

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

IN THE MATTER OF

██████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 18-02

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SUPPLEMENTAL ORDER

On December 26, 2017, the Merit System Protection Board (MSPB or Board) issued a Final Decision and Order in the above-entitled matter. The Order provided, in part:

1. That the dismissal of Appellant from County employment be rescinded;
2. That Appellant be reinstated to County service and demoted to Liquor Store Clerk II, effective August 14, 2017, with back pay;
3. That Appellant's rate of pay be at the maximum of the applicable pay grade for a Liquor Store Clerk II, in accordance with MCPR § 10-5(d)(3). . . .

On January 2, 2018, following the issuance of the Final Decision and Order, Appellant's attorney raised questions concerning interpretation of the remedies ordered. The specific questions were:

Has ██████████ been reinstated to work back at his Clarksburg location? Also, can you clarify the Board's meaning/intention regarding ██████████ back pay? Is he entitled to back pay from when he was initially placed on Administrative Leave without pay on June 26, 2017 (County Exhibit #4), but that the rate of his backpay

transitions to Liquor Store Clerk II on August 14, 2017, or will his back pay be calculated beginning August 14, 2017?

Electronic mail from [REDACTED] to MSPB Executive Director, January 2, 2018.

The Board treated [REDACTED]'s request as a motion and requested that the County respond within five (5) calendar days. The County provided its response on January 5, 2018. Electronic mail from Associate County Attorney [REDACTED] to MSPB Executive Director, January 5, 2018. The Board has reviewed and considered the questions raised by Appellant.

The June 26, 2017, Statement of Charges referenced in [REDACTED]'s email removed Appellant from duty, stating: "Due to your behavior and the disruption your presence in the workforce would cause, you are also hereby immediately relieved from duty without pay under MCPR 23 -6(a)(1) and 23-6(a)(2) and 33-7(a)."

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR) § 23-6. Placing an employee on LWOP.

(a) *LWOP associated with a disciplinary action.* Under Section 33 of these Regulations, the department director may place an employee on LWOP:

- (1) during an investigation, as described in Section 33-3(f), that may lead to disciplinary action against the employee;
- (2) after disciplinary action is proposed against the employee; or
- (3) before and during the employee's trial for offenses related to the employee's County employment.

MCPR § 33-3. Types of disciplinary actions.

(f) *Suspension pending investigation of charges or trial.*

(1) *Purpose of suspension pending investigation of charges or trial.* A department director may place an employee in LWOP status for an indefinite period while the employee is:

- (A) being investigated by the County or a law enforcement agency for an offense that has a nexus with (is reasonably related to) County employment;
- or
- (B) waiting to be tried for an offense that is job-related or has a nexus with County employment.

(2) *Employee's return to work after suspension.*

- (A) The CAO must allow the employee to return to work unless the County dismisses or terminates the employee or the employee is convicted by a court.
- (B) The CAO must give the employee back pay and benefits, subject to subparagraph (C) below, except as provided in a separate disciplinary action imposed by the County.

- (C) The CAO's approval of back pay is subject to the following:
- (i) the employee must provide documentation of other earnings or income during the period of suspension and must obey all County regulations on secondary employment; and
 - (ii) back pay must equal the amount the employee would have earned during all or part of the period of suspension less the amount the employee earned in other employment during the period.

MCPR § 33-7. Immediate removal of an employee from duty.

- (a) An immediate or higher level supervisor may immediately relieve an employee from duty for serious misconduct or if the presence of the employee will cause or continue a disruption in the workplace.
- (b) The supervisor who took the action must submit a recommendation for appropriate disciplinary action to the department director by the end of the workday following the day the employee is relieved from duty.
- (c) A supervisor must ensure that an employee removed from duty is either on administrative leave or on another appropriate type of leave until the department director takes disciplinary action against the employee or allows the employee to return to work. An employee who is ill or otherwise medically unfit for duty during the period of time before a disciplinary action is taken may be required to use sick or annual leave or LWOP.

Montgomery County Code, § 33-14(c):

The board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

- (4) Order reinstatement with or without back pay, although the chief administrative officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility. . .

ANALYSIS

Has [REDACTED] been reinstated to work back at his Clarksburg location?

