

**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. 18-17

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FINAL DECISION AND ORDER

[REDACTED] (Appellant), a part time, temporary Liquor Store Clerk I, filed this appeal with the Merit System Protection Board (MSPB or Board), challenging his January 15, 2018, non-disciplinary termination by the Montgomery County Department of Liquor Control (DLC).

On March 22, 2018, the Board wrote to the parties requesting “that the County provide clarification of Appellant’s merit system status as of the date he was provided with the notice of termination, and address the Board’s jurisdiction over this appeal if Appellant did not have merit system status.” In response, on April 4, 2018, the County filed a Supplemental Submission and Motion to Dismiss Appeal (County Supplement) asserting that because Appellant did not have merit system status when he was terminated the Board was without jurisdiction over the appeal. On April 23, 2018, Appellant filed a reply (Appellant Reply) asserting that the County had failed to advise him that by voluntarily “stepping down” from his permanent Liquor Store Clerk position to a temporary Liquor Store Clerk position he would be relinquishing his merit system status.

By letter dated May 2, 2018, the Board then requested that the County provide a written response to Appellant’s claim that he was not informed that by transferring to a temporary position he was relinquishing his merit system status. The Board specifically asked that the County address federal MSPB cases such as *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349 (1994). The County provided the issue brief on May 10, 2018, (County Response), and Appellant replied on May 16, 2018 (Appellant Response).

FINDINGS OF FACT

Appellant was originally hired in February 2016 as a temporary seasonal, part time Liquor Store Clerk I. Appellant Exhibit (AX) 1. He was appointed to a part time merit system position December 22, 2016. AX 2; County Exhibit (CX) 1. In September 2017, Appellant asked about “moving back down to a temp position” because of the time demands of his job with the federal government. AX 4; CX 2. Appellant was advised that he could again apply for a temporary seasonal, part time Liquor Store Clerk I position, such as he had previously held. AX 4; CX 2.

Appellant voluntarily requested to “move back down” to a temporary position, applied for a temporary seasonal, part time position, and was selected. The process was completed when Appellant was formally transferred to a temporary seasonal, part time position, effective October 15, 2017. AX 3; CX 3.

The DLC human resources employee involved in Appellant’s application for and selection to the temporary position did not explicitly advise him that by taking the temporary position he would be losing his merit system status. Appellant was told that once he accepted a temporary position he would lose certain benefits and “be paid out for any annual leave that you have remaining.” AX 4; CX 2. Appellant acknowledges that when he was originally “promoted” from a temporary seasonal, part time position to a permanent position he was told that he had gained merit system status. Indeed, the job posting for the permanent position explicitly stated that it was merit system. The posting for the temporary seasonal position did not mention merit system status.

On January 15, 2018, DLC provided Appellant with a non-disciplinary termination notice pursuant to MCPR § 29-2(a)(3). CX 6. The notice advised Appellant that he served in a temporary status and that his “services are no longer required” by DLC. *Id.*

APPLICABLE CODE PROVISIONS AND REGULATIONS

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

§ 401. Merit System.

The Council by law may exempt probationary employees, temporary employees, and term employees from some or all of the provisions of law governing the merit system. . .

§ 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, Personnel and Human Resources, which states in applicable part:

§ 33-6. Definitions.

In this article, the following words and phrases have the following meanings: . . .

Merit system employees: All persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law.

§ 33-7. County executive and merit system protection board responsibilities.

(g) *Adjudication.* The Board must hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

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:

§ 1-8. Career position: A full-time, part-time, or term merit system position.

§ 1-38. Merit system employee: A person employed by the County in a full-time or part time career position. . .

§ 1-71. Seasonal position: A type of temporary position that: (a) does not involve year-round employment; and (b) may be used indefinitely to perform work usually associated with a particular season, such as removing snow or collecting fallen leaves.

§ 1-75. Temporary employee: An incumbent of a temporary position.

§ 1-76. Temporary position: A non-career position classified and filled under merit system principles.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended October 21, 2008), Section 1. Termination, provides in applicable part:

§ 29-1. Definition.

Termination: A nondisciplinary act by a department director to end an employee's County employment for a valid reason. Examples of valid reasons for termination include those stated in Section 29-2.

§ 29-2. Reasons for termination.

(a) A department director may terminate the employment of an employee: . . . (3) who is a temporary employee if: (A) the employee's job performance or attendance record does not warrant retention of the employee, or (B) the employee's services are no longer needed or wanted . . .

§ 29-7. Appeal of termination.

(c) A . . . temporary employee may not appeal a termination.

