

**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. 18-04

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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 the appeal of [REDACTED] (Appellant) challenging the decision of the Montgomery County Department of Transportation (DOT) to remove him from a temporary assignment as Acting Manager of the TRiPS Commuter Stores & Processing Center (Program Specialist II - Grade 21) and return him to his permanent position as Safety & Training Instructor (Grade 19). The County filed its response (County's Response) to the appeal on October 16, 2017. Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

FINDINGS OF FACT

On February 9, 2017, DOT issued a memorandum soliciting applicants for a temporary Acting Program Specialist II position as the Acting Manager of TRiPS. County Response, at p. 2,

County Exhibit (CX) 1.¹ The memorandum notified staff of an available temporary promotion, and stated that “[d]uration of the Acting assignment will be approximately two months but may extend longer.” Appellant was selected for the position and his temporary promotion became effective April 3, 2017. County Response, at p. 2; CX 2.

On May 19, 2017, Appellant’s wife, a bus operator with the Washington Metropolitan Area Transit Authority, engaged in a conversation with a temporary TRiPS store employee at the Silver Spring Transit Center. County Response, at p. 2; CX 3 & 4; Appeal, at p. 1. Appellant was present during that conversation. *Id.* The County asserts that Appellant’s wife spoke to the temporary employee in an “accusatory and possibly threatening manner.” CX 3. Appellant acknowledges that his wife did accuse the temporary employee of having an improper relationship with Appellant. CX 4, at p. 2 (“I do not know what lead to these accusatory questions made by my wife, but I can assure you that I do not have nor have I ever had a relationship of any kind with this employee other than work.”). *See* Chief Administrative Officer (CAO) Step 2 Grievance Decision, August 28, 2017, at p. 4 (“Both parties acknowledge that an incident occurred on May 19, 2017, between the Grievant’s wife and a temporary TRiPS store employee, where the Grievant’s wife confronted the TRiPS employee with accusations of infidelity concerning the Grievant.”). Appellant also expressed regret over his wife’s behavior. CX 4, at p. 2 (“My wife has since been very apologetic for her actions and has sought out counseling through WMATA’s EAP.”). Immediately after the encounter, the temporary employee left the transit center and told her supervisor that she would not return to work at Appellant’s TRiPS store location. CX 3 & 4.

Appellant admits that while he immediately contacted the temporary employee’s supervisors about the incident on the day it occurred, he did not inform his own supervisors until late afternoon on May 22, three days later. CX 3; CX 4, at p. 2; CAO Decision, at p. 4.

Due to his failure to inform his supervisor about the workplace incident in a timely manner Appellant received an oral admonishment and was removed from the temporary promotional assignment as Acting Manager of the TRiPS store and returned to his permanent position as a Safety and Training Instructor, effective May 30, 2017. County Response, at p. 3; CX 3.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 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

¹ The County Response included six unmarked exhibits. The Board reminds the County that in the future its exhibits must be properly identified. The Board will identify the County exhibits as follows:

- Exhibit 1 – ██████████ Memorandum, February 9, 2017
Exhibit 2 – ██████████ Memorandum, March 21, 2017
Exhibit 3 – ██████████ Memorandum, May 30, 2017
Exhibit 4 – Appellant Memorandum, June 2, 2017
Exhibit 5 – Appellant’s Grievance, June 2, 2017
Exhibit 6 – ██████████ Memorandum, June 22, 2017

respect to their application for appointment or promotion. . . Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . 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:

§ 1-17. 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.

§ 1-77. Temporary promotion: The short-term, non-permanent assignment of an employee to:

- (a) a vacant position with a higher grade;
- (b) a vacant position on a different salary schedule at a higher salary; or
- (c) a higher-level position while the employee in the position is absent on extended leave.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended June 30, 2015), Section 27. *Promotion*, provides in relevant part:

§ 27-1. Policy on promotion.

(a) A supervisor's assignment of higher-graded duties to an employee or an employee's assumption of higher-graded duties must not be considered a promotion or temporary promotion unless it has been formally designated as a promotion or temporary promotion.

§ 27-2. Types of promotion.

* * *

(c) *Noncompetitive temporary promotion.*

(4) When a temporary promotion ends, the department director must:

(A) return the employee to the position occupied immediately prior to the temporary promotion, unless the department director otherwise promotes, demotes, or transfers the employee to another position; . . .

(d) *Competitive temporary promotion.*

(1) Prior to making the final selection for a competitive temporary promotion, the department director must provide for full and open competition and ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

(2) A competitive temporary promotion may extend beyond 12 consecutive calendar months without obtaining the approval of the MSPB.

§ 27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), Section 33, *Disciplinary Actions*, provides in pertinent part:

§ 33-9. Right of an employee to appeal a disciplinary action.

(a) *Grievance rights.*

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

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:

§ 34-9. Grievance procedure.

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

§ 34-10. Appeal of a grievance decision.

(a) An employee with merit system status may appeal a grievance decision issued by the CAO to the MSPB under Section 35 of these Regulations.

ISSUE

Was the County's decision on Appellant's temporary promotion arbitrary and capricious or in violation of established procedure?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Oral Admonishment is Not Subject to Appeal and the Termination of Appellant's Temporary Promotion Was Not Discipline

Although Appellant received an oral admonishment on May 30, 2017, for his failure to advise his supervisor about the workplace incident involving his wife, that form of discipline is not subject to grievance or appeal to the MSPB. MCPR § 33-9(a)(1). Accordingly, the Appeal must be dismissed for lack of jurisdiction over the oral admonishment.

Moreover, Appellant was not subject to any other disciplinary action, as termination of a temporary promotion is not a demotion or discipline. MSPB Case No. 90-36 (1990); *Compare* MCPR § 1-77 (temp promotion) to MCPR § 33-3(g) (demotion). 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. MSPB Case No. 17-28 (2017). For these reasons, to the extent that Appellant alleges that he was improperly subject to discipline, the Appeal must be denied.

Appellant Failed to Carry His Burden of Proof Regarding His Nonpromotion

In a nonpromotion case, an appellant has the burden of proving that the County's decision not to promote him was arbitrary, capricious or based on other non-merit factors. Montgomery County Code, § 33-9(c). Moreover, in a grievance over a promotional action an "employee must show that the action was arbitrary and capricious or in violation of established procedure." MCPR § 27-4. The Board concludes that Appellant has failed to meet this burden.

Appellant's grievance asserts that notwithstanding his failure to promptly advise his supervisor of the contentious workplace incident involving his wife and another employee he should have been allowed to continue in his temporary promotion. However, he fails to identify how the County's decision to end the temporary promotional assignment a few days before the expiration of the two-month duration in the February 9, 2017, posting was arbitrary and capricious or otherwise improper. A temporary promotion is the prerogative of management and not a right or entitlement of an employee. MSPB Case No. 89-50 (1990). It was also a prerogative of management to end the temporary promotion assignment and, while the Board may or may not have taken action in the same manner, the Board may not substitute its judgment when management is taking a discretionary action that is not arbitrary and capricious. *See* MSPB Case No. 16-07 (2016); MSPB Case No. 13-14 (2013); MSPB Case No. 84-70 (1984).


The Board finds that Appellant has failed to meet his burden of showing that the County's decision to rescind his temporary promotion and return him to his permanent position was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board denies Appellant's appeal.

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

For the Board
December 14, 2017


Charlotte Crutchfield
Chair