

**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. 18-16

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FINAL DECISION AND ORDER

████████████████████ (Appellant), a Correctional Shift Commander Lieutenant, filed a grievance with the Montgomery County Department of Correction and Rehabilitation (DOCR or Department) concerning the use of leave. On January 9, 2018, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging the February 3, 2017, Step 2 grievance decision by the County Chief Administrative Officer (CAO) denying his grievance. With his Appeal, Appellant filed a copy of the CAO’s decision (Appellant Exhibit 1). Appellant has also requested a hearing. The County filed a response on February 8, 2018, with five unnumbered exhibits. (County Response).¹

On May 23, 2018, the Board wrote to the County requesting the following clarification of its response to the Appeal:

The Appeal Form filed with the Board on January 9, 2018, contains a February 16, 2017, date on page 4, and next to Appellant’s signature is the notation “SUBMIT

¹ We will identify the unlabeled County Exhibits (CX) as follows:
CX 9 - Emails to and from ██████████ (B), Office of Human Resources (OHR), and Appellant
CX 10 - Email from B to Appellant attaching CAO decision
CX 11- Memorandum of Understanding between DOCR and UFCW Local 1994
CX 12 - DOCR Policy 1100-05, January 27, 2017
CX 13 - DOCR Policy 1100-7, December 30, 2016

The Board requests that in future filings the County provide exhibits that are properly identified and marked.

PLEASE.” The County’s response states that “there is no record that anyone in OHR . . . offered to file the appeal on Appellant’s behalf.” County Response, p. 2. It is unclear whether the same form that was filed with the Board on January 9, 2018, was also sent to the Office of Human Resources. Please provide an explanation and documentation . . . as to whether and when OHR received a copy of the appeal form, whether it was identical to the form filed with the Board, and any subsequent actions taken by OHR. What document was referenced in the January 3, 2018, email from OHR to Appellant, County Exhibit 1, p. 3, (“When you submitted your appeal to the Merit Board, did you send them a copy of what you sent me?”), and when it was received by OHR?

The County filed a Response to Request for Clarification (County Clarification) on June 5, 2018.²

Although by letter dated January 9, 2018, the Board specifically advised Appellant of his right to file a response to the County’s submission, no response by Appellant has been filed to date.

FINDINGS OF FACT

Appellant filed a grievance with DOCR on October 27, 2016, alleging that DOCR twice denied his requests for Sunday leave use, that the leave requests for four other employees were approved, and that DOCR failed to notify him of the leave denial within five days of his request for leave, in violation of DOCR policy. Appellant also claims that DOCR has no written policy, and that the rules for bidding on leave were changed by DOCR in that his leave could not be carried over into the next calendar year.³

DOCR responds by asserting that the denial of Appellant’s leave request was because the minimum staffing requirements at MCDC require that at least one lieutenant be on duty during every shift. County Response, p. 2; Appellant Exhibit 1. DOCR admits that it failed to respond to Appellant’s leave request within the required five (5) days, but explains that it needed additional time to determine whether another officer was available to replace Appellant on the Sunday shift. County Response, p. 2.⁴ The County also asserts that the four other employees granted leave were

² The County Clarification contained the following exhibits:

- CX 1 – Affidavit of B, June 5, 2018
- CX 1A – Email from B, February 3, 2017
- CX 1B – CAO Step 2 Grievance Response, February 3, 2017
- CX 2A – Email from Appellant, February 16, 2017
- CX 2B – MSPB Appeal Form Attached to Appellant’s February 16 email
- CX 3 – Email from B, January 8, 2018, with chain of earlier emails

³ The Appeal Form, p. 2., states: “False statements and very misleading. The Department never give notice that leave would be denied if I bid to work in Rockville. No policy written. Plus I bid in November of 2015 the rules changed eight months later. July 2016. I wish to have a hearing. My leave “roll over” I wanted time off.”

