

**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. 18-19

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ORDER DENYING MOTION FOR HEARING AND DISQUALIFICATION

The Merit System Protection Board (MSPB or Board) has received a March 5, 2019, Motion for Hearing filed by Appellant. The motion asks the Board to: hold a hearing determine whether there was improper disclosure of confidential information relating to Appellant’s grievance appeals; order the production of documents; disqualify the Montgomery County Office of Zoning and Administrative Hearings (OZAH) Hearing Examiner; and vacate all orders issued by the Hearing Examiner in this appeal.¹ On March 6, 2019, Appellant filed a Supplement to Motion for Hearing requesting that as additional relief the Board decide the merits of the grievance appeals based on motions and cross motions for summary decision and the record. On March 14 the County filed a reply to which Appellant responded on March 18, 2019.

This is Appellant’s second request to have the Board disqualify the Hearing Examiner. The Board denied the first request in an order dated August 22, 2018. That decision held that Appellant could not obtain an interlocutory appeal since the Hearing Examiner was not delegated authority to issue a final decision. Further, Appellant should have in any event first filed her motion to disqualify with the Hearing Examiner. We nevertheless went on to address the merits of that motion in an effort to avoid unnecessary additional proceedings. Subsequently, Appellant filed a

¹ On February 1, 2018, the Board consolidated Appellant’s seven grievance appeals into this case and referred the matter to OZAH for a Hearing Examiner to conduct an evidentiary hearing and rule on motions. The Hearing Examiner’s proposed findings and recommendations will be subject to exceptions by the parties prior to the Board reaching a final decision.

motion with the Hearing Examiner asking her to recuse herself. That motion was denied by the Hearing Examiner on February 19, 2019. No attempt to appeal that ruling was filed with the Board.

The current motion alleges impropriety by the Hearing Examiner, the director of OZAH, various members of the County Council staff, and outside counsel representing the County in Appellant's litigation regarding Public Information Act (PIA) requests and Ethics complaints.²

The Board has reviewed the motion, exhibits, and replies, and can discern no reason for the Board to hold the requested hearing or to disqualify the Hearing Examiner. The alleged disclosures appear to do nothing more than mention that Appellant has a number of grievance appeals pending, that those appeals were referred to the OZAH Hearing Examiner, and that Appellant sought to disqualify the Hearing Examiner. The substance of the grievance appeals does not appear to have been disclosed. Further, several of the exhibits Appellant has submitted to support her argument that OZAH and Council staff have revealed confidential information seem to demonstrate the opposite. For example, Appellant sent an email to a County Councilmember complaining about the County Attorney and his senior staff, and apparently attaching the complaint she had filed with the County Ethics Commission. The email informed the Councilmember that the matter has been appealed to court, and expressly states that the Ethics complaint "is publicly available and by no means confidential." Appellant Exhibits 4, 5, and 9.

In our view, the mere existence of Appellant's MSPB appeal is no longer confidential. One year ago, Appellant filed a motion with the Hearing Examiner requesting that the hearing be open to the public. Appellant's March 7, 2018, Notice of Request and Motion for a Public Hearing. The Hearing Examiner granted that motion by order dated March 29, 2018. By asking for a public hearing Appellant has waived her right to keep the existence of her grievance appeals confidential. Appellant attempts to deal with this inconvenient reality by arguing that an open hearing does not necessarily mean that everything in the record is public. While that may be true, there is no allegation that anything in the record has been disclosed, other than the fact that there are appeals and that motions to disqualify the Hearing Examiner were filed. *See, e.g.*, Appellant Exhibits 1 and 2. The Montgomery County Code, § 33-14(a), provides that an MSPB "[h]earing shall be open to the public with reasonable notice, if requested by the employee."³ That provision suggests that the public is entitled to know about an appeal hearing that is open to the public, even if some of the underlying documents in the record may not be disclosed (*e.g.*, medical records, social security numbers, and the personnel information of other employees).

