

**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 Nos. 16-09, 16-11,  
16-12, 17-02,  
17-04, 17-08, and  
17-23**

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**ORDER CONSOLIDATING APPEALS AND REFERRING TO HEARING EXAMINER**

For the reasons discussed below, the Merit System Protection Board (MSPB or Board) has determined that it is appropriate to consolidate the above captioned grievance appeals and to refer them to a Hearing Examiner to conduct an evidentiary hearing, rule on motions, and issue a report and recommendation with proposed findings of fact and conclusions of law, and a proposed decision.

***The Grievance Appeals***

On December 20, 2015, Appellant filed an appeal with the Board, challenging a decision by the County’s Chief Administrative Officer (CAO) to uphold a decision by the Office of the County Attorney (OCA) denying her grievance. That appeal was designated MSPB Case No. 16-09. In that appeal, Appellant alleged that the OCA improperly and in violation of the Merit System law: (1) reduced her performance appraisal rating from “Highly Successful Performance” to “Successful Performance”; (2) conducted a “secret investigation” of Appellant’s behavior at a hearing and maintained a copy of records relating to that investigation in Appellant’s supervisory file; and (3) engaged in a pattern and practice of intimidation, harassment and retaliation against

Appellant by attempting to have Appellant move her office in violation of OCA past practice, making inappropriate comments about Appellant in front of other OCA staff, and seeking to have Appellant change her work schedule, hours and duty assignments. Grievance Appeal, MSPB Case No. 16-09, December 20, 2015.

On April 4, 2016, Appellant filed two additional grievance appeals, both of which also challenged decisions by the CAO to uphold OCA denials of Appellant's grievances. One of those appeals, docketed as MSPB Case No. 16-11, alleged that the County Attorney improperly permitted the posting of information concerning the Appellant's first grievance (the subject of MSPB Case No. 16-09) onto "Pro Law," the OCA case tracking system to which OCA staff have access. According to Appellant, making such confidential personnel information concerning Appellant's grievance available to all employees in OCA constitutes a form of retaliation, harassment, and intimidation against Appellant. The relief requested by Appellant includes a Board order requiring OCA to remove information concerning the first grievance from Pro Law or, alternatively, limiting its access to OCA personnel assigned to defend the case. Grievance Appeal, MSPB Case No. 16-11, April 4, 2016. Appellant's also requested that the Board issue an order directing OCA management to "cease and desist in its harassment, retaliation, and intimidation" of Appellant. *Id.*

The other April 4 appeal, docketed as MSPB Case No. 16-12, involves Appellant's grievance alleging that the OCA improperly obtained electronic records of Appellant, such as virtual private network (VPN) log-in information and emails. Appellant contends that OCA obtained the electronic records as part of an effort to justify terminating Appellant's employment and as part of its continuing retaliation, harassment, and intimidation against Appellant. Appellant also alleges that OCA officials sought the electronic data regarding Appellant in order "to satisfy their prurient interest about Grievant's private life." Grievance Appeal, MSPB Case No. 16-12, April 4, 2016. Appellant's requested relief includes a Board order directing OCA management to "cease and desist in its harassment, retaliation, and intimidation" of Appellant. *Id.*

The Board concluded that the interests of judicial economy would best be served if the merits of Appellant's claims were addressed together and, on May 26, 2016, consolidated MSPB Case Nos. 16-09, 16-11, and 16-12.

Subsequent to the consolidation of MSPB Case Nos. 16-09, 16-11, and 16-12, Appellant filed four additional grievance appeals. On August 18, 2016, Appellant filed a grievance appeal, docketed as MSPB Case No. 17-02, alleging that the CAO could not fairly decide her grievances. Appellant alleged that the CAO failed to fairly administer her most recent grievances because: (1) responsibility to hear the grievances was delegated to an Assistant CAO who previously had approved the CAO decisions in Case Nos. 16-11 and 16-12; (2) certain OCA managers failed to appear at the CAO grievance meeting; and (3) the County Attorney did not instruct certain OCA managers to attend the Step 2 grievance meeting held by the CAO's designee. Appellant asked that the Board consolidate MSPB Case No. 17-02 with MSPB Case Nos. 16-09, 16-11, and 16-12; rule in favor of her or hold an evidentiary hearing; and, find that there has been a pattern and practice of intimidation, harassment, and retaliation against her. Alternatively, Appellant asked the

Board to remand the case to the CAO with an order that: (1) an impartial neutral party be appointed to conduct the Step 2 meeting; (2) OCA managers must attend; and (3) certain named OCA managers must disclose all facts relating to the grievance known by or available to them.