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

(b) A . . . temporary employee may file a grievance over a disciplinary action, except for an oral admonishment, but may not appeal a grievance decision by the CAO to the MSPB.

§ 34-10. Appeal of a grievance decision.

(b) A . . . temporary employee may not appeal a grievance decision by the CAO 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. . .

§ 35-7. Dismissal of an appeal.

(c) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.

§ 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.

ISSUE

Does the Board have jurisdiction to hear the appeal of a terminated temporary, part time, non-merit system employee?

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 No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *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 Board Lacks Jurisdiction Over the Termination Appeal of a Temporary Employee

As a result of the Board's request for clarification regarding Appellant's employment status, the County advised that he does not have merit system status. Appellant responded that he had not been warned by DLC that by accepting a temporary position he would be losing merit system status.¹

The Montgomery County Charter provides the County Council with the authority to exempt temporary employees from the provisions of law governing the merit system. Montgomery County Charter, § 401. The County Council has acted on that mandate, and has denied temporary employees the right to file and pursue appeals with the MSPB. More specifically, the personnel regulations expressly provide that a temporary employee may not challenge a termination before the Board by way of an appeal, grievance, or any other method. MCPR, § 29-7(c) ("A . . . temporary employee may not appeal a termination").

Pursuant to § 404 of the Charter, only merit system employees have the right to appeal a removal action to the Board. The Code defines a merit system employee as a person who is employed in a permanent career position. County Code, § 33-6. The Code further provides that the Board only has the authority to hear and decide the disciplinary appeals of merit system employees who have been removed, demoted or suspended. County Code, § 33-7(g). MSPB Case No. 13-08 (2013) (temporary employees lack merit system status and therefore lack appeal rights to the Board).

¹ Even though the County did not initially raise the issue of the Board's jurisdiction over the termination of Appellant's temporary appointment, the Board is always obligated to ensure that it has jurisdiction. MSPB Case No. 09-08 (2009), *citing Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The County personnel regulations specifically provide that while temporary employees may file grievances over disciplinary actions, they may not appeal grievance decisions to the Board. MCPR § 34-2(b) (“A . . . temporary employee may file a grievance over a disciplinary action . . . but may not appeal a grievance decision by the CAO to the MSPB”); MCPR § 34-10(b) (“A . . . temporary employee may not appeal a grievance decision by the CAO to the MSPB”).

It is undisputed that at the time of his termination Appellant was not in a permanent career position but, rather, was a temporary employee. The Board lacks jurisdiction over the appeals of temporary employees since they do not have merit system status. MSPB Case No. 13-08 (2013) (no jurisdiction over suspension appeal because not a merit system employee); *see also* MSPB Case No. 16-19 (2016); MSPB Case No. 17-26 (2017); MSPB Case No. 16-04 (2015). By the nature of his current appointment, Appellant would therefore not be entitled to full merit system protections, including the right to appeal his removal. As noted above, an appeal to the MSPB over the termination of a temporary employee is specifically barred under the disciplinary regulations, grievance procedure, and the regulations governing temporary employment.

The Board requested that the parties brief the possible impact of federal MSPB cases such as *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349 (1994), on the question of jurisdiction. *Exum* held that when an agency fails to affirmatively inform an employee that a voluntary change in position within the same agency might lead to a loss of appeal rights, the employee is deemed not to have accepted the new appointment and to have retained the appeal rights of the former position. Since in this case Appellant applied for and accepted a different position with the same agency, and was not expressly informed that by transferring to a temporary position he was relinquishing his merit system status, the “*Exum* Rule” and line of cases appeared to be a closely analogous federal MSPB precedent.²

However, after the Board received the briefs of the parties, the “*Exum* Rule” was specifically rejected by the United States Court of Appeals for the Federal Circuit in *Williams v. Merit System Protection Board*, ___ F.3d ___, 2018 WL 2769095, at *4-5 (Fed. Cir. June 11, 2018):

We reject . . . the *Exum* rule. As we held in *Carrow v. Merit Systems Protection Board*, [626 F.3d 1348 (2010)] an agency’s failure to advise federal employees on the terms of their appointment “does not create appeal rights for positions as to which Congress has not given the Board appellate jurisdiction.” 626 F.3d 1348, 1353 (Fed. Cir. 2010). . . we specifically disapprove the *Exum* rule, even for intra-agency transfers, and hold that an agency’s failure to inform an employee of the

² *Exum* was based on *Covington v. DHHS*, 750 F.2d 937 (Fed.Cir. 1984), which involved a claim that a retiree did not make a knowing and voluntary choice between a RIF and a retirement due to coercion, or misinformation amounting to deception. It is notable that in *Exum* the agency knew that the employee’s request for part-time employment was limited (she requested the change “until further notice”) and the MSPB held “that the agency should have known that the appellant was acting under the erroneous impression that the only effects of her requested change would be to limit her working hours temporarily.” *Exum*, 62 MSPR at 349.

consequences of a voluntary transfer cannot confer appeal rights to an employee in a position which has no appeal rights by statute.

