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant has been in Appellant's position for sixteen years and has been consistently passed over for promotion despite years of quality service.
- It was not fair to add the four additional people only initially rated "Qualified" to the "Well Qualified" list. This was a flaw in the rating process.

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<sup>6</sup> The County provides no further details on how this "discovery" was made.

<sup>7</sup> There is no explanation in the evidence submitted in this case or in the Personnel Regulations applicable to recruitment and application rating procedures as to why a different policy should exist when rating applications for promotion as opposed to rating applications for employment. The Board is at a loss as to the need for separate rating policies.

<sup>8</sup> There apparently was some disagreement among the two subject matter experts, as Mr. A revised the scores for five individuals, County's Response, Attach. 2b, while the other expert, Mr. B, revised an unknown amount of scores, with the result being the addition of four more candidates to the "Well Qualified" list. County's Response, Attach. 2a.

- Appellant believes that someone has a personal vendetta against Appellant. Appellant also understands that the candidate that was chosen has an outside relationship with one of the interviewers, which may have been a factor in the Selectee being chosen.<sup>9</sup>
- Appellant does not understand how Appellant’s performance in the structured interview was rated “Below Average” or “Average” when Appellant has interviewed for the position several times and therefore knows what to expect in the structured interview.
- The County failed to submit each individual rater’s evaluation sheet for Appellant. In addition, it did not submit Appellant’s individual responses to each of the questions asked during the structured interview process.

County:

- The Personnel Regulations provide that a selecting official may choose any individual from the highest rating category for a position. The Selectee was rated “Well Qualified”.
- The Selectee performed significantly better than Appellant and the other “Well Qualified” applicants in the structured interview process, receiving a rating of “Above Average” in all but two of the questions asked. Appellant received a rating of “Below Average” for seven of the questions asked, a rating of “Average” for six questions, and “Above Average” in only one question.
- Appellant has cited as a flaw in the selection process the fact that, initially, six applicants were rated “Well Qualified”, and then four additional applicants were subsequently placed on the “Well Qualified” list. This was due to a “defect” in the rating process discovered by the Staffing Specialist, when the Staffing Specialist found out that the two subject matter experts had rated the applicants solely on the preferred criteria section and not considered their entire application. Thus, the flaw complained about by Appellant in the rating process was not a flaw but a mid-course correction by OHR to ensure the merit system principles are adhered to during the course of a selection process.
- In assessing a challenge to a selection decision as arbitrary and capricious, the Board generally does not substitute its judgment for that of the selecting official unless an appellant demonstrates that the appellant’s qualifications were plainly superior to those of the individual selected for appointment. This Appellant has failed to do so.

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<sup>9</sup> As Appellant has provided no further information regarding this “outside relationship”, the Board will not address this allegation any further in this Final Decision. The Board notes that it is incumbent upon OHR to ensure that all rating officials and interviewing officials involved in a selection process have no “outside relationship” with any of the candidates for the position at issue.

**APPLICABLE LAW AND REGULATIONS**

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

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

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

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:
  - (1) Order retroactive promotion or reclassification with or without back pay;
  - . . .
  - (3) Order priority consideration be given to an employee found qualified before consideration is given to other candidates; . . .

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

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

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

**6-5. Competitive rating process.**

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

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

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

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

**ISSUE**

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

**ANALYSIS AND CONCLUSIONS**

**The County Has Failed To Offer Any Evidence To Support Its Assertion That A Defect In The Initial Rating Process Occurred So As To Warrant The Inclusion Of Additional Candidates On The Well Qualified List.**

The MCPR provides that a selecting official may choose any individual from the highest rating category. Thus, management was free to select anyone in the “Well Qualified” category, including Appellant, as long as the selection process is consistent with law or regulation and not otherwise improper. See MSPB Case No. 06-02 (2006); MSPB Case No. 09-01 (2009); MSPB Case No. 10-11 (2010).

Both the County and Appellant agree that Appellant was one of the original six applicants for the Work Force Leader IV position placed in the “Well Qualified” category. Appellant claims it was a flaw in the rating process to place four additional candidates on the “Well Qualified” list two weeks after Appellant was notified that Appellant was on the “Well



Qualified” list. The County alleges that it was merely correcting a “defect” in the rating process it discovered.

The Board has reviewed the entire record in this case and holds that the County has failed to offer even a scintilla of evidence in support of its “defect” theory. It is well established that statements made by a representative in a pleading are not evidence. MSPB Case No. 08-13 (2008); *see, e.g., Joos v. Department of Treasury*, 79 M.S.P.R. 342, 348 (1998); *Leaton v. Department of Interior*, 65 M.S.P.R. 331, 337 (1994); *Perez v. Railroad Retirement Board*, 65 M.S.P.R. 287, 289 (1994); *Rickels v. Department of Treasury*, 42 M.S.P.R. 596, 603 (1989); *Vincent v. Department of Justice*, 32 M.S.P.R. 263, 268-69 (1987); *Enos v. USPS*, 8 M.S.P.R. 59, 63 (1981). The Board notes that the County has submitted no affidavit or other probative evidence to support the allegation that a defect occurred in the rating process, only the mere arguments of counsel.

The County asserts that it is OHR’s policy regarding promotional applications to consider the contents of the applicant’s entire resume and not just the portion of the resume addressing the preferred criteria. Significantly, the County has offered no probative evidence to support its assertion that such a policy exists. There is certainly no indication in the Personnel Regulations of such a policy, nor is there any indication in the Work Force Leader IV vacancy announcement of this rating policy.<sup>10</sup> Moreover, the County has utterly failed to explain why it would use a different rating procedure for promotional opportunities as opposed to employment opportunities. The Board is of the opinion that the rating process should be the same for both, absent a compelling reason as to why they should differ.

Accordingly, based on the lack of any probative evidence with regard to the “defect” in the rating process, the Board concludes that the County erred in re-reviewing<sup>11</sup> the “Qualified” applicants and placing them in the “Well Qualified” group.

**The Appropriate Remedy For The Flaw In The Rating Process Is To Accord The Appellant Priority Consideration.**

Having established that there was a flaw in the rating process, the Board must now determine the appropriate remedy. In the instant case, Appellant was one of six original “Well Qualified” candidates before the re-review. As the County has correctly noted, management is free to select anyone from the “Well Qualified” list.

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<sup>10</sup> The Board notes that the Personnel Regulations require a description of the competitive rating process be included in the vacancy announcement. MCPR, Section 6-5(b).

<sup>11</sup> Nor is there any record of evidence regarding the policy of “re-reviewing” a candidate’s application on the basis of a complaint about the rating. The Board is not going to challenge the establishment of such a policy so long as it is fair, in writing, and available for all to see. To be fair, the policy should only be based on OHR receiving an applicant’s complaint, not on receiving a hiring manager’s complaint.

It is longstanding Board precedent that retroactive promotion as a remedy for a flaw in a promotional process is only appropriate where it can be shown that “but for” the flaw, the appellant would have been the selectee. See MSPB Case No. 04-12 (citing to Hennessey v. Montgomery County, MSPB Case No. 02-15, aff’d No. 597 (Md. Ct. Spec. App. Apr. 20 2004)); MSPB Case No. 02-04 (2002); MSPB Case No. 00-09 (2002). In the instant case, Appellant, as one of six “Well Qualified” candidates, cannot demonstrate that “but for” the flaw in the rating process, Appellant would have been selected. Therefore, the Board concludes that the appropriate remedy is to order priority consideration for Appellant. Id.

### **ORDER**

Based on the above, the Board grants Appellant’s appeal from Appellant’s nonselection for the position of Work Force Leader IV in the Department of Transportation and orders the following:

1. Appellant be granted priority consideration for the next appropriate vacancy. To constitute an appropriate vacancy, it must be a promotional opportunity for which Appellant meets the minimum qualification requirements as detailed in the job vacancy announcement.
2. OHR ensure that it includes in all vacancy announcements a description of the specific competitive rating process and rating criteria that will be used to create the eligible list.

# APPEALS PROCESS GRIEVANCES

In accordance with Section 34-10(a) of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, July 21, 2008, and July 12, 2011), 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 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011) specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. As with all appeals, the employee need only initially file a notice of intent to appeal.

Upon receipt of the notice of intent, the Board's staff will provide the employee with an Appeal Form, which must be completed within 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

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 fifteen (15) working days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. 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 oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the CAO's grievance decision.

During fiscal year 2012, the Board issued the following decisions on appeals concerning grievance decisions.

# **GRIEVANCE DECISIONS**

## **CASE NO. 12-03**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland Chief Administrative Officer (CAO), Timothy Firestine, that the County was correct in reducing Appellant's pension benefit, even though Appellant is not yet receiving Social Security benefits. The County responded to the appeal on October 19, 2011 (County's Response) and included Exhibits A-D. Appellant was provided with an opportunity to reply to the County's Response but did not do so.

### **FINDINGS OF FACT**

Appellant was employed by the County and participated in the Employees' Retirement System (ERS). County's Response at 1. Appellant retired from County employment in June 2008. Appellant was given the choice of electing which benefit payment option Appellant desired. Appellant's application for retirement benefits, County's Response, Exhibit (Ex.) C., shows that Appellant elected the Social Security Adjustment for age 65. Id. Appellant's retirement benefits application states that "[t]he Payment option elected, as well as the Designated Joint Annuitant (if applicable), cannot be changed." Id. On July 18, 2008, Appellant received a letter from the Office of Human Resources (OHR), enclosing Appellant's first retirement check due on July 1, 2008. County's Response, Ex. D. The letter also indicated that under the Social Security Adjustment Option for Age 65, Appellant would receive payments in the amount of \$2,989.08 each month, which would reduce to \$1,289.08 on August 1, 2011.<sup>1</sup> Id.

Appellant applied to the Social Security Administration for retirement benefits in 2011. Appellant's Appeal,<sup>2</sup> Ex. 2. The Social Security Administration notified Appellant on July 15, 2011 that it had approved Appellant's application for retirement benefits and that Appellant's entitlement date was August 2011. Id. However, Social Security informed Appellant that because Appellant worked during 2011 and estimated that Appellant would earn \$30,000, Social Security was withholding all of Appellant's benefits for 2011. Id.

Upon being notified by Social Security that it was withholding all of Appellant's

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<sup>1</sup> Appellant's application for retirement benefits indicates Appellant's date of birth is 07/19/46. County's Response, Ex. 3. Thus, Appellant turned 65 on 07/19/11.

<sup>2</sup> Appellant's appeal consisted of a letter to the Board with three enclosures. For ease of reference, the enclosures have been labeled thusly: Ex. 1 – CAO letter to Appellant; Ex. 2 – Social Security Administration Retirement, Survivors and Disability Notice of Award; and Ex. 3 – Pension Payment Options.

benefits for 2011, Appellant wrote to the CAO, questioning why Appellant's County pension benefit had been reduced, since Appellant was not receiving Social Security benefits. Appellant's Response, Ex. 1. Appellant noted in Appellant's letter to the CAO that the information provided to Appellant at the time of Appellant's election indicated the following about the Social Security Adjustment Option:

This option usually gives you a larger initial monthly benefit until Social Security retirement benefits begin, and smaller monthly payments thereafter. The intention is to provide you with a nearly level total income, from both sources, from the date of your retirement until the date of your death. At your death, payment will continue to your beneficiary until a guaranteed amount is exhausted.