On September 26, 2016, Appellant filed a fifth grievance appeal, docketed as MSPB Case No. 17-04, even though she had not received a Step 2 grievance decision of the CAO. MSPB Case No. 17-04 involves Appellant's allegation that the County improperly converted her sick leave to FMLA leave against her will and without medical certification. Appellant sought to appeal directly to the Board by raising a claim that the CAO is biased because of advice received from the OCA without a proper firewall between the lawyers advising the CAO and those defending against the grievance.<sup>1</sup> Appellant asked that: there be a decision in her favor; her timesheet be amended to reflect the use of sick leave; OHR be required to comply with FMLA and HIPAA; the Board find that the Assistant CAO denied Appellant fair treatment; and, the Board find that OCA failed to disclose necessary facts. Finally, Appellant renewed her request that the Board order the OCA to cease and desist the alleged harassment, retaliation, and intimidation.

The Board issued an Order Requesting Decision on September 27, 2016. The Order instructed the CAO to provide a Step 2 response to the grievance before the Board would begin processing the appeal. The CAO decision was issued on October 27, 2016, and Appellant filed an amended grievance appeal with the Board on November 9, 2016. Appellant has also requested that MSPB Case No. 17-04 be consolidated with her other grievance appeals.

Appellant's sixth grievance appeal, docketed as MSPB Case No. 17-08, was filed on November 10, 2016. Appellant alleged that the CAO and the OCA have conflicts of interest in the processing of her grievances and requested that the Board consolidate the appeal with her other appeals and rule in her favor in all of the pending grievance appeals. Although Appellant had not received a Step 2 grievance decision of the CAO, she nevertheless claimed the right to immediately file an appeal with the Board, alleging that because her grievance is against both the OCA and the CAO, a Step 2 meeting would be "farcical" and "futile since the CAO and his staff are the subject of the grievance and would have a conflict of interest in deciding a grievance directed at their own conduct." Grievance Appeal, MSPB Case No. 17-08, pp. 1-2. Grievant further alleged that she is entitled under the Montgomery County Personnel Regulations (MCPR) § 34-9(a)(3), to immediately appeal to the Board because the CAO failed to respond separately to the grievance within the time limits under Step 1. Grievance Appeal, MSPB Case No. 17-08, p. 1.

The Board decided that the processing of Appellant's grievance appeal would benefit from adherence to the steps of the grievance procedure and a Step 2 decision by the CAO, and on November 17, 2016, ordered that the grievance be held in abeyance until the CAO had conducted the Step 2 process. The decision of the CAO was received on March 13, 2017, and Appellant submitted an Amended Notice of Appeal on March 27, 2017.

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<sup>1</sup> Appellant alleged that she had been "denied . . . fair treatment" because the CAO's designee conducted a "sham" Step 2 grievance meeting on September 12, 2016. Appellant contended that an immediate appeal to the Board was justified because the County "has demonstrated animus against Grievant and intent to deny a fair hearing within 30 days of filing of the grievance." Appellant's Grievance Statement, MSPB Case No. 17-04, p. 1.

Appellant's seventh grievance appeal, docketed as MSPB Case No. 17-23, was filed on April 3, 2017, and alleged that the County Attorney improperly disclosed her various grievances in a brief filed with the Maryland Court of Special Appeals. Appellant had filed a lawsuit in Circuit Court challenging the County's refusal to provide certain documents pursuant to the Maryland Public Information Act (PIA). The case is now pending at the Maryland Court of Appeals. [REDACTED] v. *Montgomery County*, September Term 2016, Case No. 892, 2017 WL 3668171 (August 25, 2017) (unreported), *cert. granted* 2017 WL 6819757 (December 18, 2017).

