

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

[REDACTED]

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 17-21

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FINAL DECISION AND ORDER

On March 20, 2017, [REDACTED] (Appellant) filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a March 16, 2017, decision by the County Chief Administrative Officer (CAO) denying his grievance. With his Appeal, Appellant filed a copy of the CAO's response, a December 2016 email exchange, an undated statement apparently written by Appellant, and a copy of Appellant's grievance of December 20, 2016. We will refer to those attachments as Appellant Exhibits (AX) 1 through 4. The County filed a response on May 4, 2017, (County Response) with twelve exhibits designated as A through C and C-1 through C-9. (County Exhibits or CX). Appellant filed a response on May 17, 2017, (Appellant Response), with 18 pages of attachments consisting of a 12-page internet article entitled "8 Ways Working Night Shifts is Putting Your Health at Risk," a three-page article from the Journal of Headache & Pain Management entitled "Shift Work and Neurological Disease," and a three-page email from the County Live Well wellness program with the subject line "Wellness Wednesday" and the addressing the topic "Sleep Awareness Week." We will refer to those three attachments as Appellant Exhibits 5 through 7.

For the reasons stated herein, the Board denies Appellant's appeal and upholds the CAO's decision.

FINDINGS OF FACT

Appellant is one of two Inspection and Enforcement Field Supervisors with the Animal Services Division of the Montgomery County Police Department (MCPD). Appeal, p. 1, AX 2; County Response, p. 1; CX C-1, ¶ 2. On December 20, 2016, Appellant filed a grievance alleging that, based on his seniority, a new rotating scheduling system that applies to both Field Supervisors should not be applied to him. AX 4; CX A.¹

Appellant's supervisor, ██████████, the Director of the Animal Services Division, provided an affidavit detailing the process and considerations that went into development of the rotating schedule at issue. CX C-1. As a result of numerous complaints from line staff that supervisors were not sufficiently responsive or overseeing operations, CXs C-1, ¶¶ 3-4, C-5, C-7, a primary goal of the new schedule was to address the continuing shortcomings in evening and night shift coverage. CX C-1, ¶ 12. As part of his effort to design an appropriate schedule, ██████████ solicited the input of and engaged in discussions with Appellant and the other supervisor over how best to structure the schedule. CX C-1, ¶¶ 5-10. After deciding that he was unable to reach a consensus with both Field Supervisors, ██████████ established a 9-hour rotating schedule, with weekday coverage from 6:00 a.m. to 10:00 p.m. ██████████ determined that the schedule best addressed concerns about night shift coverage and call responsiveness, and sought to be equitable to both Field Supervisors by alternating night shift coverage. CX C-1, ¶¶ 11-13. ██████████ gave Appellant first choice of the rotating schedule, which provides both supervisors with a 3-day weekend every pay period. As Appellant's preference was for a day shift he was placed on the initial day shift and the other Field Supervisor was placed on the night shift. CX C-1, ¶ 13.

Appellant acknowledges the need for an evening supervisor. Appellant Response, p. 1.² Appellant asserts that as the more senior Field Supervisor he should have the option to choose either the day or night shift. Appeal, p. 2. Permanently assigning Appellant to the day shift would necessarily mean that the only other Field Supervisor would permanently be assigned to the night shift.

¹ Appellant's grievance, AX 4, stated:

Grievance Statement- I am grieving the new schedule that is assigned to me beginning January 8, 2017. It will require me to rotated [*sic*] different days and hours. I have provided a schedule that covers the evening hours that the Director wants and also half of the weekends. If the Director insists on a compressed schedule as a senior supervisor I should be granted first choice. See enclosed emails.

Relief Requested - To stay on my current shift 0600-1600 rotating between Sunday thru Wednesday or Wednesday thru Saturday or if the compresses [*sic*] schedule is implemented take the 0600-1500 Monday thru Friday shift with alternate Fridays off.

² Appellant's Response, p.1, states: "I understand the need for an evening supervisor. I don't see the advantage of rotating shifts for the Animal Control Supervisors."