Appellant's Appeal, Ex. 1 & Ex. 3.

The CAO replied to Appellant, indicating that while the provision cited by Appellant did state that the option provides a larger benefit "until Social Security retirement benefits begin", it was clearly communicated to Appellant in the letter Appellant received from OHR along with Appellant's first benefit payment that Appellant's monthly payment would be reduced as of August 1, 2011. Appellant's Appeal, Ex. 1. Accordingly, because Appellant elected the Social Security Adjustment option with a reduction at age 65, the CAO indicated that Appellant's benefit had been reduced in accordance with Appellant's election. Id.

This appeal followed.

### **POSITIONS OF THE PARTIES**

Appellant:

- Appellant was provided a retirement information package in 2008 which informed Appellant that the Social Security Adjustment Option "usually gives you a larger initial monthly benefit until Social Security retirement benefits begin, and smaller monthly payments thereafter." The key word for Appellant was the word "begin", as Appellant believed that Appellant's pension would not be reduced until Appellant's Social Security benefits began.
- When Appellant applied for Social Security benefits, what happened "was a bit of trickery from the Social Security Administration." Because Appellant was working and earning over the allowable amount, which Appellant did not know until after Appellant applied, Social Security decided to withhold all of Appellant's benefits for 2011.
- Even though Appellant has yet to receive any payment from Social Security, the County reduced Appellant's pension by \$1,700. With such a huge loss, Appellant may not be able to keep up with Appellant's mortgage payments and could conceivably lose Appellant's house.

County:

- Appellant is receiving a reduced benefit payment because Appellant elected this option when Appellant retired in June 2008.
- At the time of Appellant's election, Appellant was specifically told that Appellant's pension amount would be reduced from \$2,989.08 to \$1289.08 on August 1, 2011.
- While it is true that the information provided to Appellant about the Social Security Adjustment Option indicates that Appellant would receive a larger initial monthly benefit until the Social Security retirement benefits begin, it was also communicated to Appellant that, under this option, Appellant's pension would be reduced upon Appellant reaching the age of 65.
- Once a form of retirement benefit is chosen, it cannot be changed.

**APPLICABLE LAW**

**Montgomery County Code, Section 33-44**, *Pension payment options and cost-of-living adjustments*, which states in applicable part:

- (b) Voluntary adjustments of pension payment by a member who retires before qualifying to receive [S]ocial [S]ecurity benefits.
  - (1) A member may elect to receive an actuarial equivalent benefit of a certain level of pension payments until normal [S]ocial [S]ecurity payments begin and an adjusted level of payments after normal [S]ocial [S]ecurity payments begin. A member may elect these adjustments to receive a more uniform total income from both sources.

**ISSUE**

Is the County's determination to reduce Appellant's retirement benefit in accordance with applicable law?

**ANALYSIS AND CONCLUSIONS**

The County clearly put Appellant on notice of the date certain when Appellant's retirement benefit would reduce. The County informed Appellant on July 18, 2008 that Appellant's retirement benefit would reduce as of August 1, 2011. County's Response, Ex. D.

Appellant, aware that Appellant's County retirement benefit would be reduced in August 2011, filed with the Social Security Administration to collect Social Security retirement benefits beginning in August 2011. Appellant's Appeal, Ex. 2. Social Security approved Appellant's application for retirement benefits and indicated that Appellant's entitlement date for said benefits was August 2011. *Id.* However, Social Security also informed Appellant that because Appellant worked in 2011 and estimated Appellant's

earnings for 2011 would be \$30,000, it was withholding all of Appellant's Social Security benefits. Id. Absent Appellant's election to work in 2011, it is clear that Appellant's Social Security benefits would have begun in August 2011, at the very time Appellant's County retirement benefit was reduced. Significantly, Social Security has not denied Appellant benefits, only withheld them. Id. Specifically, Social Security informed Appellant that it needed to know how much Appellant would actually earn in 2011 before it could decide whether August 2011 is the earliest possible month that Appellant's Social Security retirement benefits could begin. Id. Therefore, the Board finds that the County was correct to reduce Appellant's retirement benefit and that this reduction was in accord with applicable law.

### **ORDER**

Based on the above, the Board denies Appellant's appeal.

## **CASE NO. 12-04**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Chief Administrative Officer (CAO) to deny Appellant's request to participate in the Employees' Retirement System (ERS)<sup>1</sup> as a Group E<sup>2</sup> member rather than the Retirement Savings Plan in which Appellant was placed when Appellant began Appellant's employment with the County. The County responded to the appeal on October 17, 2011 (County's Response) and included Exhibits A-F. Appellant provided multiple replies to the County's Response on October 28, 2011 (Appellant's Reply I), on November 1, 2011 (Appellant's Reply II) and on November 8, 2011 (Appellant's Reply III with attachment<sup>3</sup>). Thereafter, the

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<sup>1</sup> The ERS is a defined benefit plan which pays a retiree a set monthly amount from retirement to death. The Retirement Savings Plan (RSP) is a defined contribution plan, where both the employee and the County contribute a set percentage of the employee's salary into a retirement account, which changes its value over time as a result of investment returns (or losses). Upon retirement, the employee's benefit is the total of the employee and employer's contributions and any investment income earned on the joint contributions. See Office of Legislative Oversight Report 2011-2, *Achieving a Structurally Balanced Budget in Montgomery County, Part II: Options for Long-Term Fiscal Balance* at B-2 to B-3 (2010) available at <http://www.montgomerycountymd.gov/cshtml.asp?url=/Content/council/olo/reports/2008.asp>.

<sup>2</sup> Group E, one of the groups comprising the ERS, applies to certain public safety employees. See Montgomery County Code Section 33-37(f)(4).

<sup>3</sup> The attachment to Appellant's Reply III (hereinafter Attachment 1) is a highlighted portion of Montgomery County Code 33-37(f)(4).

Board reviewed the record of evidence and asked the County to respond to Appellant's assertion that certain comparables in Appellant's organization were being treated differently from Appellant with regard to their placement in the ERS. The County provided its Supplemental Response (County's Supplemental Response) with Exhibit A on December 5, 2011. Appellant again provided multiple replies to the County's Supplemental Response on December 7, 2011 (Appellant's Supplemental Response I) and December 13, 2011 (Appellant's Supplemental Response II).

### **FINDINGS OF FACT**

Appellant was employed with the Department of Correction and Rehabilitation (DOCR) as a Nurse Manager on October 15, 2007, and placed in the RSP as a non-public safety employee. County's Response at 1. Due to the fact that Appellant's position is a management position, Appellant is not represented by any employee organization. Id.

On September 21, 2010, the Director, DOCR, requested that the Director of the Office of Human Resources (OHR) change Appellant's Nurse Manager position designation so as to change Appellant's retirement plan from the RSP to Group E of the ERS. County's Response, Exhibit (Ex.) B. On June 15, 2011, the OHR Director recommended to the Assistant Chief Financial Officer that Appellant's position be designated as a public safety position. County's Response, Ex. C. On June 24, 2011, the Assistant Chief Financial Officer approved the request. Id.

After Appellant's position was designated a public safety position, Appellant continued to participate in the RSP but began to make and receive contributions as a public safety employee at a different contribution rate.<sup>4</sup> County's Response at 1. The County asserts that this occurred because Appellant is not eligible to participate in the ERS, even though Appellant's position has been reclassified as a public safety position. Id. at 2. According to the County, since Appellant began Appellant's employment in 2007 and is not represented by an employee organization, under the County Code, Appellant must continue to participate in the RSP. Id. at 2-3. Appellant, upon learning Appellant was still in the RSP despite the designation of Appellant's position as a public safety position, appealed to the CAO on August 9, 2011. See documentation accompanying Appellant's Appeal. By memorandum dated September 12, 2011, the CAO found that, as an unrepresented public safety employee hired after October 1, 1994, Appellant is only eligible to participate in the RSP, not the ERS. County's Response, Ex. A.

This appeal followed.

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<sup>4</sup> A public safety employee participating in the RSP contributes 3% of base pay (6% of base pay exceeding the Social Security limit) and receives 10% of base pay in employer contributions (8% for fiscal year 2012). A nonpublic safety employee contributes 4% of base pay (8% of base pay exceeding the Social Security limit) and receives 8% of base pay in employer contributions (6% for fiscal year 2012). County's Response at 3.



## POSITIONS OF THE PARTIES

### Appellant:

- Another Correctional Manager, Manager A, in DOCR who is not a represented employee, submitted a request to be converted to the ERS retirement plan in 2005 and this request was granted.
- Manager B, who is a Correctional Manager in DOCR, is not represented by the union. Manager B's hire date was after October 1, 1994, yet Manager B is allowed to participate in the ERS.
- Manager C in DOCR is also not represented by the union. Manager C's hire date was after October 1, 1994, yet Manager C is allowed to participate in the ERS.
- Both Manager B and Manager C were hired in represented positions and applied for and were selected for their current management positions (unrepresented), and were allowed to remain in the ERS even though they no longer met the qualifications to remain in the plan.
- In the interest of fairness, Appellant should be allowed to convert to the ERS plan as Appellant's start date, which is after October 1, 1994, is similar to both Manager B's and Manager C's start dates, which are after October 1, 1994.

### County:

- Appellant references another manager, Manager A, who was allowed to participate in the ERS. This was due to Manager A's hire date, which was before 1994, unlike Appellant, whose hire date is 2007.
- Both Manager B and Manager C were first hired in represented positions, unlike Appellant, who was hired for an unrepresented position. Because Manager B and Manager C were in represented positions, they were eligible to participate in the ERS.
- Although the County Code does not address the situation where an ERS member transfers to a position outside their membership eligibility group, the County Attorney's office has opined that when an ERS member transfers to a position outside the ERS eligibility group, they are not required to freeze their ERS benefit and join the RSP.

## APPLICABLE LAW

**Montgomery County Code, Section 33-37(f)(4), *Membership groups and eligibility*,** which states in applicable part:

Group E: The Chief Administrative Officer, the Council Staff Director, the hearing examiners, the County Attorney and each head of a principal department or office of the County government, if appointed to that position before July 30, 1978, or a member having held that position on or before October 1, 1972. Any sworn deputy sheriff and any County correctional staff or officer as designated by the chief administrative officer. Any group E member who has reached elective early retirement date may retain

membership in group E if the member transfers from the position which qualified the member for group E. Any group E member who is temporarily transferred from the position which qualified the member for group E may retain membership in group E as long as the temporary transfer from the group E position does not exceed 3 years. Notwithstanding the foregoing provisions in group E, any employee who is eligible for membership in group E must participate in the guaranteed retirement income plan or the retirement savings plan under Article VIII if the employee:

- (A) (i) begins, or returns to, County service on or after October 1, 1994 (except as provided in the last sentence of subsection (e)(2));
- (ii) is not represented by an employee organization; and
- (iii) does not occupy a bargaining unit position; or
- (B) (i) begins County service on or after October 1, 1994; and
- (ii) is subject to the terms of a collective bargaining agreement between the County and an employee organization which requires the employee to participate in the guaranteed retirement income plan or the retirement savings plan.