⁴ DOCR Policy 1100-7 on the Scheduling and Use of Leave, §VII.B, provides that an “employee’s supervisor reviews the request as soon as possible and notifies the employee, in writing, within five (5) working days of receipt of the request as to the status of the leave request. . .”. CX 13

not Correctional Shift Commander Lieutenants, and that Appellant has not demonstrated any harm as a result of the delayed notification. *Id.*

DOCR also notes that it has a written policy concerning minimum staffing requirements and written policies on leave and staffing. *Id.* Policy 1100-05, January 27, 2017, Section II.C, (CX 12), provides that at least one lieutenant must be on duty during every shift:

MCDC shall maintain a minimum of one Lieutenant at all times. When a Lieutenant is unable to report for his/her scheduled shift or there is not a minimum of one (1) Lieutenant scheduled to work that shift, overtime is authorized for Lieutenants. If there are no volunteers, a Lieutenant shall be drafted to meet the minimum shift requirement.

DOCR introduced “shift switch” agreements in 2011, under which employees are permitted to arrange a “shift switch” with another employee of the same rank when they apply for leave. CX 11. The County alleges that Appellant did not attempt to find another lieutenant to take his Sunday shift under the “shift switch” policy. County Response, p. 3.

The CAO’s decision advised Appellant that he had the right to appeal to the Merit System Protection Board within ten (10) working days. Appellant was also advised in a February 3, 2017, email from OHR: “If you would like to pursue this grievance to next *[sic]* step please follow the outlined process in Section 34 of the Montgomery County Personnel Regulations.” Email from B to Appellant, January 3, 2018, CX 10, p. 1.

The record does not reflect any further activity by Appellant or the County regarding the grievance until almost a year later when, on December 27, 2017, Appellant sent an email to OHR inquiring into the status of his appeal. CX 1, ¶6. OHR responded by asking: “When you submitted your appeal to the Merit Board, did you send them a copy of what you sent me?” Email from B to Appellant, January 3, 2018, CX 9, p. 3. Appellant simply responded “Yes.” Email from Appellant to B, January 3, 2018, CX 9, p.3. Appellant was then informed by B that “MSPB handles their hearings independently” and provided the email address for the MSPB. CX 9, p. 3. Appellant then forwarded the email chain to the MSPB without explanation. In response, the Board’s Executive Director replied by advising Appellant that the Board had no record of an appeal. Appellant replied, “I was informed that the appeal was forward *[sic]* to the MSPB.” Appellant Email to MSPB, January 5, 2018, CX 9, p. 2. The County denies that Appellant was told that anyone in OHR offered to file the appeal on Appellant’s behalf. County Response, p. 2; CX 1, ¶¶8-10; CX 9, p. 1.

On Monday, January 8, 2018, the Executive Director emailed Appellant the following in response to Appellant’s email of Friday, January 5, 2018, email:

We have checked both our paper and electronic records and can find no indication that you have filed an appeal with the MSPB. . . .

Who informed you that your appeal had been forwarded to the MSPB? Do

you have any documents reflecting that an appeal has been filed with the MSPB?

For your information, appeals may be filed on the MSPB website. Here is the link to the Appeals Form. The form allows you to attach supporting documents and upon submission should provide you with an automatically generated confirming email.

I have also attached a PDF of the Appeal Form that you may print, fill out, sign, and submit in hard copy. You may mail the completed form to our offices . . . You may also hand deliver the form to our offices during the MSPB's regular business hours . . .

Email from MSPB Executive Director to Appellant, CX 9, pp. 1-2.

In a telephone call to the Board's Executive Director the morning of January 9, 2018, Appellant claimed that he had electronically filed an appeal on the MSPB website in February, 2017, and that he sent a hand written "back up" copy to OHR by facsimile. Email from MSPB Executive Director to Appellant, January 9, 2018.⁵ Another thorough search of the Board's electronic and paper files did not provide confirmation that Appellant had any contact with or filed an appeal with the MSPB at any time prior to January 9, 2018.

Later on the morning of January 9, 2018, Appellant filed this appeal challenging the CAO's February 3, 2017, Step 2 grievance decision denying his grievance. The appeal form filed with the MSPB contains a February 16, 2017, date, and next to Appellant's signature has the notation "SUBMIT PLEASE." The County acknowledges that on February 16, 2017, Appellant emailed OHR a copy of the appeal form containing the "SUBMIT PLEASE" notation. CX 1, ¶4. Ms. B states that she assumed Appellant was providing OHR with a copy of his MSPB appeal and took no further steps. *Id.*, ¶5. Appellant resent the appeal form to OHR on December 27, 2017. *Id.*, ¶6.