There is no allegation in this case that Appellant was in any way coerced or deceived. Appellant's argument is solely that he was not affirmatively advised that he would be sacrificing his merit system status by voluntarily transferring to a temporary position. In that regard, this case is identical to the factual circumstances faced by the Court in *Williams*:

Mr. Williams made no allegation that he was misled or coerced into taking the new CCA position. He voluntarily applied, and was selected, for the CCA position. Taking on a new position often leads to various changes in benefits. The agency has no obligation to advise its employees of all the potential changes associated with a new job. And certainly the agency's failure to advise its employee on the full range of consequences associated with a new position does not make the employee's decision to accept the position involuntary.

2018 WL 2769095, at *5. Under the reasoning of *Williams*, we find that Appellant voluntarily relinquished his merit system status when he chose to transfer back to a temporary position with DLC. See *Gaudette v. Department of Transportation*, 832 F.2d 1256, 1259 (Fed.Cir.1987) ("it defies logic to say that a voluntary action by an employee is somehow made involuntary because of an agency's failure to advise of appeal rights or to counsel the employee"); *Bergman v. United States*, 28 Fed. Cl. 580, 589 (1993); *Soler-Minardo v. Dep't of Defense*, 92 M.S.P.R. 100, 103-4 (2002) (An employee-initiated action is presumed to be voluntary, and the Board does not have jurisdiction over voluntary actions); *Heaphy v. United States*, 23 Cl. Ct. 697, 703 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) ("Plaintiff cannot be granted relief simply because he failed to more fully educate himself as to the law, and later wishes to revisit his voluntary choice").

Even under the *Exum* Rule there is sufficient evidence in the record for the Board to conclude that when Appellant initiated the change in his position he was primarily concerned with reducing his working hours due to the demands of his federal job, and knew that he was relinquishing his merit system status. Appellant previously held a temporary seasonal position, acknowledged that when he was "promoted" to a permanent position he was told that he had gained merit system status, and he characterized his request to transfer to a temporary position as a "move back down."³ The fact that Appellant did not anticipate the possible consequences of his decision (*i.e.*, that he could be terminated from his temporary position), does not convert the voluntary action he initiated into an involuntary act.

We find that because Appellant's decision to seek and accept a temporary position was entirely voluntary there is no basis to exempt Appellant from the rule that it lacks jurisdiction over appeals of temporary employees. *Williams v. Merit System Protection Board*, ___ F.3d ___, 2018 WL 2769095, at *4-5 (Fed. Cir. June 11, 2018). See *Miller v. Bd. of Educ. of Baltimore Cty.*, 2016 WL 4591612, at *10 (Md. Ct. Spec. App.), *cert. denied*, 450 Md. 438 (2016) ("because Miller

³ Appellant was also told that upon transfer to the temporary position he would lose certain benefits and receive an annual leave pay out.

voluntarily relinquished his status as an employee, he no longer had a right to a hearing and appeal. *See Christie v. United States*, 518 F.2d 584, 588–89 (Ct.Cl.1975)”).

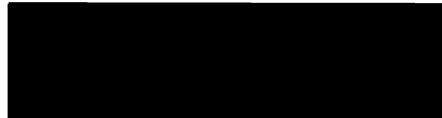
The County Council has not delegated to the Board the authority to hear matters involving temporary, seasonal non-merit system employees. Under Maryland law, the Board cannot enlarge its own jurisdiction, and the parties cannot confer jurisdiction on the Board where it does not otherwise exist. *See John A. v. Board of Education for Howard County*, 400 Md. 363, 388 (2007); *Boyd v. Supervisor of Assessments*, 57 Md. App. 603, 608 (1984). *See* MSPB Case No. 16-07 (2016) (subject matter jurisdiction may not be conferred by estoppel). Given the reasoning in *Williams v. Merit System Protection Board*, the principles of State law, the facts of this case, and the statutory jurisdiction of the Board, Appellant’s voluntary decision to transfer to a temporary, seasonal, non-merit position deprives the Board of jurisdiction here.

ORDER

Based upon the foregoing analysis the Board hereby **ORDERS** that the Appeal be **DISMISSED** for lack of jurisdiction.

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