**Montgomery County Code, Section 33-115(b)(2), *Participants groups and eligibility***, which states in applicable part:

- (2) Group II.
  - (A) Except as provided in the last sentence of Section 33-37(e)(2), a full-time or career part-time employee must participate in the retirement savings plan if the employee begins, or returns to, County service on or after October 1, 1994; and
    - (i) is a public safety employee; and
    - (ii) is subject to the terms of a collective bargaining agreement between the County and an employee organization which requires the employee to participate in the retirement savings plan.
  - (B) A member of the Police Bargaining Unit may transfer to Group II of the retirement savings plan if the employee has accumulated enough credited service to obtain the maximum retirement benefit under the optional or integrated plan.

- (C) Except as provided in the last sentence of Section 33-37(e)(2), a full-time or career part-time employee must participate in the retirement savings plan or the guaranteed retirement income plan if the employee begins, or returns to, County service on or after October 1, 1994; and
  - (i) is not represented by an employee organization;
  - (ii) does not occupy a bargaining unit position; and
  - (iii) is a public safety employee.

### **ISSUE**

Is the County's determination that Appellant is not eligible to participate in the ERS despite the reclassification of Appellant's position as a public safety position in accordance with applicable law?

### **ANALYSIS AND CONCLUSIONS**

The parties agree that Appellant began Appellant's employment with the County after October 1, 1994. The parties also agree that Appellant, as a Nurse Manager, is not represented by an employee organization. Additionally, the parties also agree that Appellant's position was not designated as a public safety position when Appellant began Appellant's employment.

The Director of DOCR requested OHR change the designation of Appellant's position so as to allow Appellant to participate in the ERS. While OHR did recommend that Appellant's position designation be changed, and this recommendation was approved by the Assistant CAO, Appellant was not permitted to participate in the ERS because Appellant began Appellant's employment with the County after October 1, 1994. County's Response at 3.

Appellant, during the course of Appellant's appeal, has pointed to other DOCR employees that Appellant believes are comparable to Appellant but who are allowed to participate in the ERS. Appellant indicated that Manager A, who is not represented by an employee organization, has had Manager A's position subsequently designated as a public safety position and been allowed to participate in the ERS since 2005. See Appellant's Appeal. The County has explained that Appellant's first comparable, Manager A, began Manager A's employment with the County prior to October 1, 1994. County's Response at 3. Thus, Manager A's situation is not comparable to Appellant, as Appellant concedes Appellant commenced employment with the County after October 1, 1994.

Appellant also asserts that Appellant's situation is comparable to that of Manager B. Appellant's Reply I. Appellant indicates that Manager B, a Correctional Manager, has a hire

date of January 6, 1997. Id. According to Appellant, Manager B is not represented by an employee organization. Id. Appellant also points to another comparable, Manager C in DOCR. Appellant's Reply II. Appellant notes that Manager C's hire date was October 6, 1997 and Manager C is not represented by an employee organization. Id. Appellant states that Manager C is allowed to participate in the ERS. Id.

The County, however, disagrees with Appellant that the employment situations of Manager B and Manager C are comparable to that of Appellant's. The County avers that both Manager B and Manager C were originally hired into positions which were represented by the union. County's Supplemental Response at 1. Because they were both hired into represented public safety positions,<sup>5</sup> they were eligible to participate in the ERS at the time they were initially hired. Id. Thus, they are unlike Appellant, whose position was not originally designated as a public safety position at the time Appellant was hired.

Appellant notes that although Manager B and Manager C were originally hired into represented public safety positions, both individuals applied for and were selected for non-represented management positions. Appellant's Supplemental Response II at 1. Thus, according to Appellant, both individuals lost their eligibility to remain in the ERS but nevertheless were permitted by the County to do so. Id. at 1-2.

The County acknowledges that both Manager B and Manager C have been promoted into non-represented management positions but have been allowed to remain in the ERS. County's Supplemental Response at 1. According to the County, the retirement statute does not anticipate or address the situation where an individual is promoted out of a group eligible for ERS participation. Id. Therefore, the Office of the County Attorney was asked by OHR to opine on whether an ERS member who transfers to a position outside of their membership eligibility group must be required to participate in the RSP instead of the ERS. Id. The Office of the County Attorney concluded it would be reasonable to allow the ERS member in such a situation to continue his/her participation in the ERS. Id., Ex. A. The Board has reviewed the Office of the County Attorney's opinion and finds it is a reasonable interpretation of the retirement statute.

Appellant argues that Appellant is the only front line supervisor in DOCR who is not afforded the benefit of placement in the ERS. Appellant's Supplemental Response II at 1. Appellant also asserts that Appellant's day-to-day inmate contact is equal to the contact that the correctional nurses Appellant supervises have, and they are permitted to be in the ERS. Id. Therefore, as a matter of fairness, Appellant should be allowed to participate in the ERS. Id.

Significantly, Appellant concedes that there is no law that pertains to the retirement status of Appellant's colleagues, Manager B and Manager C, which is why there was a need for the Office of the County Attorney to interpret the statute. Appellant's Supplement

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<sup>5</sup> The County asserts that these County correctional staff positions previously occupied by Manager B and Manager C have been designated as Group E positions by the CAO in accordance with the provisions of County Code Section 33-37(f)(4).

Response II at 2. However, unfortunately for Appellant, there is a law that pertains to Appellant's retirement status. Specifically, Section 33-115(b)(2) of the County Code mandates that an employee, such as Appellant, who begins County service after October 1, 1994, is not represented by an employee organization, and is a public safety employee, **must** participate in the RSP. While Appellant is correct that Appellant is being treated differently than other managers at DOCR because Appellant alone cannot participate in the ERS, said treatment is nevertheless in accordance with the law. The Board does not have the authority to change the law, even if it views the law as being unfair. See MSPB Case No. 08-08 (2008).

Therefore, the Board finds that the County was correct in its determination that Appellant is not eligible to participate in the ERS.

### **ORDER**

Based on the above, the Board denies Appellant's appeal.

## **CASE NO. 12-07**

### **DECISION AND ORDER**

This is the Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal concerning the denial of Senior Career Officer Differential and Administrative Differential. The County responded to the appeal on November 16, 2011 (County's Response) and included Attachment (Attach.) 1. Appellant was provided with an opportunity to reply to the County's Response, but did not do so.

### **FINDINGS OF FACT**

Appellant is employed by the County as a Battalion Chief in the Montgomery County Fire and Rescue Service (MCFRS). On February 27, 2009, Appellant filed a grievance relating to Appellant's pay as a Battalion Chief. County's Response at 1. The Fire Chief denied the grievance. Id.

The grievance proceeded to Step 2 of the grievance procedure. Id. A Step 2 meeting was held on October 8, 2009, with the Labor Relations Specialist<sup>1</sup> from the Office of Human Resources (OHR) serving as the Chief Administrative Officer's (CAO's) designee. Id. According to the County, at this Step 2 meeting, the parties agreed to hold the grievance in abeyance pending an upturn of the economy and an improvement in the County Government's fiscal situation, at which time OHR would consider doing a compensation survey and study of the MCFRS chief officer ranks, including the Battalion Chief position. Id.

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<sup>1</sup> The County asserts that the Labor Relations Specialist left employment with the County in July 2010. County's Response at 1 n.1.

On October 25, 2011, Appellant appealed to the Board the failure of the CAO to issue a written decision on Appellant's grievance within forty-five (45) days of the Step 2 meeting.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The failure of the CAO to issue a written decision within the time limits of the grievance procedure constitutes a denial of Appellant's grievance under the Personnel Regulations, and Appellant is allowed to raise it to the Board for adjudication.
- Appellant's duties and responsibilities are the same as those of a Battalion Chief who receives Senior Career Officer Differential and Administrative Differential. Therefore, Appellant should be paid the same as other Battalion Chiefs who were promoted before July 1, 2008.

#### **County:**

- Instead of processing the appeal, the Board should afford the CAO an opportunity to respond to the grievance within 45 days.
- Appellant's grievance was not timely filed. Therefore, it should be dismissed as untimely.
- Appellant was promoted to Battalion Chief after June 30, 2008. Therefore, Appellant is not eligible for Senior Career Officer Pay Differential or the Administrative Differential, as the Fire Chief discontinued the differentials based on budget considerations.

### **APPLICABLE REGULATION**

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

#### **34-9. Grievance procedure.**

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

- (1) A grievance may be dismissed by the OHR Director if it is not filed within 30 calendar days after:
  - (A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or
  - (B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

- (2) If a grievant does not file the grievance at the next step of the grievance procedure within the time limits specified in the procedure, the OHR Director may consider the grievance resolved on the basis of the most recent response and may end the consideration of the grievance.
- (3) If 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.
- (4) If an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time.
- (5) The parties to a grievance may agree to extend the time limits stated in the grievance procedure.
- (6) The OHR Director may extend the time limits stated in the grievance procedure for compelling reasons. The OHR Director must give the parties prompt notice of an extension.

### **ISSUE**

Has the County shown good cause as to why the Board should remand the case to the CAO for a decision prior to accepting the instant appeal?

### **ANALYSIS AND CONCLUSIONS**

The County claims that it reached an informal agreement with the Appellant at the Step 2 grievance meeting to hold the grievant in abeyance pending an improvement in the economy and the County Government's fiscal situation. County's Response at 2. According to the County, this informal agreement was open ended. Id. Significantly, the County has offered no evidence of said agreement. The County does acknowledge that Appellant has the right at any time to opt out of the agreement. Id. It is obvious from Appellant's appeal to the Board that, if there was in fact an informal agreement, Appellant has chosen to opt out of it.

The County requests that the Board choose not to process this appeal but rather return it to the employee and request the CAO respond to the appeal within a specific period of time. County's Response at 2. The Board has decided that, given the length of time that has

passed since the Step 2 meeting – over two years – it will not return the appeal to Appellant. Rather, it will hold the processing of the appeal in abeyance pending a response by the CAO. The Board will order to CAO to respond by no later than January 17, 2012.

The County has argued in the alternative that Appellant’s appeal is untimely. The Board finds this argument lacks merit. According to the County, Appellant was notified in July 2008 about the MCFRS decision to discontinue the senior career officer pay differential and administrative differential for all employees promoted to the rank of Battalion Chief after July 1, 2008. County’s Response at 2. In support of this allegation, the County has proffered an email, which purportedly was sent to Appellant. County’s Response, Attach. 1. However, the email is addressed to only the following group – #FRS.Battalion Chiefs – with #FRS.Assistant Chiefs and #FRS.Division Chief being copied on the email. At the time the email was sent on July 7, 2008, Appellant was not yet a Battalion Chief.

Further, as the email makes clear, the Labor Relations Specialist, who was the OHR Representative of the CAO at the Step 2 grievance on October 8, 2009, was on notice of the email’s existence as of September 30, 2009. County’s Response, Attachment 1. Yet, significantly, the County does not indicate that the Labor Relations Specialist, on behalf of OHR or the CAO, raised any issue of timeliness at the Step 2 grievance meeting. The OHR Director, under the Personnel Regulations, had the ability to dismiss the grievance if the OHR Director believed it was untimely. Instead, the OHR Labor Relations Specialist purportedly reached an agreement with the Appellant to review the merits of Appellant’s grievance once the economy improved. Therefore, the Board is of the opinion that, given the history of this grievance, the County owes the Appellant a decision on the merits of Appellant’s grievance.