MSPB Case No. 17-23 was another direct appeal to the Board without a Step 2 CAO decision. Appellant argued that the CAO and his office are tainted because they receive advice from the OCA, are the subject of her other grievances, and are subject to "command influence." On April 18, 2017, the Board ordered that the grievance be returned to the CAO for a response after a Step 2 meeting.

On April 24, 2017, Appellant filed a request that the Board reconsider its April 18 order. Appellant again alleged that the CAO could not be impartial in conducting a Step 2 grievance hearing because the CAO's designees have received advice from the OCA that is "contaminated by command influence." Request for Reconsideration, MSPB Case No. 17-23, p. 1. Appellant further alleged that the CAO's designee would continue to improperly permit the County Attorney to withhold relevant documents. Request for Reconsideration, MSPB Case No. 17-23, p. 2. Appellant also suggested that there has been *ex parte* contact between the OCA and a CAO designee because the CAO designee was told about the grievance in MSPB Case No. 17-23 after the conclusion of the Step 2 hearing for the grievance which is the subject of MSPB Case No. 17-08. *Id.* After analyzing the relevant legal principles raised by Appellant's motion, the Board denied Appellant's request for reconsideration. Order Denying Request for Reconsideration, May 8, 2017. The CAO's Step 2 response in MSPB Case No. 17-23 was filed with the Board on July 31, 2017; on August 9, 2017, Appellant reinstated her appeal by filing a Request to Continue Processing Appeal.

### ***Consolidation***

Under the Montgomery County Administrative Procedures Act, Montgomery County Code, § 2A-8(h)(7), the Board may grant motions to consolidate. *See* MCPR, § 34-1(c) (consolidated grievance means two or more grievances filed by one employee and processed as one grievance if they concern the same subject and request the same or similar relief).

Appellant claims "harassment, retaliation, and intimidation" by OCA management in all her grievance appeals. It appears from the voluminous pleadings filed with the Board that the various workplace matters in dispute are, at least arguably, interrelated. Moreover, there is no indication that handling the seven appeals together would be prejudicial to the interests of either party. It is thus the Board's determination that it would be in the interests of judicial economy to address the merits of all of Appellant's claims and requests for relief together. Order Consolidating Appeals, MSPB Case Nos. 16-09, 16-11, and 16-12 (May 26, 2016). *See* MSPB Case No. 07-17

(2007); *Doe v. Pension Ben. Guar. Corp.*, 117 M.S.P.R. 579 (2012), *review denied* 120 M.S.P.R. 363 (2013) (joinder “appropriate when doing so would expedite processing of the cases and not adversely affect the interests of the parties,” and given the “interrelatedness of the subject matter and the similar procedural posture of both appeals”); *Fitzpatrick v. Dep’t of Justice*, 91 M.S.P.R. 556 (2002) (appeals that concern related issues of fact and law should be joined); *West v. United States Postal Service*, 44 M.S.P.R. 551, n.1 (1990) (appeals that involve the same parties and some identical issues should be joined for consideration in the interests of judicial economy).

The Board hereby **ORDERS** that MSPB Case Nos. 16-09, 16-11, 16-12, 17-02, 17-04, 17-08, and 17-23 be, and hereby are, consolidated. The consolidated case shall be docketed and referenced in all future pleadings as MSPB Case No. 18-19.

### ***Referral to Hearing Examiner***

Pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations, § 35-2(b), the Merit System Protection Board hereby **ORDERS** that MSPB Case No. 18-19, the above captioned consolidated cases, be referred to the Montgomery County Office of Zoning and Administrative Hearings for a Hearing Examiner to conduct an evidentiary hearing, rule on motions, and issue a report and recommendation to the Board with proposed findings of fact and conclusions of law, and a proposed decision. The Hearing Examiner’s findings and recommendations shall be subject to written exceptions by the parties, and the parties shall have the opportunity to present oral argument on the record to the Board prior to the Board reaching a final decision.

### ***Motions***

Having granted Appellant’s motions to consolidate and for hearings, in the interest of further advancing these matters and narrowing the issues to be addressed by the Hearing Examiner, the Board will also rule on the following motions. The numerous motions and cross-motions not addressed herein shall be decided by the Hearing Examiner. The Hearing Examiner’s rulings will, of course, be subject to exceptions and final Board review and approval at such time as any exceptions are taken to the Hearing Examiner’s findings and recommendations.

