

**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. 17-28

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FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on an appeal by [REDACTED] (Appellant), challenging the placement and retention of a sick leave restriction notice in his Department of Correction and Rehabilitation (DOCR) personnel file. Appellant filed his appeal on June 28, 2017. (Appeal).¹ The County filed a motion seeking to dismiss the appeal on July 31, 2017. (County’s Motion to Dismiss). On August 10, 2017, Appellant filed a response captioned Motion to Not Dismiss. (Appellant’s Response). The Board has reviewed and considered the submissions of the parties.

FINDINGS OF FACT

Appellant is employed by the Montgomery County Department of Correction and Rehabilitation as a Correctional Officer. Appellant alleges that the County DOCR improperly: (a) maintained a sick leave restriction notice in his DOCR personnel file; and, (b) used the sick leave restriction notice for purposes of determining job assignments and promotions.

Appellant was issued a sick leave restriction notice on August 18, 2015. Appeal, p. 3; Appellant Response, p. 2. As of April 25, 2017, the sick leave restriction notice was still in Appellant’s file. Appeal, p. 7; Appellant Response, p. 2. Appellant claims that the retention of the sick leave restriction notice in his DOCR file was improper because “the notice has been and is

¹ Appellant’s Appeal and supporting exhibits total some 173 pages.

continued to be used as a tool to deny promotions, and special assignments to employees.” Appeal, p. 1. In Appellant’s view, retention of the sick leave restriction notice in his file after the restriction itself had expired was disciplinary in nature. Appellant Response, pp. 2-3.

POSITIONS OF THE PARTIES

Appellant:

- The sick leave restriction notice “has been and is continued to be used as a tool to deny promotions, and special assignments to employees.”
- Such use by DOCR is disciplinary and thus may be appealed directly to the MSPB.

County:

- Appellant may not file a direct appeal to the MSPB as his complaint is a grievance, and there is no right to a direct appeal of a grievance.
- Appellant has not filed a grievance, nor has he received an adverse final decision from the CAO which may be appealed to the MSPB.
- The appeal is untimely since it involves a sick leave notice issued in 2015, and Appellant acknowledges that he knew it was in his DOCR operational file over two months before he filed his appeal.

APPLICABLE LAW AND REGULATION

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

Section 404. Duties of the Merit System Protection Board.

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board
...

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

- Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.
- Grievances.* A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to

a term or condition of employment. The determination of the board as to what constitutes a term or condition of employment shall be final. Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process. A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the event of such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal. The county executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. In providing these procedures, the county executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution after a fact-finding inquiry authorized by the board. Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended 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:

1-7. CAO: The Chief Administrative Officer or designee.

1-17. Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;
- (d) within-grade salary reduction;
- (e) suspension;
- (f) demotion; or
- (g) dismissal.

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 March 5, 2002, July 13, 2004, January 18, 2005, December 11, 2007, October 21, 2008, June 30, 2015, and February 14, 2017), Section 17, *Sick Leave*, states, in part:

17-1. Definitions.

(h) ***Sick leave restriction:*** A requirement that an employee provide a doctor's certificate to justify the employee's use of sick leave if a supervisor has reason to suspect the employee of misuse or abuse of sick leave.

17-9. Sick leave restriction.

(a) Before placing an employee on sick leave restriction, the supervisor must give the employee written notice and an opportunity to respond to the notice.

* * *

(c) An employee on sick leave restriction must provide medical certification from a licensed health care provider to support the use of sick leave, if the sick leave is not scheduled and approved in advance.

(d) The employee must give the medical certification to the employee's supervisor immediately after the employee returns from the use of unscheduled sick leave.

(e) If the employee fails to provide medical certification as required, the employee's supervisor may:

- (1) designate the absence as AWOL; and
- (2) take disciplinary action against the employee

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

34-2. Eligibility to file a grievance.

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

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 35. *Merit System Protection Board Appeals, Hearings, and Investigations*, which states in applicable part:

35-2. Right of appeal to MSPB.

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

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

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

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

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35-3. Appeal period.

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

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

ISSUE

Does the Board have jurisdiction over Appellant's grievance?

ANALYSIS AND CONCLUSIONS

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g.*, MSPB Case No. 10-09 (2009); MSPB Case No. 10-12 (2010); MSPB Case No. 10-16 (2010). *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Appeal Does Not Involve A Disciplinary Action

Appellant is alleging that DOCR is using sick leave restriction notices against employees when making promotional and job assignment decisions. Appellant alleges that the denial of a promotion or a job assignment is a disciplinary action. Appeal, p. 1. Appellant argues that a sick leave restriction is a disciplinary action since the notice is placed in an employee's DOCR operational file, and may be "viewed and used for disciplinary purposes." Appellant's Response, p. 2. Appellant concludes that he may thus appeal directly to the MSPB.

Appellant is incorrect as to what constitutes a disciplinary action, and does not allege that any of the disciplinary actions specified in MCPR § 1-17 have been taken against him. Denial of a promotion or a job assignment may be the basis for a grievance, but such actions simply do not fit under the MCPR § 1-17 definition of disciplinary action.

Accordingly, the Appeal must be dismissed because it contains no allegations of an adverse personnel action of a disciplinary nature (*i.e.*, demotion, suspension, termination, dismissal, or involuntary resignation) that would permit Appellant to file an appeal directly with the MSPB. MCPR § 35-2(a).

The Board Lacks Jurisdiction Over Direct Grievance Appeals

Appellant's complaint that the sick leave restriction notice was improperly maintained in his DOCR operational file may be a grievable matter, however he does not allege that he ever filed a grievance, let alone received a Step 2 decision from the Chief Administrative Officer.

To the extent that Appellant is seeking to file a direct Board appeal of a grievance, he is doing so without exhausting his administrative remedies. Such direct appeals are not within the Board's jurisdiction. The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 11-08 (2011). *See* MCPR § 35-2(b) ("An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO").²

Accordingly, for the foregoing reason, the Board concludes that it lacks jurisdiction over Appellant's appeal.

ORDER

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

² The Appeal is also untimely because it was filed over two months after he saw a copy of the sick leave notice in his file. *See* MCPR § 34-9; § 35-3.

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

For the Board
October 31, 2017



Charlotte Crutchfield
Chair