### **ORDER**

Based on the above, the Board hereby remands this matter to the CAO for a decision on the merits on Appellant’s grievance. To ensure that Appellant’s grievance is processed in a timely manner, the Board hereby sets the following time limits:

1. The CAO will issue a written decision on the merits of Appellant’s grievance by **COB January 17, 2012.**
2. If Appellant is not satisfied with the CAO’s response, Appellant will notify the Board within **10 working days** after Appellant receives the CAO’s response, and the Board will continue the processing of the appeal.



## **DISMISSAL OF APPEALS**

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-8(J), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal. Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if the appellant fails to prosecute an appeal, the appellant's appeal is untimely, or the appellant fails to comply with a Board order or rule.

The Board also may dismiss an appeal if it lacks jurisdiction over the appeal, if the case becomes moot, if there is no actual (i.e., justiciable) controversy between the parties, or if the employee fails to exhaust administrative remedies.

During FY 2012, the Board issued the following dismissal decision.

# **DISMISSAL FOR LACK OF A JUSTICIABLE CONTROVERSY**

## **CASE NO. 11-22**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned appeal involving Appellant's termination by reduction-in-force from Appellant's position with the Volunteer Fire Department (VFD).

### **FINDINGS OF FACT**

#### Procedural History

On January 10, 2011, Appellant filed an appeal with the Merit System Protection Board (Board), challenging the County's action in defunding and thus purportedly forcing the elimination of all administrative staff positions of the Local Fire and Rescue Departments (LFRDs), to include Appellant's position<sup>1</sup> with the VFD. In the appeal, Appellant requested that the Board stay the defunding of the LFRD administrative staff positions and Montgomery County Fire and Rescue Service (MCFRS) Fire Chief's reduction-in-force (RIF) directives to the LFRDs pending an adjudication of Appellant's appeal on the merits. Appellant subsequently filed with the Board a copy of the Termination Notice – Reduction-in-Force, which was issued to Appellant by the President of VFD, on January 11, 2011, and filed additional comments with regard to Appellant's appeal (Appellant's Comments). Appellant claimed that, under the County's Personnel Regulations, any RIF action against an LFRD employee is the responsibility of the MCFRS County Fire Chief, who is the Department Director for purposes of the County Personnel Regulations, and no one below the Fire Chief is authorized to act for the Fire Chief. Appellant's Comments at 1. Therefore, Appellant claimed that the RIF notice Appellant received from VFD's President was invalid. Id.

On February 3, 2011, the Board denied Appellant's request for a stay of Appellant's termination. See Decision and Order on Appellant's Stay Request. The Board also held that as Appellant was an LFRD employee, Appellant was not a County employee and therefore the County was not a proper party, and dismissed the County as a party to the instant case. Id. In dismissing the County as a party to this case, the Board also addressed Appellant's claim that the President of VFD lacked the authority to issue Appellant a RIF notice. The Board ruled that as the statute provides that the County's Personnel Regulations are "generally" applicable, the President, as head of the VFD, occupies a position that is the equivalent to a Department Director in the County's Personnel Regulations. Id. at 4 n.7. Therefore, the President had full authority to implement a RIF action against Appellant, so long as it was in accord with the procedures set forth in the County's Personnel Regulations. Id. The Board ordered Appellant's employer, VFD, to submit its Prehearing Submission in

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<sup>1</sup> Appellant was an Administrative Specialist with VFD.

this appeal.<sup>2</sup> Id. at 5-6.

After VFD, through counsel, submitted its Prehearing Submission,<sup>3</sup> Appellant, instead of submitting a Prehearing Submission, emailed the Board, indicating Appellant had nothing further to add beyond what Appellant had already communicated in this case. See Email from Appellant to the Board's Executive Director, dated 05/03/11, subject: Re: MSPB Appeal No. 11-22 Response to VFD and County.<sup>4</sup> The Board's Executive Director informed Appellant that Appellant's email did not comply with the Board's Hearing Procedures.<sup>5</sup> See Email from the Board's Executive Director to Appellant, dated 05/03/11, subject: Re: MSPB Appeal No. 11-22 Response to VFD and County. Appellant was counseled by the Executive Director that failure to comply with the Board's hearing procedures could result in the Board finding Appellant in noncompliance with its Hearing Procedures and result in the Board sanctioning Appellant by entering judgment in favor of VFD.

On May 4, 2011, the Board ordered Appellant to provide a statement of such good cause as exists for why Appellant failed to file Appellant's Prehearing Submission in this case. See Show Cause Order. Appellant was informed that failure to show good cause could result in the Board entering judgment in favor of VFD. Id.

On May 11, 2011, Appellant filed a response to the Board's Show Cause Order (Appellant's Response), indicating Appellant had not intended to impede the proceedings in this case but had somehow misinterpreted the expected flow of information. Appellant also indicated that, as the Board has dismissed the County as a party in this case and it appeared that the proceedings in this matter would only concern whether proper notice was given by VFD, then Appellant was not sure that there was any reason to hold a hearing. Appellant's

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<sup>2</sup> Pursuant to Section 35-8(g) of the Montgomery County Personnel Regulations, when a Local Fire and Rescue Department employee appeals a termination action, the Local Fire and Rescue Department must respond to the MSPB within 15 working days of notification of the appeal. The Board provided both VFD and Appellant with a copy of its Hearing Procedures, which include its Prehearing Submission requirements.

<sup>3</sup> Appellee, VFD, did not submit its Prehearing Submission on the date originally set by the Board. Rather, only after the Board issued a Show Cause Order did Appellee file the required pleading. However, the Board found that Appellee demonstrated good cause for its failure and permitted Appellee to file its Prehearing Submission. See Show Cause Order Decision (Mar. 23, 2011).

<sup>4</sup> Appellant sent a copy of Appellant's email to various officials of the County, even though Appellant was aware that the County has been dismissed as a party in this case. See Decision on Appellant's Stay Request at 5.

<sup>5</sup> The Board's Executive Director provided Appellant with yet another copy of the Board's Hearing Procedures as an attachment to the email sent to Appellant. See Email from the Board's Executive Director to Appellant, dated 05/03/11, subject: Re: MSPB Appeal No. 11-22 Response to VFD and County.

Response at 1. Appellant stated that Appellant did receive notice. Id. Appellant further indicated that if the Board was going to reexamine the County's role in the process, then "it will pay to continue the process." Id. at 1-2.

On May 16, 2011, the Board received Appellee's Response to Appellant's Response to Show Cause Order (Appellee's Response). Appellee noted in its response that Appellant had admitted that Appellant had received proper notice of the RIF action from VFD. Appellee's Response at 1. Appellee stated that Appellant had indicated in Appellant's Response that, unless the Board was willing to reexamine the County's role in the process, then it did not pay to continue the appeal process. Id. Appellee stated that the dismissal of the County by the Board had not been appealed by the Appellant to court and, therefore, there was no good cause as to why the instant appeal should continue. Id. at 2.

After reviewing the pleadings, the Board determined to grant Appellant one more opportunity to proceed in this matter, as Appellant was pro se. See Show Cause Order Decision at 3 (May 16, 2011). The Board noted in this Show Cause Order Decision that it had made it clear in its Decision on Appellant's Stay Request that the County was not a party to this proceeding; rather, Appellant's employer at the time of Appellant's termination, VFD, was the proper party. Id. The Board observed that Appellant could have asked the Board to reconsider this decision, but Appellant failed to do so in a timely manner. Id. Accordingly, the Board stated in the Show Cause Order Decision that it would not examine the role of the County in this process; rather, the issue to be decided in this case was whether Appellant's reduction-in-force action was in accordance with applicable County Personnel Regulations and otherwise proper. Id.

Appellant subsequently submitted Appellant's Prehearing Submission (Appellant's Prehearing Submission) on May 31, 2011. In the Prehearing Submission, Appellant stipulated to the reports included in Appellee's Prehearing Submission and asserted that these documents supported Appellant's position that "MCFRS, OMB, and OHR have failed to adhere to the RIF requirements imposed by Section 30 of the County Personnel Regulations."<sup>6</sup> Appellant's Prehearing Submission at 1.

In Appellant's Prehearing Submission, Appellant promulgated interrogatories that Appellant wanted VFD to answer. See Appellant's Prehearing Submission at 2-4. Appellant also promulgated interrogatories to be answered by the OHR Director and the Fire Chief. Id. at 4-6. In the subsequent Scheduling and Discovery Order issued by the Board on June 8, 2011, the Board again reiterated that the only issue to be decided in the instant case was whether Appellant's reduction-in-force was in accordance with applicable County Personnel Regulations and otherwise proper. See Scheduling and Discovery Order at 2. As the County and its officials were not parties to the instant proceedings, the Board held that Appellant's interrogatories directed to two County officials were irrelevant to the instant case and only the ones directed to VFD needed to be answered. Id. at 1 n.1.

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<sup>6</sup> "OMB" is the acronym for the County's Office of Management and Budget. "OHR" is the acronym for the County's Office of Human Resources.

## Prehearing Conference

The Board held a Prehearing Conference in this case on July 13, 2011. The purpose of the Prehearing Conference was to review the various exhibits submitted by the parties and proposed witnesses identified and to also schedule a hearing date. During the Conference proceedings, Appellant agreed to stipulate to all of the exhibits submitted by the Appellee. Appellant also stipulated that Appellant received proper notice from VFD regarding the RIF. However, according to Appellant, the notice did not come from the Fire Chief but instead from the President of VFD. Appellant continued to argue that the President did not have the authority under the Montgomery County Personnel Regulations to issue Appellant a RIF notice; only the County's Fire Chief could issue said notice. The Board pointed out to the Appellant that the County was not a party to this appeal and that the Board had previously ruled that the President had the authority to issue the RIF notice to Appellant. Appellant then stipulated that Appellant had no issue with regard to the actions of VFD in the RIF process. The Board subsequently announced it would dismiss Appellant's appeal and issue a written decision on the matter.

## **APPLICABLE LAW**

**Montgomery County Code, Section 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part,

- (h) **Powers of the hearing authority.** In addition to any other power granted by this article, a hearing authority is empowered:
  - (9) To request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof.
  - (10) To take any other action authorized by this article or necessary to a fair disposition of the case.
  - (11) To accept evidence by stipulation of facts which may be introduced at any time.

**Montgomery County Code, Section 2A, Administrative Procedures Act, Section 2A-10. Decisions**, which states in applicable part,

- (g) **Informal disposition.** Where appropriate to the nature of the proceedings and the governing laws, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

**Montgomery County Code, Section 21-3, Fire Chief; Division Chiefs**, which states in applicable part:

- (g) In addition to any other authority under this Chapter, the Fire Chief

may take disciplinary action against any employee or volunteer in the Service, including those in a local fire and rescue department, for violating any County law, regulation, policy, or procedure, or any lawful order of the Chief or the Chief's designee. Disciplinary action under this subsection may include suspension or discharge of an employee and restriction or prohibition of a volunteer from participation in fire and rescue activities. The Chief must not take any action involving an employee or volunteer of a local department, except when the Chief finds that immediate action is required to protect the safety of the public or any employee or volunteer, unless the Chief finds that the local department has not satisfactorily resolved the problem in a timely and effective manner. Any finding by the Chief under the preceding sentence is not subject to appeal. Each employee or volunteer must give the Chief any information, not otherwise legally privileged, that the Chief reasonably needs to administer this Chapter.

