

**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. 18-07

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ORDER GRANTING DEPOSITION

On June 14, 2018, the County filed a Motion for Appropriate Relief seeking to address a scheduling conflict for Lieutenant ██████████ a County witness approved by the Board at the March 6, 2018, pre-hearing conference. The County’s motion states that the witness will be on pre-approved leave during the dates scheduled for the hearing on the merits.

The witness is the lead Defensive Tactics instructor for the County Department of Correction and Rehabilitation (DOCR) and is to testify regarding permissible defensive techniques, required training, and what is taught to employees during the training. The County proposes that the Board approve one of the following approaches to obtaining the witness’s testimony:

1. Hold a *de bene esse* deposition prior to the currently scheduled hearing;
2. Conduct the hearing as scheduled and hold it open until the witness can testify “at a mutually convenient time for all parties”;
3. Convene the Board prior to the full hearing to conduct live testimony of the witness;
4. Permit the witness to submit testimony by affidavit; or
5. Reschedule the hearing.

The Appellant objects to obtaining the testimony by deposition or affidavit, incorrectly suggesting that it would be impermissible for the Board to accept such testimony in lieu of live

testimony. *See* Montgomery County Administrative Procedures Act, Montgomery County Code, § 2A-8(e) and (h)(14); Montgomery County Personnel Regulation (MCPR), § 35-12(b). Appellant also raises concerns about the cost of a video deposition, although it does not appear that the County is suggesting that a deposition should only be by video or that Appellant would be required to share the costs.


As it appears that the County witness is unavailable to testify, and that a deposition will protect the rights of the parties and the interests of justice, pursuant to Montgomery County Code, § 2A-8(h), and MCPR, § 35-12(b), the Board hereby **ORDERS** that the County may hold a *de bene esse* deposition of Lieutenant [REDACTED].

At the March 6, 2018, prehearing conference the Associate County Attorney agreed to notify employee witnesses and their supervisors of the hearing dates in this case so that leave would not be approved. That obligation was included in the March 14, 2018, Pre-hearing Order. The County's motion states that the witness "will be on pre-approved leave from July 15-28," but does not state when the leave was approved. As the Board is displeased that the witness is unavailable for the hearing despite the assurance it received from the County at the pre-hearing conference, the Associate County Attorney is hereby **ORDERED** to provide certification to the Board of when and in what manner the Associate County Attorney notified the witness and his supervisors of the hearing dates; when the leave was approved; and, what steps the County will take in the future to prevent a reoccurrence of this situation.

It is the Board's view that a party wishing to preserve its own witness's testimony through a deposition in these circumstances should bear the costs. Accordingly, the Board further **ORDERS** that the County bear all costs relating to the taking of the deposition, including the costs of providing Appellants with copies of the transcript and video recording, if any.

For the Board

June 26, 2018



Angela Franco
Chair