

Appellant's job performance. The Board approved [REDACTED] as a witness and sees no reason to alter that decision. While it is not for Appellant to decide how the County can best make its case, Appellant has at all times been free to request fact witnesses for her case. Nevertheless, Appellant did not designate the OHR Director as a proposed witness in her prehearing submission. Nor does it appear that she is requesting that her witness list be amended to add the OHR Director. If Appellant decides that she wishes to call the OHR Director as her witness the Board would look favorably upon that request, but it will not order the County to call this particular witness for its case in chief.

The following passage in Appellant's motion purports to describe events at the prehearing conference regarding this issue:

According to [REDACTED], at the Board's prehearing conference on June 21, 2018, Vice Chair Michael Kator at one point expressed the view that [REDACTED] should be testifying and wanted to know why she wasn't. County attorney [REDACTED] stated that she would explain that in private. [REDACTED] did not know to object to that *ex parte* process. Appellant has a right to know why [REDACTED] will not be testifying at the hearing. Assuming that [REDACTED] is leaving County employment soon, if she is still on the payroll on October 9, 2018, she should be made to appear and testify.

No member of the Board invited any *ex parte* discussion. We assume Appellant misunderstood Member Kator's remarks to [REDACTED] regarding the County's choice of witnesses as between the OHR Director and [REDACTED]. Member Kator noted that the Board generally preferred to hear from the appropriate decisionmaker, but that it was up to the County to determine how best to try its case and meet its burden of proof. No *ex parte* contact has occurred before or after the prehearing conference.⁴

In her June 14, 2018, filing Appellant requested a subpoena to obtain the testimony of the County's CAO even though Appellant's prehearing submission did not include the CAO on her proposed witness list. The Board denied Appellant's request to call the CAO as a witness because his proposed testimony concerning Appellant's disability retirement matter is of questionable relevance to this termination case. Appellant will be permitted to introduce documents and present

⁴ The Montgomery County Administrative Procedures Act, Montgomery County Code (MCC), § 2A-8(b)(2), provides that "Section 19A-15(b) applies to any *ex parte* or private communications received by a member of a hearing authority." MCC § 19A-15(b), provides that:

- (1) A public employee decision-maker must not consider any communication made outside of the record regarding any matter that must be decided on the basis of a record . . .
- (2) Except as otherwise expressly authorized by law, any public employee decision maker, and any public employee who directly advises a decision maker, must not: (A) initiate or participate in any communication outside the record with any person regarding a matter that must be decided on the basis of a record; . . .
- (4) This subsection does not restrict a communication that consists solely of: (C) a procedural question that does not involve the substance of facts in a record. . . .

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further argument at the hearing on the merits as to the relevance of the disability retirement determination to this case.

For the Board

August 22, 2018



Michael J. Kator
Vice Chair