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

- (a) Applicability of County Regulations. Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).
  
- (c) Limitations. Nothing in this Chapter means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis. Nothing in this Chapter abrogates the authority of each local fire and rescue department over such functions as hiring, promotion, discipline, and discharge of employees of that department; the assignment of administrative staff; and day-to-day assignments of volunteer personnel at that department. This Section does not diminish the authority of County government to act under Sections 21-13 and 21-14 or the authority of the Fire Chief to discipline an employee or volunteer of a local fire and rescue department as provided in Section 21-3(g).

### **ISSUE**

Is there a justiciable controversy between the parties so as to warrant this matter going to hearing?

## ANALYSIS AND CONCLUSIONS

### As Appellant Made Clear At The Prehearing Conference, There Is No Actual Controversy Between Appellant And Appellee. Absent A Justiciable Controversy, There Is No Need For A Hearing In This Case And The Case Is Dismissed With Prejudice.

The Board, in MSPB Case No. 10-08 (2010), held that the LFRDs had to follow the notice requirements set forth in the Montgomery County Personnel Regulations (Personnel Regulations or MCPR) when effecting a RIF of an LFRD employee. Under the applicable Personnel Regulations, an employee must receive a termination notice at least thirty days prior to termination. Appellant has continued to challenge the fact that the RIF notice Appellant received was from VFD's President, not from the County's Fire Chief.

As the Board has made repeatedly clear to Appellant, the County and its officials were dismissed early on as parties to this case. See Decision on Appellant's Request for a Stay at 5; Show Cause Order Decision at 3 (May 16, 2011); Scheduling and Discovery Order at 1 n.1. Moreover, in its decision regarding Appellant's stay request, the Board addressed the contention of Appellant that only the Fire Chief could dismiss Appellant. See Decision on Appellant's Stay Request at 4 n.7. The Board noted in its decision that Appellant had asserted that VFD's President did not occupy the position of a Department Director and therefore did not have the power to implement the RIF procedures in the MCPR for VFD. Id. The Board found that Appellant had ignored the fact that the statute provides that the MCPR is "generally" applicable. Id. The Board found that the President, as head of the VFD, occupied a position that was the equivalent to a Department Director in the MCPR. Id. Therefore, the Board concluded that the President had full authority to implement a RIF action against Appellant, so long as it was in accord with the procedures set forth in the MCPR. Id.

This holding is also supported by the County Code, which vests in each LFRD the authority to discharge employees. Montgomery County Code, Section 21-16(c). The only authority the County Fire Chief is given over LFRD employees is to take a disciplinary action against an LFRD employee for violating any County law, regulation, policy, or procedure, or any lawful order of the Chief or the Chief's designee. Montgomery County Code, Section 21-3(g). But a RIF action is not a disciplinary action.<sup>7</sup> Therefore, pursuant to the County Code, only VFD could terminate Appellant through a reduction-in-force; the Fire Chief lacked authority to do so.

Appellant, as a matter of right, is entitled to a hearing on Appellant's termination from VFD. The Board held the Prehearing Conference in this matter to review the witnesses identified by each party, the exhibits submitted by Appellee, and to schedule a hearing in this

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<sup>7</sup> The Personnel Regulations define a RIF as "[t]he elimination of a position because of: (a) lack of funds; (b) change in an approved work program or plan; (c) administrative reorganization; or (d) technological change that affects staffing needs." MCPR, Section 1-63.

matter. Appellant readily stipulated to all the exhibits submitted by Appellee. Appellant also stipulated that Appellant received proper notice from VFD and that Appellant had no issue regarding VFD. As Appellant has stipulated that the notice Appellant received from VFD was proper and that Appellant has no issue with regard to VFD's actions in connection with Appellant's reduction-in-force, the Board finds that there is no justiciable controversy between the parties so as to warrant a hearing in this matter. See, e.g., Hatt v. Anderson, et al., 297 Md. 42, 45-46, 464 A.2d 1076, 1078-79 (1983) (dismissing the case against Anne Arundel Fire Department as there was no justiciable issue, which is an absolute prerequisite to the maintenance of an action); Prince George's County, Maryland v. Board of Trustees of Prince George's Community College, 269 Md. 9, 12-13, 304 A.2d 228, 230 (1973) (a controversy is justiciable where there are parties asserting adverse claims; where there is no actual controversy, the case must be dismissed).

### **ORDER**

Accordingly, pursuant to its authority under the Administrative Procedures Act, the Board hereby dismisses this appeal with prejudice.



# **DISMISSAL FOR LACK OF JURISDICTION**

## **CASE NO. 11-37**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal concerning the failure of the Chief Administrative Officer (CAO) to issue decisions on two grievances filed by Appellant within forty-five (45) days of the Step 2 grievance meeting. The County filed its response (County's Response) to the appeal on June 27, 2011. Appellant was provided the opportunity to file a reply to the County's Response but did not do so.

### **FINDINGS OF FACT**

Appellant is an Administrator in the Department of Technology Services (DTS). On October 5, 2010, the Municipal and County Government Employees Organization (MCGEO or Union)<sup>1</sup> submitted a grievance on Appellant's behalf (Grievance 1), asserting that Appellant was working at a higher job classification without being compensated at a higher salary. On October 13, 2010, the Chief Information Officer (CIO), DTS, provided the management response to MCGEO's grievance on behalf of Appellant, denying the grievance.

On October 25, 2010, MCGEO submitted a second grievance on Appellant's behalf (Grievance 2), challenging the work improvement plan Appellant had received. On November 1, 2010, the CIO responded to Grievance 2, denying the grievance.

MCGEO raised both grievances to the CAO and a Step 2 grievance meeting was held on both grievances on January 18, 2011. According to both Appellant and the County, the County requested an extension on the time limit for providing a response to Appellant after the Step 2 meeting, and MCGEO granted the extension.

As of the date of filing Appellant's appeal with the Board, Appellant had received no response to either Grievance 1 or Grievance 2.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The County failed to issue a decision on either Grievance 1 or Grievance 2 within forty-five (45) days of the Step 2 grievance meeting, as required by the County's

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<sup>1</sup> As a DTS employee, Appellant is part of the bargaining unit represented by MCGEO.

Personnel Regulations.<sup>2</sup>

- While the County indicates it needs to wait for Appellant’s job reclassification study to be finalized, there is no connection between the reclassification issue and the grievance issues so as to warrant a delay in resolving the grievances.

County:

- The Board lacks jurisdiction over the processing of the contractual grievances. The Board’s decision in MSPB Case 10-16 is dispositive of this case.
- The MCGEO Collective Bargaining Agreement provides a remedy to the Union with respect to delays in the grievance process.
- However, the Union agreed to waive the 45-day time limit for the CAO to respond to the two grievances after the Step 2 meeting. The Union agreed to wait on the CAO decision until after the ongoing independent classification study of Appellant’s position has been completed and finalized.

### **APPLICABLE CONTRACTUAL PROVISIONS AND REGULATION**

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Office, Professional, and Technical (OPT) and Service, Labor, and Trades (SLT) Bargaining Units, For the Years July 1, 2010 through June 30, 2011, Article 10, *Grievances*, which states in applicable part:**

#### 10.1 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, including disputes arising over changes in existing work rules and working conditions referenced in Article 31, *Maintenance of Standards/Retention of Benefits and Conditions*.

All future work rules or practices governing terms and conditions of employment shall be subject to the grievance procedure should the employee or the certified employee organization believe that they are in conflict with any provisions of this Agreement.

#### 10.2 Discipline Grievances

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<sup>2</sup> Although Appellant filed a copy of the County’s administrative grievance procedure regulations with Appellant’s appeal, as discussed infra, it is the grievance procedure set forth in the MCGEO Collective Bargaining Agreement with the County that controls.

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

10.3 Exclusivity of Forum

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

10.4 Granting of Relief

Relief that is granted at any level of this procedure, as stated in any formal grievance, shall end further processing of the grievance.

10.5 Procedure

Step 1 A written grievance must be presented to the immediate supervisor and Department Director by the Union within 30 calendar days from the date of the event giving rise to the grievance or the date on which the employee knew or should have known of the event giving rise to the grievance. The immediate supervisor/Department Director shall provide a written response within 7 calendar days of receipt of the grievance. If the Union is not satisfied with the response or no response is given, the grievance may be appealed to Step 2 to the Office of Human Resource in writing within 10 calendar days of receipt of the written response from the immediate supervisor.

Step 2 Upon receipt of a written appeal from Step 1, the CAO or designee shall meet with the Union and the Department within thirty (30) working days. The purpose of the meeting is to attempt to resolve the grievance. If the grievance is not settled at this meeting, the CAO or designee shall respond in writing to the grievance within forty-five (45) calendar days after the meeting.

10.6 Waiver/Appeal

Failure of the Union to appeal a grievance within the specified time limits, from the date of receipt of the Employer's answer, unless

otherwise waived, will result in the grievance being resolved based on the last Employer response. Failure of the Employer to respond within the specified time limits, unless otherwise waived, may be treated by the Union as a denial of the grievance at the applicable step.

#### 10.7 Mutual Waiver

The parties recognize and agree that the purpose of this procedure is to provide for equitable resolution of disputes. Therefore, in the administration of this procedure, the parties agree to interpret the terms of this procedure in a manner conducive to dispute resolution. In this spirit, the parties may agree to waive time limits set forth in this procedure.

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

#### **ISSUE**

Does the Board have jurisdiction over the instant appeal?

#### **ANALYSIS AND CONCLUSIONS**

#### **The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.**

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

**The Board Lacks Jurisdiction Over A Grievance Which Is Covered By A Collective Bargaining Agreement.**

The Montgomery County Personnel Regulations clearly indicate that a bargaining unit employee may not file a grievance under the administrative grievance procedure but must instead file a grievance under his applicable collective bargaining agreement (CBA). The record of evidence establishes that Appellant is a member of the bargaining unit represented by MCGEO and that MCGEO filed two grievances on behalf of Appellant. Pursuant to the MCGEO Collective Bargaining Agreement, its grievance procedure is the exclusive forum for grievances. See MCGEO Collective Bargaining Agreement, Section 10.3.

The County is correct that MSPB Case No. 10-16 is dispositive of this matter. In that case, a bargaining unit employee sought to bring an appeal to the Board of an issue that was covered by the MCGEO CBA grievance procedure. The Board found that it did not have jurisdiction over that appeal. The same is true for the instant appeal.

**ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction.

# **DISMISSAL BASED ON MOOTNESS**

## **CASE NO. 12-06**

### **FINAL DECISION AND ORDER**

On October 24, 2011, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging Appellant's three-day suspension. On February 27, 2012, the County notified the Board that it had rescinded the Notice of Disciplinary Action (NODA) issued to Appellant and moved to dismiss the appeal, as the matter was now moot.<sup>1</sup> The County indicated that Appellant was in agreement with dismissing the appeal.