² Appellant also filed a tort claim against OZAH and the Hearing Examiner alleging violation of various rights because of the alleged disclosures. Appellant's Exhibit 18. Appellant has also sent a series of emails urging Board action. *See, e.g.*, Appellant Exhibits 19 and 20.

³ *See also* Montgomery County Code, § 2A-8(a) ("hearings shall for the purpose of the taking of evidence upon a contested matter shall be held at such time and place as designated in the notices therefor . . . [and] such hearings shall be public except where otherwise ordered by the hearing authority or provided by law."). Montgomery County Personnel Regulation, § 35-10(g), provides that MSPB hearings are not open to the public "unless the appellant requests it. . .".

Further, even if Appellant had shown the existence of improper disclosures by various County employees, offices, and their attorneys, disqualification of the Hearing Examiner would not necessarily follow. Nothing presented to us suggests that the Hearing Examiner knowingly violated any confidentiality requirements. The Board perceives no abuse of discretion by the Hearing Examiner that has prejudiced Appellant's substantive rights. The alleged disclosures involving Appellant and her representative are collateral matters, not material to the substance of these appeals. There is nothing in the record to suggest that the Hearing Examiner is incapable of carrying out her duties in an unbiased and professional manner.

Moreover, we have already held that the Hearing Examiner's orders are not subject to interlocutory appeal because they do not finally determine rights and liabilities, have immediate legal consequences, or result in irreparable harm. *See* Order Dismissing Interlocutory Appeal, MSPB Case No. 18-19 (May 16, 2018); Order Denying Motion for Disqualification, MSPB Case No. 18-19 (August 22, 2018).

In addition to filing a Supplement to Motion for Hearing on March 6, 2019, Appellant sent an email late that afternoon responding to an Order Disclosing *Ex Parte* Communication issued by the Hearing Examiner earlier that day. On March 4, 2019, Appellant's representative had copied the Hearing Examiner on emails he sent to the County Council accusing the Director of OZAH and other Council staff of misconduct. He did not copy the attorneys representing the County in Appellant's grievance appeals. The Hearing Examiner deemed it appropriate to treat the communications as *ex parte* and provided them to the lawyers for the County. Appellant's response questioned why other communications between the OZAH Director and Council staff were not treated the same way.⁴ As the Hearing Examiner has not had an opportunity to address Appellant's concerns, it is premature for the Board to consider the matter.

Finally, Appellant's March 6 Supplement to the Motion for Hearing again asks that the Board not hold a hearing on the merits and instead decide the grievance appeals on the record and the cross motions for summary decision. The Board has previously decided the record would benefit from the Hearing Examiner's proposed findings of fact, conclusions of law, and recommendations. Order Denying Motion for Disqualification, MSPB Case No. 18-19 (August 22, 2018). We again find that the Hearing Examiner has the discretion to determine the appropriate scope and extent of the hearing, and to decide whether an evidentiary hearing is necessary and desirable. As we have said before, after the Hearing Examiner has fulfilled her responsibilities either party may waive their right to present oral argument on the record to the Board prior to the Board reaching a final decision.⁵

⁴ We note that Appellant's representative mischaracterizes Exhibit 6, the August 6, 2018, email from the Director of OZAH as "discussing Appellant's grievances at length." Exhibit 6, however, only discusses the existence of the grievance appeals, the fact that Appellant had moved to disqualify the Hearing Examiner, and outlines the basis for Appellant's motion to disqualify. There is no discussion of the substance and nature of the various grievance appeals themselves.

⁵ The Board expects the hearing, if any, to be held relatively promptly and the Hearing Examiner's recommendations to be issued expeditiously thereafter.

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For the above reasons, it is hereby **ORDERED** that the Motion for Hearing and disqualification of the Hearing Examiner is hereby **DENIED**.

For the Board
March 21, 2019



Michael J. Kator
Chair