

**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. 18-26

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ORDER

On March 29, 2018, [REDACTED] (Appellant) filed an appeal with the Merit System Protection Board (MSPB or Board). An acknowledgement letter was sent to Appellant on March 30 advising her that the Board could not process her appeal until it receives a copy of a Notice of Disciplinary Action (NODA). On April 2, Appellant submitted a Statement of Charges (SOC). In response, another letter was sent to Appellant advising her that the Board lacks jurisdiction unless the County issues a NODA taking disciplinary action, and requesting that she provide the Board with a copy of a NODA.

On April 3 Appellant filed copies of three Statements of Charges.¹ Appellant was again advised, by letter dated April 4, that a NODA was necessary for the Board to proceed. Montgomery County Personnel Regulation § 35-4(d)(1) requires that an employee contesting a disciplinary action provide a copy of a NODA to the MSPB. Thus, the three letters from the Board advised Appellant that if the Board did not receive a copy of a NODA her appeal would be dismissed. On April 4, Appellant submitted copies of her April 3 responses to the SOCs, but not a NODA.

¹ Appellant provided: (1) Statement of Charges – Three-Day Suspension, dated March 26, 2018; (2) Statement of Charges – 3 Day Suspension, dated March 5, 2018; and, (3) Statement of Charges – Written Reprimand, dated February 23, 2018.

After being given multiple opportunities to provide the Board with a copy of a NODA, and failing to do so, on May 30 the Board ordered Appellant to provide good cause as to why she has failed to provide a required NODA. The Show Cause Order required that Appellant's response be filed on or before June 12, 2018. When Appellant filed no response to the order the Board sent an email asking Appellant for an explanation. No response to the email was received by the Board.

The Show Cause Order also required the County to advise the Board whether a NODA had been issued effectuating discipline against Appellant in any of the three cases for which Appellant submitted a SOC to the Board. Having received no information from the County, in the same email sent to Appellant the Board also asked the County to explain its failure to meet the deadline. The County responded by advising the Board that a NODA for the written reprimand had been issued, but no NODAs had been issued that relate to the two SOCs involving suspensions.

This 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 are 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 right of a merit employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal is granted by the Montgomery County Charter. Montgomery County Charter, § 404. The Montgomery County Code, § 33-12(a), provides that merit system employees who have been "notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board. . .". While it is true that under the Montgomery County Personnel Regulation (MCPR) § 35-2(a), an employee with merit system status has the right to appeal a suspension to the Board, the regulations provide a specific process by which the County must provide formal notification of a disciplinary action from which an employee may appeal to the Board. The personnel regulations make a clear distinction between a Statement of Charges, which notifies an employee of a *proposed* disciplinary action "[b]efore taking a disciplinary action," § 33-6(b)(1), and a Notice of Disciplinary Action, which provides notice of the actual imposition of discipline. § 33-6(c). *See* MSPB Case Nos. 17-17 and 17-06 (2017); MSPB Case No. 07-13 (2007). It is only after an employee receives a NODA that an appeal to the Board is permitted. MCPR § 35-3(a) ("An employee has 10 working days to file an appeal with the MSPB in writing *after* the employee: (1) receives a notice of disciplinary action. . .") (emphasis added). The Board has no jurisdiction to entertain an appeal of a Statement of Charges that has not been followed by a NODA. MSPB Case Nos. 17-17 and 17-06 (2017).

Furthermore, MCPR §35-4(d)(1) provides that an employee contesting a disciplinary action "must include the following documentation with the appeal: (1) If the employee is contesting a disciplinary action, a copy of the Notice of Disciplinary Action must be provided to the Board." After being given multiple opportunities, Appellant has not provided a copy of a NODA. Thus, because Appellant has not provided the copy of the NODA, presumably because no

disciplinary action has yet been effectuated against her, the Board must dismiss this matter for failure to comply with established appeal procedures and because the Board lacks jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 17-17 (2017); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

Finally, there is no right of direct appeal to the Board with regard to a written reprimand. MSPB Case No. 15-10 (2015). A grievance is a prerequisite to the filing of an appeal to the Board under MCPR, § 33-9(b)(2); § 35-2(b) (a merit system employee may appeal to the Board “after receiving an adverse final decision on a grievance from the CAO.”). As we have no record of a grievance being filed over the written reprimand, or of any adverse final decision of the Chief Administrative Officer for the Board to review, the Board lacks jurisdiction to hear an appeal of the written reprimand due to a failure of Appellant to exhaust her administrative remedies.²

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 18-26 is dismissed. Should a NODA ultimately be issued suspending Appellant, or an adverse CAO decision be issued regarding the written reprimand, she may then timely file an 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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 26, 2018



Angela Franco
Chair

² Under the facts before us we need not address the possible distinction between the appeal rights of a bargaining unit employee and those of a non-bargaining unit employee in cases of a written reprimand. *See* MSPB Case No. 15-10 (2015); MCPR, § 33-9(a)(2).