An appeal must be dismissed as moot where an agency completely rescinds the action appealed. Hodge v. Dep't of Veterans Affairs, 72 M.S.P.R. 470 (1996). The County has demonstrated to the Board that it has rescinded the action appealed and will make Appellant whole for any pay and benefits<sup>2</sup> Appellant lost due to the three-day suspension. Accordingly, the Board hereby dismisses the appeal.

### **ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal based on mootness.

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<sup>1</sup> As part of its submission to the Board, the County included a Memorandum from the Director, Department of General Services, to the Appellant, rescinding the NODA.

<sup>2</sup> The County also provided an email to the Board, indicating it would ensure Appellant was made whole.

## **RECONSIDERATION**

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code Section 2A-7(c) of the Administrative Procedures Act (APA). The Board's Hearing Procedures require that any preliminary reconsideration request be filed within five (5) calendar days from the date the ruling being challenged was received.

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

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

In FY12, the Board issued two Reconsideration Decisions with regard to Final Decisions.

# **RECONSIDERATION REQUESTS** **INVOLVING FINAL DECISIONS**

## **CASE NO. 12-02**

### **DECISION ON APPELLANT'S MOTION FOR RECONSIDERATION**

On October 25, 2011, Appellant filed<sup>1</sup> a Request for Reconsideration (Appellant's Request), seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Final Decision and Order dated October 17, 2011. In its Final Decision, the Board denied Appellant's appeal from the County's determination that Appellant was only "Qualified" for the Manager III position.

### **APPELLANT'S ARGUMENTS**

Appellant seeks reconsideration, arguing that the Board did not address all of Appellant's arguments in its Final Decision and that the Office of Human Resources (OHR), together with the Department of Health and Human Services (DHHS), committed fraud and irregularities in connection with the recruitment for the Manager III position.<sup>2</sup> Specifically, Appellant notes that the Board did not discuss the fact that Appellant presented evidence that the County has proceeded to fill additional Manager III positions using the same vacancy announcement IRC382 which Appellant applied for in February. According to Appellant, Appellant applied for the vacancy in Rockville, and subsequently has become aware that interviews are being conducted for a Manager III position in DHHS' Germantown office.

### **APPLICABLE LAW**

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

...

- (f) *Rehearing and reconsideration.* Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten (10) days

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<sup>1</sup> Pursuant to Section 2A-10(f) of the Administrative Procedures Act, any request for reconsideration is to be filed within ten days from a final decision. The Board has ten days from receipt of the request to grant or deny the request.

<sup>2</sup> In particular, in Appellant's Request, Appellant asks that the Board "please review emails between OHR and myself once again." Appellant's Request at 1. Appellant also notes that in Appellant's initial Reply, Appellant included seven pages of written correspondence and six pages of attachments. *Id.*



from a final decision. Thereafter, a rehearing or reconsideration may be approved only in the case of fraud, mistake or irregularity. . . . Any decision on a request for rehearing or reconsideration not granted within ten (10) days following receipt of the request therefor in accord with subsection (c) of this section shall be deemed denied.

### **ISSUE**

Has Appellant shown good cause as to why the Board should reconsider its Final Decision and Order of October 17, 2011?

### **ANALYSIS AND CONCLUSIONS**

Appellant challenges the fact that the Board did not discuss in the Board's Decision all the evidence Appellant presented in Appellant's Reply. The mere fact that the Board did not recite in its Final Decision all the evidence submitted by Appellant does not mean it did not consider it. See Perkin-Elmern Corp. v. Computervision Corp., 732 F.2d 888, 901 (Fed. Cir.), cert. denied, 469 U.S. 857 (1984). As case law indicates, there is simply no need for the Board to catalog all of the evidence before it. See Marques v. Department of Health and Human Services, 22 M.S.P.R. 129 (1984), aff'd mem. 776 F.2d 1062 (Fed. Cir. 1985), cert. denied, 476 U.S. 1141 (1986).

Significantly, the evidence presented by Appellant about the filling of more than one Manager III position<sup>3</sup> using the same vacancy announcement has no relevance whatsoever to the issue in this case. As the Final Decision made clear, the issue addressed by this Board was whether the County's decision on Appellant's application – i.e., to rate it “Qualified” – was arbitrary and capricious, illegal, or based on political affiliation or other nonmerit factors. Nothing presented in Appellant's Request changes the fact that Appellant failed to ensure that Appellant's application for the Manager III position was complete. As the record of evidence clearly indicates, Appellant submitted the wrong resume and cover letter for the Manager III position. Therefore, Appellant only received a rating of “Qualified” for the position Appellant sought.

### **ORDER**

On the basis of the above analysis, the Board denies Appellant's Request for Reconsideration.

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<sup>3</sup> The Board notes that the announcement clearly states that the “eligible List may be used to fill current and/or future vacancies in Germantown, Rockville, or Silver Spring.” See Appellant's Reply, Attachment 1.

## **CASE NO. 12-11**

### **DECISION ON COUNTY'S MOTION FOR RECONSIDERATION**

On February 24, 2012,<sup>1</sup> the County emailed the Merit System Protection Board (MSPB or Board) its Motion for Reconsideration (Motion), seeking to have the Board reconsider its Final Decision and Order dated February 16, 2012.<sup>2</sup> In its Final Decision, the Board granted the Appellant's appeal regarding Appellant's nonselection for the position of Work Force Leader IV, in the Department of Transportation (DOT). Appellant also filed a response (Appellant's Response) to the Motion on February 24, 2012, indicating that Appellant believed the Final Decision of the Board was appropriate. Appellant emailed additional comments to the Board<sup>3</sup> on that same day.

### **THE PARTIES' ARGUMENTS**

The County argues in its Motion that the Board erroneously found that there are two policies with regard to the rating of applications – one for employment applications and another for promotional applications. According to the County, it has only one rating policy covering both employment applications and promotional applications. This unwritten or verbal policy of the County is that raters are to read and review all of the content of the application/resume. In support of the validity of this unwritten/verbal policy, the County cites to the case of Mayer v. Montgomery County, Maryland, 143 Md. App. 261, 287, 290, 794 A.2d 704 (2002). In addition, the County has presented additional evidence, in the form of an email from the Staffing Specialist in charge of the recruitment action at issue,

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<sup>1</sup> As the County is aware, the Board's office is open Monday – Thursday, from 9:30 a.m. to 3:00 p.m. As the Board's office was closed on Friday, February 24, the date of receipt of the Motion is deemed to be Monday, February 27, 2012, the next business day for the Board.

Pursuant to the Administrative Procedures Act, the Board has ten (10) days following the receipt of a request for reconsideration to issue a decision. If the Board fails to act within ten days from receipt of the request, the request is deemed denied. Montgomery County Code, Section 2A-10(f).

<sup>2</sup> The County's Motion also contained an email from the Staffing Specialist (Staffing Specialist's Statement) who oversaw the Work Force Leader IV recruitment process. Subsequently, on February 24, 2012, the County sent an additional email to the Board, containing as an attachment a memorandum from the Supervisor of the Staffing Specialist in the Office of Human Resources (OHR) (Supervisor's Statement). In addition to the memorandum, pages from the OHR website dealing with the Explanation of Rating Process, Resume Tips and Job Application Process FAQs were enclosed.

<sup>3</sup> In Appellant's additional comments, Appellant discussed what occurred on a previous occasion when Appellant was only rated "Qualified" and contacted the Staffing Specialist about Appellant's rating.

explaining the complaints the Staffing Specialist received from various employees after the Eligible List was certified. The Staffing Specialist explained that Employee C told the Staffing Specialist that Employee C had previously been rated “Well Qualified” for the same position using the same resume. Finally, in support of its Motion, the County has provided a memorandum from the Supervisor “clarifying” the selection process.

Appellant argues that the raters that reviewed the applications to develop the Eligible List were very experienced and there should have been no need for them to re-rate the applicants. Appellant asserts that this was merely a cover-up, as someone did not like the original certified “Well Qualified” list because it did not contain the name of the candidate that “they” wanted to choose. This serves to demonstrate that there is a “good old boy network” which needs to stop. Appellant also challenges the Staffing Specialist’s statement regarding the complaints the Staffing Specialist received. Appellant notes that, previously, when Appellant applied for an inspector’s job and was only rated “Qualified”, Appellant contacted the Staffing Specialist to explain that Appellant had not changed Appellant’s resume from previous applications, yet the Staffing Specialist still failed to put Appellant on the “Well Qualified” list.

### **FINDINGS OF FACT**

Appellant, a Work Force Leader II, Grade 18 in DOT, submitted Appellant’s application for the Work Force Leader IV position on October 23, 2011. Appellant’s Appeal; County’s Response at 1. OHR received seventeen applications for this position. County’s Response at 1. According to the County, OHR reviewed the applications and determined that only thirteen of the applicants, including Appellant, met the minimum qualifications for the position. Id. at 1-2.

Those applications which met the minimum qualifications for the Work Force Leader IV position were referred to two subject matter experts, chosen by DOT, to rate the applications using the five preferred criteria listed in the job vacancy announcement. County’s Response at 2. A total of six applicants, including Appellant, were rated as “Well Qualified.” Id.; Appellant’s Appeal.

According to Appellant, two weeks later, four additional candidates were added to the Well Qualified list. Appellant’s Appeal. According to the County, when the thirteen applicants were notified of the rating categories into which they had been placed, the Staffing Specialist received complaints. County’s Response at 2. The County alleged that the Staffing Specialist contacted the two subject matter experts and discovered that they had rated the applications solely on the preferred criteria of the Job Vacancy Announcement and had not considered the entire contents of an applicant’s resume. Id. The County further alleged that it is OHR’s policy regarding the rating of applications<sup>4</sup> that the entire contents of

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<sup>4</sup> In its Motion for Reconsideration, the County states that it has a unified policy regarding the manner in which both employment and promotional applications are to be issued, and the Board erred in finding there were two policies – one for employment applications and another for promotional applications. The Board would note with regard to

an applicant's resume, and not just the portion of the resume addressing the preferred criteria identified in the announcement, be reviewed. Id. Because of this undocumented policy, the Staffing Specialist contacted the two subject matter experts to have them re-review the applicants in the "Qualified" rating category. Id. Based on this re-review, four additional candidates were added to the "Well Qualified" rating category, to include the Selectee. Id. & Attachs. 2a & 2b.

### APPLICABLE LAW AND REGULATIONS

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-5, Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article**, which states in applicable part,

- (b) **Merit system principles.** The merit system established by this chapter encompasses the following principles:
  - (2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment; . . .

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

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

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010 and July 12, 2011),**

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this issue that in the County's original response to the appeal, it specifically stated: "Because OHR's policy regarding the rating of promotional applications calls for the consideration of the entire contents of an applicant's resume (and not just the portion of the resume addressing the "preferred criteria" in the Announcement), the Staffing Specialist asked the subject matter experts to re-review the applicants in the "Qualified" status and to properly consider the entire application and resume and not just the preferred criteria section." County's Response at 2. It was because the Board accepted this assertion by the County that it found there were two distinct rating policies.

**Section 6, *Recruitment and Application Rating Procedures***, which states in applicable part:

**6-5. Competitive rating process.**

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

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

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

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

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

**35-8. Notification, response and submission of record in appeal.**

- (a) The MSPB must promptly notify the CAO, County Attorney, OHR Director, and department director in writing that a County merit system employee filed an appeal and provide the County Attorney and OHR Director with a copy of the appeal.
- (d) The OHR Director and County Attorney must respond to an appeal filed by a County merit system employee within 15 working days and forward a copy of the action or decision appealed and all relevant reports, papers, and documents to the MSPB. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.