APPLICABLE CODE PROVISIONS AND REGULATIONS

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

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

- (c) *Appeals by applicants.* . . . Appeals alleging that the decisions of the chief administrative officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the merit system protection board. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides in relevant part:

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

Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, and June 30, 2015), Section 15, Work Schedules, Attendance, Hours of Work:

§ 15-2. Work schedules.

- (c) *Authority to change work schedule.* A supervisor may change the work schedule of an employee who reports to the supervisor. However, an employee must request a compressed work schedule, flextime, or job sharing arrangement under Section 15-4(b) or (c), as appropriate, and only the department director may approve an agreement to change to one of these types of alternate work schedules.

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

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

- (a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy;
- (b) improper or unfair act by a supervisor or other employee, which may include coercion, restraint, retaliation, harassment, or intimidation;
- (c) improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, RIF, promotional action that was arbitrary and capricious or in violation of established procedures, or denial of an opportunity for training . . .

§ 34-9. Grievance procedure.

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

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

- (a) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

Montgomery County Police Department Attendance Policy, FC No. 315 (November 24, 2014), provides, in relevant part:

§I.A.

First-line supervisors and unit/district commanders will be responsible for scheduling, reviewing, and approving employee attendance. . . .

ISSUE

Did the County properly establish and implement the work schedule for Animal Services Division Inspection and Enforcement Field Supervisors?

ANALYSIS AND CONCLUSIONS

Appellant is grieving the implementation of a new rotating shift for Animal Services Division Inspection and Enforcement Field Supervisors. Appellant does not dispute his supervisor's authority to decide when Field Supervisors must be on the job. Appeal, p. 2 ("I agree management has a right to determine what hours and days of the week are to be covered."). The authority to establish employee schedules is vested in supervisors under the County's personnel regulations and the policies of the Police Department. MCPR § 15-2(c) ("A supervisor may change the work schedule of an employee who reports to the supervisor."); MCPD Attendance Policy, FC 315, § I.A ("First-line supervisors and unit/district commanders will be responsible for scheduling, reviewing, and approving employee attendance. . .").

Appellant specifically acknowledges the necessity for an evening supervisor. Appellant Response, p. 1. Nevertheless, Appellant believes that because of his seniority he should not have to serve as the evening supervisor. Appeal, p. 2; AX 4. Appellant asserts that while there has been a past practice in the agency of code enforcement officers and supervisors having their workdays subject to change, the hours of their shifts remained unchanged. Appeal, p. 1. According to Appellant, "Officers and employees would pick their shift by seniority." *Id.* However, Appellant has not provided any evidence of such practices being uniformly applied to supervisors, nor has he identified any regulation or policy that otherwise requires seniority be a factor in determining the work schedules of supervisors.

It appears that Appellant's impression concerning the role of seniority in shift assignments is based on a Memorandum of Agreement (MOA) between the County and the United Food & Commercial Workers, Local 1994, Municipal & County Government Employees Organization (MCGEO). CX C-3. However, the MOA expressly applies only to "shift assignments by bargaining unit members" in the Animal Services Division, and specifically lists only non-supervisory job classifications as covered. As a Field Supervisor, Appellant is not in the MCGEO bargaining unit. Thus, by its express terms, the MOA's seniority-based provisions do not apply to Appellant.³

Permanently assigning Appellant to the day shift would unavoidably mean that the only other Field Supervisor would always be assigned to the night shift. There is nothing improper or inconsistent with any regulation or policy with the Director of the Animal Services Division considering the fairness of having both Field Supervisors alternating on the evening shift.

Appellant bears the burden of proof to show by a preponderance of the evidence that the schedule change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2). The County provided a detailed justification for its action, and that justification does not appear to be arbitrary, capricious, or discriminatory. As Appellant has not demonstrated how the County's implementation of the new rotating schedule for Animal Services Division Inspection and Enforcement Field Supervisors violates any applicable provision of law, regulation, or policy, the grievance appeal must be denied.

³ We note that even for bargaining unit employees, seniority may be overridden by operational need. CX C-3, ¶ 13.

ORDER

Based on the foregoing, Appellant's grievance appeal is hereby **DENIED**.

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

For the Board
July 25, 2017



Charlotte Crutchfield
Chair