The Board's December 26, 2017, Order did not purport to require the County to assign Appellant to a particular position, job assignment, or duty location. This is consistent with Montgomery County Code, § 33-14(c)(4), which provides that the Board may "Order reinstatement with or without back pay, although the chief administrative officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility."

The Board has previously recognized that even in cases where the Board has completely rescinded discipline and reinstated the Appellant, the Code "unequivocally grants the County the

unilateral discretion to reinstate the Appellant to a position other than” the specific position from which the Appellant was dismissed. *See Supplemental Decision on Remedial Issues*, MSPB Case No. 01-08 (November 7, 2002). In this case, where Appellant’s dismissal has been rescinded and he has been reinstated to County service, but demoted to Liquor Store Clerk II, the limitations of § 33-14(c)(4) appear equally applicable. Moreover, the Board is unaware of any provision in the County personnel regulations which would entitle Appellant to be assigned to a specific work location upon reinstatement.

If upon his reinstatement and assignment Appellant believes that the County’s action is inconsistent with the Board’s order or otherwise improper he may seek enforcement of the Board’s order or file a grievance. The Board does not and cannot express any opinion as to the merits of any potential action the County or Appellant may take, or whether procedural or jurisdictional requirements have been satisfied.

Is he entitled to back pay from when he was initially placed on Administrative Leave without pay on June 26, 2017?

The Board advises the parties that Appellant is entitled to reimbursement for back pay and benefits for the period of Appellant’s suspension pending dismissal. *See* MCPR § 33-3(f); MSPB Case No. 05-07 (2005). Under the authority granted by Montgomery County Code, § 33-14(c)(4), the Board has the discretion to decide whether interim earnings should be deducted from back pay. *Supplemental Decision on Remedial Issues*, MSPB Case No. 01-08 (November 7, 2002).

Although the County argues that back pay should be offset by any compensation received from secondary employment, the record suggests that there are no outside interim earnings. Hearing Transcript, December 7, 2017 at p. 34. Nevertheless, Appellant shall cooperate in good faith with the County’s efforts to compute the correct amount of back pay due, and promptly provide all information that may be necessary to verify the absence or existence of any interim earnings. In the absence of any proof of outside interim earnings, no offset shall be required.

As the Board has rescinded the dismissal and reinstated Appellant, the County shall restore any benefits lost by Appellant, including leave benefits. To avoid double compensation, the amounts of any paid leave actually received by Appellant may be deducted from back pay.

[Will] the rate of his backpay transitions to Liquor Store Clerk II on August 14, 2017, or will his back pay be calculated beginning August 14, 2017?

Since the Board’s Order specifies that the disciplinary action (demotion) is effective August 14, 2017, Appellant’s back pay during the suspension pending prior to that date should be at Appellant’s rate of pay prior to August 14. The County concedes that Appellant’s compensation during that time should be at the rate associated with his status as a Liquor Store Assistant Manager. Back pay for the period after August 14, 2017, shall be as a Liquor Store Clerk II, at a rate in compliance with the Board’s Order.


ORDER

For the reasons discussed above, it is **ORDERED** that the Board's Final Decision and Order of December 26, 2017, be clarified as follows:

1. That the Board's Order that Appellant be reinstated to County service and demoted to Liquor Store Clerk II, effective August 14, 2017, does not require placement in a particular position or work location;
2. That Appellant's back pay for the period from June 26, 2017, to August 14, 2017, be calculated at the pay rate associated with his status as a Liquor Store Assistant Manager;
3. That Appellant's rate of pay effective August 14, 2017, be at the maximum of the applicable pay grade for a Liquor Store Clerk II, in accordance with MCPR § 10-5(d)(3), and that back pay for the period on and after that date be calculated accordingly;
4. That Appellant and the County shall cooperate in good faith with regard to the County's efforts to calculate the appropriate amount of back pay due, and Appellant shall promptly provide all information necessary to verify the absence or existence of any interim earnings;
5. That the County shall restore any benefits lost by Appellant, including leave benefits, provided that Appellant's back pay may be offset by any paid leave received; and
6. That within forty-five (45) days of this Order the County shall complete the actions ordered by the Board and provide written certification of full compliance to the Board.

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

For the Board
January 9, 2018


Angela Franco
Chair