### ***Motion to Disqualify Chief of OCA’s Division of Government Operations***

Appellant moved to disqualify [REDACTED], [REDACTED], [REDACTED], from providing advice and counsel to the Board, asserting that there is a conflict of interest. *See* MSPB Case No. 16-09. Appellant apparently assumes that the Board may have already consulted [REDACTED] regarding her cases, and that he will be a witness if there are hearings. While [REDACTED] has occasionally provided Board staff with legal advice, neither the members of this Board nor its staff have communicated with [REDACTED] regarding any of the Appellant’s grievances, grievance appeals, or her other litigation involving the County.

The Board agrees that ██████ should remain uninvolved in providing advice to the Board. One of Appellant's exhibits is a May 24, 2016, email from ██████ to Appellant's former attorney indicating that ██████ acted as counsel to OHR regarding at least three of Appellant's grievances. The email states, in part: "The remainder of the withheld emails arise out of my role as counsel to OHR on all three of [Appellant's] grievances. As indicated in one of the attached emails, I advised OHR in accordance with our office's firewall policy." MSPB Case No. 17-04, Appellant Exhibit 9. While that involvement does not mandate ██████ disqualification as the Board's counsel, the Board wishes to avoid even the mere appearance of impropriety. Accordingly, even though ██████ has not been consulted on any of the issues raised in these grievance appeals, the motion to disqualify him is granted based on the specific circumstances of these cases. This disqualification from participation also applies to the Hearing Examiner, who shall not consult or have any communication with ██████ regarding these grievance appeals. We emphasize that if the Board decides that it or the Hearing Examiner require counsel, the Board will either ask that an uninvolved attorney in OCA be assigned, or invoke its authority under Montgomery County Code, § 33-14(b), to request outside special counsel.

#### *Motions for Discovery*

Appellant has requested various documents, under both the PIA and as part of the grievance procedure. Appellant has asked the Board to order discovery and "forensic discovery." While the Personnel Regulations providing for the grievance procedure do not provide for formal discovery, they do require the parties to share relevant facts:

#### **MCPR, § 34-3. Policy on Grievances.**

(j) *Disclosure of facts*. Each party to a grievance must provide timely full disclosure of facts known by or available to that party directly relating to the grievance, unless that information must not be disclosed under any other applicable law, regulation, or policy. The OHR Director must resolve disputes that arise under this subsection.

Appellant filed a complaint in Montgomery County Circuit Court seeking documents the County refused to produce under the PIA. The County asserts that many of the documents requested under the PIA are the same documents requested in these proceedings. The County asserted various exemptions and privileges under the PIA and, on June 28, 2016, ruling in favor of the County, the Circuit Court dismissed Appellant's complaint. Appellant filed an appeal to the Court of Special Appeals which, in an unreported opinion, affirmed in part, vacated in part, and remanded for further proceedings. The case is now pending at the Court of Appeals. ██████ v. *Montgomery County*, 2017 WL 3668171 (August 25, 2017) (unreported), *cert. granted*, 2017 WL 6819757 (December 18, 2017).

While the County Administrative Procedures Act, Montgomery County Code, § 2A-7(b), provides for discovery subject to the limitations of the State PIA, in MSPB Case No. 15-04 (2015) this Board held that "discovery is only permitted under the County's APA in cases involving hearings before the Board." Normally, there is no right to a hearing before the Board in a grievance.

Montgomery County Code, § 33-12(b); MCPR § 35-2(b) and § 35-10(a)(2). However, because the Board is referring this matter to a Hearing Examiner with instructions to conduct an evidentiary hearing and rule on motions, the Hearing Examiner shall permit the parties to conduct appropriate discovery and to raise issues concerning the proper scope of that discovery, privileges, and the relevance of specific requests. The Hearing Examiner may limit discovery, as appropriate.<sup>2</sup>

For the Board  
February 1, 2018



Angela Franco  
Chair

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<sup>2</sup> The Board notes that it has previously held that it lacks jurisdiction over document requests made under the PIA. MSPB Case No. 15-04 (2015).