**35-10. Appellant's right to review; right to hearing.**

- (a) (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.
- (2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.

### **ISSUE**

Has the County shown good cause as to why the Board should reconsider its Final Decision and Order in this case?

### **ANALYSIS AND CONCLUSIONS**

#### **The Board Concludes That The County Has Failed To Show Good Cause As To Why The Board Should Reconsider Its Final Decision.**

- A. In Support Of A Request For Reconsideration, The Board Will Only Consider New And Material Evidence That Was Not Available When The Record Closed.

The Board is charged under the Personnel Regulations with making a decision based on the written record before it. The Board did that in this case. Now, somewhat belatedly, the County seeks to supplement the record. The Board has not had the occasion before to consider the issue of whether it should accept additional evidence at the reconsideration stage that was not presented to it during the processing of the case up until the issuance of the Final Decision. The Board notes that the federal MSPB will grant a petition for review of an administrative judge's decision when "new and material evidence is available that, despite due diligence, was not available when the record closed." 5 C.F.R. § 1201.115(d)(1). Under the Federal Rules of Civil Procedure, Rule 60(b), a court may grant relief from a "final judgment, order, or proceeding", when a party establishes, *inter alia*, that there exists "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." See Avansino v. USPS, 3 M.S.P.R. 211, 214 (1980). In interpreting Rule 60(b), the courts have required the party offering the new evidence to provide a reasonable explanation as to why the additional material could not have been supplied earlier. *Id.* (citing to United Medical Laboratories, Inc. v. Colombia Broadcasting System, Inc., 258 F. Supp. 735, 747 (D. Or. 1966), *aff'd*, 404 F.2d 706 (9<sup>th</sup> Cir. 1968), *cert. denied*, 394 U.S. 921 (1969)).

There is a sound policy rationale for permitting the introduction of new evidence only at the reconsideration stage. The Fourth Circuit in Springer v. Fairfax County School Board, 134 F.3d 659, 667 (1998), reviewed the Individuals with Disabilities Education Act, which permitted the district court to hear additional evidence not put before the administrative

agency during its processing of the matter. The Fourth Circuit held that such evidence should be limited to that which could not have been presented before the administrative agency. The Fourth Circuit explained its rationale for this rule thusly: “[A] lax interpretation of ‘additional evidence’ would reduce the proceedings before the state agency to a mere dress rehearsal . . . .” Id. (quoting Roland M. v. Concord Sch. Comm., 910 F.2d 983, 997 (1<sup>st</sup> Cir. 1990)). We find the Fourth Circuit’s rationale persuasive. We therefore decline to allow the County to conduct a dress rehearsal before the Board and when that fails, plug the holes in its case by relitigating the case at the reconsideration stage.

Accordingly, we will only consider evidence at the reconsideration stage which could not have been presented to the Board during the proceedings leading up to the issuance of a Final Decision. To constitute new and material evidence, the information contained in a document submitted during the reconsideration stage, not just the document itself, must have been unavailable despite due diligence when the record closed. Conway v. USPS, 93 M.S.P.R. 6, 14 n.6 (2002); Salaz v. OPM, 91 M.S.P.R. 300, 302 (2002). Moreover, to be considered material evidence, the evidence provided must be of sufficient weight to warrant a finding different from the Board’s initial decision. Russo v. VA, 3 M.S.P.R. 345, 349 (1980); Fealhaber v. OPM, 93 M.S.P.R. 143, 146 (2002).

B. The County Has Failed To Provide Any New Evidence To Support Its Position.

We now will examine the additional evidence proffered by the County in its Motion to see if it meets the standard for new and material evidence. The County offered an email from the Staffing Specialist who was in charge of the recruitment process for the Work Leader IV position. According to the Staffing Specialist’s email, after the Eligible List was certified, the Staffing Specialist received numerous phone calls from employees who did not make the “Well Qualified” list. Staffing Specialist’s Statement. Because of the complaints, the Staffing Specialist contacted the raters to clarify the process they used to rate the applicants’ submissions. Id. After finding out that they had only reviewed the “preferred criteria” section of each resume, the Staffing Specialist asked the raters to re-review the resumes of all of the applicants on the “Qualified” list. Id. Based on the re-review, four additional candidates were added to the “Well Qualified” list. Id. The Board finds that none of the information in the Staffing Specialist’s email constitutes new and material evidence, as this information was available to the County at the time it submitted its response to the appeal.

The County also submitted a memorandum from the Supervisor “clarifying” the selection process for the Work Leader IV position. The Supervisor explained that the County maintains a consistent competitive process with all recruitments, requiring that all documentation provided by an applicant is to be reviewed to determine the applicant’s overall rating. Supervisor’s Statement. In support of this memorandum, the Supervisor submitted pages from the OHR website dealing with the Explanation of Rating Process, Resume Tips and Job Application Process FAQs. Id. The Board finds that none of the information in the Supervisor’s memorandum constitutes new and material evidence, as this information (including the OHR website pages) was available to the County at the time it

submitted its response to the appeal.

C. Assuming, Arguendo, The County Had Submitted New Evidence, Its Evidence Does Not Alter The Determination Of The Board That There Was A Flaw In The Rating Process.

Despite the County's assertion that there is a consistent rating process, it is clear from the actions initially taken by the two subject matter experts that they did not understand the County's unwritten policy<sup>5</sup> of reviewing the entire contents of an applicant's submission. Moreover, nowhere is the policy specifically stated.<sup>6</sup> The County argues that the Court of Special Appeals in Mayer v. Montgomery County, Maryland, 143 Md. App. 261, 287, 290, 794 A.2d 704 (2002), dealt with a situation involving an unofficial policy of OHR. Motion at 1-2. According to the County, the Court had no problem with the County's making a decision regarding the scope of allowable discovery on the basis of the unwritten policy. Id. at 2. The County argues that a practical policy does not have to be officially stated in order to be effective. The Board has reviewed Mayer and finds it has no bearing on the issue in this case.

The Personnel Regulations make clear that OHR must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate. The regulations also state that the OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list. The Board finds that OHR failed to do so. The merit system law requires the "full and open consideration of qualified applicants." Montgomery County Code, Section 33-5(b)(2). Therefore, the selection process must be open and known to everyone involved from the beginning and throughout the process. In the instant case, this did not occur. By definition, OHR's "unwritten" policy failed to provide proper notice of the selection process. Accordingly, the Board reaffirms its determination that there was a flaw in the rating process for the Work Force Leader IV position when the County re-reviewed the "Qualified" applicants based on its "unwritten policy."

**The Board's Policy Regarding Evidence To Support The County's Position.**

The County has asked for the Board to provide clarification of its policy with respect

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<sup>5</sup> The County concedes this "policy" is unwritten or verbal, although according to the County, it is explained in the writings that are posted on the Office of Human Resources' website. Motion at 1. The Board has reviewed these writings and finds they do not support the County's position regarding its policy. Accordingly, the Board finds no reason to disturb its initial finding that no defect occurred in the original rating of the applications for the Work Leader IV position.

<sup>6</sup> Similarly, nowhere is the OHR "policy" on re-reviewing applications based on the receipt of complaints from the applicants documented for all to see.



to providing affidavits. The County alleges that, in recent years, the Board has relied on the explanations and representations made by the County in its responses to nonselection appeals. The County cites to the Board's decision in MSPB Case No. 12-02 for this proposition. In MSPB Case No. 12-02, the County notes that the Board relied on the County's description of its change from a highly customized PeopleClick software, designed for recruitment, to Oracle, which did not have as many "bells and whistles". In that case, while it is true the Board accepted the County's description of the change, it was because the appellant did not contest the County's description, but in fact complained about the fact that the Oracle system was not as "user friendly" as the PeopleClick system. See Final Decision at 2.

The Board also notes that the County has been on notice since the Board's decision in 2008 that statements made by a representative in a pleading are not considered evidence by the Board. See MSPB Case No. 08-13. The County states that the Board's rules do not even mention affidavits. That is true. However, the Board notes that the County has often submitted affidavits to the Board to support its position in cases not involving a hearing. See, e.g., MSPB Case Nos. 11-27; 11-28; 11-29; 11-30; 11-31; 11-32; 11-33; 11-34; 11-35; and 11-36 (in each case, the County submitted an affidavit from the OHR Director and an affidavit from the OHR Division Manager) to support the assertions made by the County's representative in its pleadings.

As the County is well aware, the Board's general practice is to decide a nonselection case based on the written record before it, so long as there do not exist any disputed material facts which would require a hearing. In the instant case, both the County and the Appellant agreed that the original "Well Qualified" list contained only six names. The County then alleged that it discovered a "defect" in the rating process after it had initially certified the "Well Qualified" list. The Appellant asserted there was no defect in the rating process; this was merely an excuse by the County to add the Selectee's name to the "Well Qualified" list. Having alleged there was a defect, it was incumbent upon the County to enter into the record evidence to prove the defect. Clearly, there were a number of ways for the County to do so. The County could have submitted documents to support its assertion of a defect. However, the Board would note that, often, documents require some explanation. Thus, the County might need to submit an affidavit to support its explanation of a document if it is not self-explanatory. Documents submitted that are unauthenticated and unexplained may be deemed by the Board to lack probative value. See, e.g., Atkinson v. Dep't of the Air Force, 18 M.S.P.R. 691, 693 (1984). Ultimately, it is the responsibility of the County to determine what evidence it should submit to the Board to support its position.

### **ORDER**

Based on the above, the Board denies the County's Motion for Reconsideration.

# **MOTIONS**

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-7(b), 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 five (5) calendar days to respond. 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 FY12, the Board issued the following decision on various motions filed during the course of an appeal proceeding.

# **MOTION TO DISMISS CHARGES**

## **CASE NO. 12-06**

### **DECISION ON THE APPELLANT'S MOTION TO DISMISS CHARGES AND THE COUNTY'S MOTION TO STRIKE *EX PARTE* COMMUNICATIONS**

On October 24, 2011, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging Appellant's three-day suspension. Subsequently, the Board sent out an acknowledgement letter, notifying the parties of the due date for their Prehearing Submissions.<sup>1</sup> On November 29, 2011, the County filed its Prehearing Submission in this case. The County was notified by the Board's Executive Director that its Prehearing Submission was incomplete.<sup>2</sup> The County was given until December 1, 2011 to remedy its submission.

On December 1, 2011, the County filed an Amended Prehearing Submission with the Board and mailed a copy to Appellant. On December 3, 2011, Appellant emailed the Board (Appellant's Email 1), noting that the County had made substantial changes to its Prehearing Submission which were above and beyond the changes requested by the Board. Appellant objected to this Amended Submission, noting that the County had previously obtained a two-week extension for filing its Prehearing Submission and did not show "good cause" as to why it failed to adhere to established appeal procedures. *Id.* Appellant also alleged that this conduct by the County demonstrated a lack of prosecution of the appeal. *Id.* Appellant failed to copy the County on Appellant's email to the Board.<sup>3</sup>

Appellant subsequently emailed the Board again on December 3, 2011 (Appellant's Email 2), indicating Appellant wished to formally make a motion to dismiss the charges against Appellant based on the County's failure to submit a Prehearing Submission in a proper form on November 29, 2011, as required by the Board. Appellant asserted that this constituted a "failure to prosecute the appeal or comply with established appeal procedures", and asked for summary judgment of Appellant's appeal in Appellant's favor. *Id.* In support of Appellant's motion, Appellant cited to two sections of the Montgomery County Personnel

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<sup>1</sup> The acknowledgement letter specifically informed the parties that they needed to file an original and three copies of their Prehearing Submission with the Board and serve a copy on the opposing party.