APPLICABLE CODE PROVISIONS AND REGULATIONS

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

§ 33-12. Appeals of disciplinary actions; grievance procedures.

(b) *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. . . Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

⁵ This explanation is seemingly inconsistent with Appellant's initial response concerning whether his appeal had been timely filed in February 2017; Appellant's initial response was that he had been "informed that the appeal was forward [sic] to the MSPB." Appellant Email to MSPB, January 5, 2018, CX 9, p. 2.

§ 33-13. Appeal procedures.

The county executive shall prescribe by personnel regulations . . . procedures covering appeals, including grievances which shall include the time limit for filing such appeal. . . .

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 February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, provides in pertinent part:

§ 34-9. Grievance procedure.

* * *

(e) *Steps of the grievance procedure.* The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of individual*
1	Employee	Present job-related problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor within 30 calendar days.
		If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.
	Department Director	Give the employee a written response within 15 working days after the written grievance is received.
2	Employee	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department's response.

	CAO's Designee	Must meet with the employee, employee's representative, and department director's designee within 30 calendar days to attempt to resolve the grievance.
	Employee and Dept. Director	Present information, arguments, and documents to the CAO's designee to support their positions
	CAO's Designee	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	CAO	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.
3	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under Section 35 of these Regulations
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

§ 34-10. Appeal of a grievance decision.

(c) A written grievance decision must include information about:

- (1) how the employee may appeal the decision to the next step of the grievance procedure or file an appeal with the MSPB, if applicable; and
- (2) the time limits for appealing the grievance to the next step, or to the MSPB.

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.

- (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.

§ 35-3. Appeal period.

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

(3) receives a written final decision on a grievance. . .

§ 35-4. Appeal filing requirements.

(a) An employee or applicant must file an appeal with the MSPB in writing . . .

(b) Alternatively, an employee or applicant may complete the MSPB Appeal Form (Appendix V) and provide the information requested on the Form.

(c) An employee or applicant may instead choose to file an appeal electronically by completing the MSPB Appeal Form found on the MSPB County website.

§ 35-7. Dismissal of an appeal.

(a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.

(b) The MSPB may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. The MSPB must give the County and the appellant prior notice of its intent to dismiss for lack of prosecution or compliance with an MSPB rule or order.

§ 35-10. Appellant's right to review; right to hearing.

(a) (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.

(2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.

ISSUE

Was the grievance filed timely?

ANALYSIS AND CONCLUSIONS

Appellant has the responsibility to establish that the appeal was filed in a timely manner, *i.e.*, the burden of proof on the issues of timeliness and jurisdiction. MSPB Case No. 17-16 (2017). The personnel regulations expressly require an employee to "file an appeal with the MSPB in writing." MCPR § 35-4(a). An appeal may also be filed "electronically by completing the MSPB Appeal Form found on the MSPB County website." MCPR § 35-4(c).

The record shows that Appellant received the CAO's decision on February 3, 2017. CX 1, ¶3, CX 1A and CX 1B; CX 10. Pursuant to MCPR § 34-10(c), the decision advised Appellant that he had the right to appeal to the Merit System Protection Board within ten (10) working days. *See* MCPR § 35-3(a)(3). Appellant was also advised in a February 3, 2017, email: "If you would like to pursue this grievance to next [*sic*] step please follow the outlined process in Section 34 of the Montgomery County Personnel Regulations." Email from B to Appellant, January 3, 2018, CX 10, p. 1; CX 1, ¶3, CX 1A. Thus, the County advised Appellant of his appeal right to the Board, and the regulatory time limit within which to effect a timely appeal.⁶

Appellant filed his Appeal with the MSPB on January 9, 2018, eleven months after receiving the CAO's decision. Although MCPR § 35-7(a) provides that the MSPB "may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3", Appellant alleges⁷ that he filed timely an electronic appeal with the MSPB on February 16, 2017. The Board's electronic filing system maintains a record of every appeal filed, and automatically sends a confirmation email. However, the Board has no record of any such filing and Appellant has provided no verification. Moreover, we have no reason to suspect that there has been a malfunction of any sort with the online filing system. While it is certainly possible that Appellant attempted to electronically file a timely appeal with the Board and that some unknown computer error prevented that filing from being received and acknowledged by the Board, Appellant has not provided any evidence, beyond his mere assertion, that this in fact happened.⁸ Thus, we cannot conclude, on the record before us, that Appellant timely filed an electronic appeal with the Board.