<sup>2</sup> The County only filed an original copy of its Prehearing Submission. In addition, the County was required to label its exhibits and place them in a three-ring binder, which it had failed to do.

<sup>3</sup> The Board's Executive Director forwarded a copy of Appellant's email to the County's counsel and copied Appellant on the forwarding email.

Regulations (MCPR), Section 35-7(b), and Section 2A-8(d).<sup>4</sup> Id. Appellant again failed to copy the County on Appellant's email to the Board.<sup>5</sup>

The County's counsel emailed the Board, asking whether the Board considered Appellant's email requesting a dismissal of the charges against Appellant a pleading in this matter. The Board's Executive Director responded, indicating that the Board intended to treat the email as a pleading.

On December 12, 2011, the County filed an Opposition to Motion to Dismiss (County's Opposition), asserting that it had taken affirmative steps to prosecute this matter and corrected its submission when there was an error. The County also filed a Motion to Strike *Ex Parte* Communication, seeking to have the Board strike Appellant's first email sent on December 3, 2011 to the Board. In support of its Motion to Strike, the County noted that Appellant had failed to serve the County with the email as required by MCPR, Section 35-5, and was engaging in *ex parte* communications with the Board.

### **APPLICABLE LAW AND REGULATIONS**

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

- (a) Submissions.
  - (1) In any case in which the Montgomery County government, or a department, office or agency thereof is a party, it shall submit to the hearing authority no later than twenty (20) days prior to the date for the hearing the following information in regard to its case:
    - A. All supporting documents which are relied upon at the hearing, including investigative reports, or portions thereof. The hearing authority may in its discretion exclude from evidence any materials or documents not included in the pre-hearing submission.
    - B. List of names and addresses of all its prospective witnesses.
    - C. List of names and addresses of any persons requested to be summoned by the hearing authority and any documents or records requested to be subpoenaed for the hearing.

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<sup>4</sup> This section which Appellant cited to is actually part of the Administrative Procedures Act, which is found at Appendix D of the MCPR.

<sup>5</sup> The Board's Executive Director forwarded a copy of Appellant's email to the County's counsel and copied Appellant on the forwarding email.

- D. Estimate of time to present case. In addition, the hearing authority, in its discretion may require any party to submit no later than ten (10) days prior to the date set for the hearing any part of or all of the information required by subsection (a)(1) above.

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

**35-5. Service requirements for a party to an appeal.**

- (a) Each party to an appeal must send to every other party a copy of every paper filed with the MSPB.
- (b) A party to an appeal must indicate on every paper filed with the MSPB that a copy was sent to the other party to the appeal.

**35-11. Prehearing procedure in appeal; motions; request for reconsideration of preliminary matters; conduct of hearings; continuances.**

(a) *Prehearing procedure in appeal.*

- (1) In all cases where the MSPB conducts an evidentiary hearing, the County must submit the following information to the MSPB or hearing officer and to any other party at least 20 calendar days before the prehearing conference:
  - (A) complete list of charges;
  - (B) copy of all written reports, documents, photographs, charts, hearing;
  - (C) names and addresses of all prospective witnesses and a summary of their anticipated testimony;
  - (D) names and addresses of witnesses, documents, and records requiring service of a subpoena; and,
  - (E) estimated time required for presentation of the case.
- (2) The Appellant must submit the same information except for a complete list of charges to the MSPB or hearing officer and the County at least 10 calendar days before the prehearing conference.

## ANALYSIS AND CONCLUSIONS

### Pursuant To Statute, The County Has The Right To Amend Its Prehearing Submission.

Appellant contacted the Board after receiving Appellant's copy of the County's Amended Prehearing Submission because Appellant noted there had been substantial changes made beyond what the County had been told to correct in its original Prehearing Submission. Appellant's Email 1. Appellant believed there was no good cause for the County's submission of an incomplete Prehearing Submission, given the fact that it had been previously granted a two-week extension to file it. Id. Appellant indicated Appellant was concerned about this, as it appeared to Appellant that there was an "unlevel playing field" given the fact that, if Appellant had missed any deadlines, it would have voided Appellant's opportunity to make Appellant's case. Id.

Subsequently, Appellant again contacted the Board to formally make a motion to dismiss the charges against Appellant, due to the fact that the County had failed to submit in proper form a Prehearing Submission by November 29, 2011. Appellant's Email 2. Appellant noted that the County has the burden of going forward with the evidence, and the County's failure to submit a Prehearing Submission in proper form was a "failure to prosecute the appeal or comply with appeal procedures." Id. Therefore, Appellant requested a summary judgment of the appeal in Appellant's favor. Id.

The County filed an Opposition to Motion to Dismiss, arguing that it had not failed to prosecute the appeal as it filed its Prehearing Submission on November 29, 2011, the deadline set by the Board upon giving the County a two-week extension. County's Opposition at 1-2. The County also noted that, when notified of the error in its submission, it took affirmative steps to correct the matter. Id. at 2. Finally, the County argued that Appellant's summary judgment request failed to make a statement of undisputed facts so as to entitle Appellant to judgment as a matter of law. Id. at 3.

The Administrative Procedures Act governs appeals before the Board for which hearings are required. Montgomery County Code, Section 2A-2(c). Pursuant to the Administrative Procedures Act, the County must submit its Prehearing Submission no later than twenty (20) days prior to the date set for the hearing. Montgomery County Code, Section 2A-7(a)(1). As no date had been set for the hearing in this case at the time the County submitted its Prehearing Submission and then its Amended Prehearing Submission, the County was in full compliance with the Administrative Procedures Act. Therefore, the Board is denying Appellant's motion for summary judgment and/or motion to dismiss the charges against Appellant.<sup>6</sup>

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<sup>6</sup> Appellant was informed that the Board was denying Appellant's motion at the Prehearing Conference held on January 30, 2012.

**While Appellant Did Engage In *Ex Parte* Communications With The Board's Executive Director, No Harm Occurred, As The Board's Executive Director Forwarded These Communications To The County.**

As previously noted, Appellant sent two email communications to the Board and failed to copy the County on the emails. The Board's Executive Director forwarded both emails to the County's counsel, and noted in the forwarding emails that Appellant had failed to copy the County. The County moved to strike the first *ex parte* communication from the record and requested the Board order Appellant to comply with the requirement in the Personnel Regulations that Appellant serve the County with a copy of every paper Appellant files with the Board.

At the Prehearing Conference on this matter, the Board indicated that it would deny the County's motion. The Board explained that the County had received the *ex parte* communication from the Board's Executive Director and was able to respond to them. Thus, there was no harm to the County.

In addition, because Appellant was *pro se*, the Board was going to give Appellant some leeway. See McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356 (Fed. Cir. 2007) (where a party appears *pro se* before a trial court, the court may grant the *pro se* litigant leeway on procedural matters). The Board did instruct Appellant at the Prehearing Conference to ensure henceforth that Appellant serves the County's counsel a copy of every paper Appellant files with the Board. The Board counseled Appellant that failure to do so could result in the Board striking the filing as a sanction for failure to comply with the Board's procedures.

**ORDER**

Accordingly, the Board denies Appellant's motion to dismiss the charges against Appellant and/or motion for summary judgment. The Board also denies the County's motion to strike *ex parte* communication.

## **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 Section 34-9(a)(3) of the grievance procedure (as amended February 15, 2005, October 21, 2008, and July 12, 2011), "[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, Section 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 FY12, the Board issued the following Show Cause Order Decision.



# **SHOW CAUSE ORDER DECISION**

## **CASE NO. 12-07**

### **SHOW CAUSE ORDER DECISION**

On October 25, 2011, the Montgomery County Merit System Protection Board (Board or MSPB) received an appeal from Appellant concerning the failure of the Chief Administrative Officer (CAO) to issue a written decision on Appellant's grievance within forty-five (45) days of the Step 2 meeting. The County responded to the appeal, requesting that the Board not exercise jurisdiction over the appeal but rather afford the CAO the opportunity to issue a written response.

The Board agreed to the County's request and remanded the matter to the CAO for a decision on the merits of Appellant's grievance. The Board set a deadline of January 17, 2012 for the CAO to issue a decision. MSPB Decision and Order at 4. The Board informed Appellant that if Appellant was not satisfied with the CAO's response, Appellant had ten (10) working days to notify the Board and it would continue to process Appellant's appeal.<sup>1</sup> *Id.* at 5.

On January 17, 2012, Ms. A, in the Office of Human Resources (OHR), emailed Appellant a copy of the CAO's Step 2 Grievance Response (CAO Decision) and also indicated Appellant would receive the original in the interoffice mail. *See* Email from Ms. A to Appellant, subject: CAO Decision.<sup>2</sup> The CAO denied Appellant's grievance. CAO Decision at 2. The CAO also informed Appellant that if Appellant was not satisfied with the response, Appellant had ten working days to contact the Board and the Board would continue the processing of Appellant's appeal. *Id.*

On February 15, 2012,<sup>3</sup> the Board received Appellant's appeal of the CAO Decision. In the appeal, Appellant indicated that Appellant had received the CAO Decision on January 23, 2012. *See* Appeal Form. Having received the CAO Decision on January 23, 2012, Appellant had until February 6, 2012 to file Appellant's appeal with the Board.

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<sup>1</sup> This time limit was consistent with the Personnel Regulations, which provide that an employee has ten (10) working days to file an appeal with the MSPB in writing after receiving a written final decision on a grievance. Montgomery County Personnel Regulations (MCPR), Section 35-3(a)(3).

<sup>2</sup> The Board's Executive Director was copied on the email.

<sup>3</sup> Appellant emailed Appellant's appeal at 10:58 p.m. on February 14, 2012. At that time, the Board's office was closed. Accordingly, the Board deems the appeal received as of February 15, 2012.

Before making a determination regarding the timeliness of the appeal,<sup>4</sup> the Board ordered Appellant to provide a statement of such good cause as exists for failing to meet the time limits set by the Board. Appellant failed to respond. Accordingly, the Board finds no good cause has been shown by the Appellant for failing to meet the time limits as specified by the Board when it remanded this matter to the CAO for a decision.

**ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal, based on untimeliness.

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<sup>4</sup> MCPR Section 35-7 provides that the MSPB may dismiss an appeal if the appellant did not submit it within the time limits specified by the regulation.

# **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.

No cases involving a request for attorney fees were decided during fiscal year 2012.

# **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, Section 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, and July 12, 2011) 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 FY12, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) Customer Service Representative I, Grade 13;
- 2) Customer Service Representative II, Grade 16;
- 3) Master Plumber, Grade 21;
- 4) Senior Latent Print Examiner, Grade 22; and
- 5) Resident Supervisor III, Grade 22.