Appellant also appears to contend that his late filing should be excused because he sent a "back up" copy of his appeal form to OHR instead of the MSPB. Email from MSPB Executive Director to Appellant, January 9, 2018. The appeal form submitted to the Board on January 9, 2018, is identical to the form that Appellant sent to OHR on February 16, 2017, eleven months earlier. CX 1, ¶4; CX 2A and CX 2B. Although the appeal form contains the notation "SUBMIT PLEASE" next to Appellant's signature, and the February 16, 2017, email transmitting it to OHR has the subject line "Thanks," the email contains no further message indicating that any action was being requested of OHR. CX 2A and CX 2B; CX 1, ¶4.

⁶ MCPR § 34-10(c)(1) requires that a CAO's Step 2 decision state "how the employee may . . . file an appeal with the MSPB." The Board strongly urges the County to explicitly provide more detailed information in such notices, including a link to the Board's website, the mailing address for the Board's office, and the Board's telephone number.

⁷ Appellant made these assertions in a telephone conversation with the Board's Executive Director, but he has never submitted any documentation to the Board to this effect, sworn or otherwise. For purposes of this decision, we will treat these assertions as having been properly raised and entered into the administrative record in this case. Telephone conversations with Board employees obviously are not, however, proper means of entering matters into the administrative record. We remind the County and others who appear before the Board that while the Executive Director is authorized to correspond with litigants on the Board's behalf and to give technical, non-substantive directions, the Executive Director is not an alter ego of the Board and should never be construed to operate as such.

⁸ The MSPB website analytics indicate that on February 16, 2017, there were three "page views" of the Board's Appeal Form, but no "entries" or filings.

The County takes the position that it bears no responsibility to file a misdirected appeal with the MSPB on behalf of an employee. County Clarification, p. 2. The County further argues that “there is no record that anyone in OHR or any other department offered to file the appeal on Appellant’s behalf.” County Response, p. 2. Further, OHR employee B, the recipient of Appellant’s February 16, 2017, email, states in her affidavit that she assumed Appellant was merely providing her with a copy of his MSPB appeal and, accordingly, took no further action. CX 1, ¶5.

While Appellant’s blank email and the “PLEASE SUBMIT” notation on the appeal form may have led Ms. B to believe that she was not being asked to forward the appeal form to the MSPB, we are troubled by OHR’s failure to make any attempt to resolve the ambiguity by simply asking Appellant about his intent. We find that the appeal form submitted to OHR on February 16, 2017, should have been understood to have contained a request by Appellant that OHR submit the appeal with the Board. At the very least, OHR should have notified Appellant that he had filed his appeal in the wrong place.

There is no County regulation or MSPB precedent permitting an appeal submitted to OHR to be treated as a filing with the MSPB. *Cf.*, *Massingale v. Merit Systems Protection Board*, 736 F.2d 1521, 1523 (Fed. Cir. 1984) (pursuit of a grievance elsewhere does not constitute good cause for delayed filing of an appeal to the Board). Moreover, the Board generally does not waive the 10-day filing limit. MSPB Case No. 17-22 (2017) (appeal filed seven weeks late untimely); MSPB Case No. 14-07 (2013) (appeal filed 10 weeks late untimely); MSPB Case No. 10-20 (2010) (appeal filed four working days late untimely).⁹ However, the Board may waive the filing time limits for good cause shown.

Under the specific authority of 5 C.F.R. § 1201.12, the federal MSPB may waive its regulations, including those relating to the timely filing of appeals, for “good cause.” The factors in determining whether good cause exists for waiving the time limits include: (1) the length of the delay; (2) whether the employee was notified of the time limit; (3) whether there were circumstances beyond the employee’s control affecting his or her ability to comply with the time limit; (4) the degree to which the employee was negligent; (5) whether any neglect was reasonably excusable; (6) whether there was unavoidable casualty or misfortune that could not reasonably have been prevented; and, (7) the extent and nature of prejudice to the agency that would result from a waiver of the time limit. *Alonzo v. Department of the Air Force*, 4 MSPR 180, 184, 186 (1980).¹⁰

The federal MSPB has also created an exception to the rules regarding timeliness when a *pro se* appellant has failed to follow filing instructions, directed the appeal to the Office of Personnel Management, clearly indicated intent to seek further review, but OPM failed to redirect an otherwise timely appeal to the MSPB. *Custodio v. Office of Personnel Management*, 113 MSPR 639, 643 (2010); *Tress v. Office of Personnel Management*, 109 MSPR 126, 128 (2008).

⁹ See also MSPB Case No. 17-07 (2017); MSPB Case No. 14-43 (2014); MSPB Case No. 14-08 (2013); MSPB Case No. 13-05 (2013).

¹⁰ The agency is only required to submit evidence of prejudice if the appellant has met the burden of showing that there was good cause for the delay. *Booker v. U.S. Postal Service*, 5 MSPR 219, 221 (1981).

Under *Custodio* and *Alonzo*, Appellant has not demonstrated good cause. Appellant was notified of the time limit and his failure to exercise due diligence in filing and pursuing his appeal with the MSPB militates against a finding of good cause for the delay. *White v. Department of Navy*, 55 MSPR. 376, 379 (1992) (“filing with OPM does not exhibit the necessary due diligence or ordinary prudence and therefore does not show good cause”). The only claim Appellant makes regarding circumstances beyond his control affecting his ability to comply with the time limit is that there must have been a malfunction on the MSPB electronic filing system. Even if we were to accept Appellant’s assertion in this regard, it is undisputed that Appellant waited nearly a year before seeking to ascertain the status of his appeal.

After apparently misdirecting his appeal to OHR in February, 2017, Appellant waited until December 27, 2017, to first inquire with OHR as to the status of his appeal. The first time Appellant contacted the MSPB was by an email on January 3, 2018. The length of the delay is always a factor in assessing whether an untimely filing may be excused. Here the extremely long delay strongly militates against any finding of good cause. MSPB Case No. 13-03 (2013) (appeal filed 14 months late is untimely). We are unaware of any prior decision of the MSPB that waived the 10-day filing limit where the employee’s filing with the Board was eleven months late. This is not a circumstance where a misdirected filing to OHR resulted in an appeal reaching the MSPB a few days or weeks late, nor is it one where OHR misinformed or deceived the employee. Here, almost a year passed before Appellant even inquired as to the status of his appeal. A delay of that length does not demonstrate due diligence and cannot be characterized as reasonable. MSPB Case No. 10-08 (2010) (appellant waiting nearly a year to appeal to the MSPB “was not diligent in attempting to discover and exercise her appeal rights in a timely manner”).

Because an appeal of a grievance must be filed within 10 working days after receipt of the Step 2 CAO decision, MCPR § 35-3(a)(3), and Appellant has not demonstrated good cause to waive that time limit, we find that Appellant’s appeal must be dismissed as untimely.

While we reaffirm that filing an appeal with OHR does not constitute a filing with the Board, it is unsatisfactory for OHR to do nothing when an employee provides information that may suggest confusion concerning the appeals process. The Board expects OHR to immediately adopt and implement procedures for clarifying the process with unrepresented employees and for promptly redirecting appeals to the MSPB in cases where *pro se* appellants have erroneously directed appeals to OHR. The Board stands ready to work with OHR in crafting policies and regulations consistent with *Custodio* to implement needed improvements to the appeals process.

ORDER

Based on the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant’s request for a hearing and grievance appeal are hereby **DENIED**.¹¹

¹¹ Unlike appeals of demotions, suspensions, and removals, there is no right to a hearing before the Board in the appeal of a grievance decision. Montgomery County Code, § 33-12(b); MCPR § 35-2(b); § 35-10(a)(2). The Board rarely holds hearings in grievance appeals, and only does so where it has concluded that a hearing is necessary to resolve

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
June 28, 2018



Angela Franco
Chair

material issues of fact. MSPB Case No. 03-08 (2002); MSPB Case No. 04-10 (2004). As the record submitted by the parties adequately provides the Board with the material facts concerning the appeal, the Board concludes that a hearing in this appeal is unnecessary.