

**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 OF DISMISSAL

On December 20, 2015, Appellant filed a grievance appeal with the Merit System Protection Board (Board or MSPB). MSPB Case No. 16-09. On April 4, 2016, Appellant filed two additional grievance appeals. MSPB Case Nos. 16-11 and 16-12. The Board concluded that Appellant’s claims should be addressed together and, on May 26, 2016, ordered consolidation of MSPB Case Nos. 16-09, 16-11, and 16-12. Subsequent to the consolidation of the first three appeals, Appellant filed four additional grievance appeals: MSPB Case No. 17-02 (August 18, 2016); MSPB Case No. 17-04 (September 26, 2016); MSPB Case No. 17-08 (November 10, 2016); and, MSPB Case No. 17-23 (April 3, 2017).

On February 1, 2018, the Board consolidated MSPB Case Nos. 16-09, 16-11, 16-12, 17-02, 17-04, 17-08, and 17-23 into this case, which we designated as MSPB Case No. 18-19. In the February 1, 2018, Order, and pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations (MCPR), § 35-2(b), the Board also ordered that MSPB Case No. 18-19 be referred to the Montgomery County Office of Zoning and Administrative Hearings (OZAH) 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 were to be subject to written exceptions by the parties prior to the Board reaching a final decision.

For over a year the parties have engaged in extensive discovery, contested various motions and cross-motions, and participated in hearings before the Hearing Examiner.¹ By our count, the Hearing Examiner has issued 28 orders, including those that are procedural. The Board itself has issued four orders, three in response to Appellant's motions.²

On March 27, 2019, Appellant filed a Notice of Withdrawal of Appeal seeking to dismiss MSPB Case No. 18-19, including all of the consolidated appeals referenced above. Notwithstanding the Board's delegation to the Hearing Examiner, Appellant has filed this motion directly with the Board itself. Because of the nature of the motion and in the interest of judicial economy, we choose to hear and decide Appellant's motion without the necessity of review by the Hearing Examiner.

Pursuant to MCPR § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 17-18 (2017); MSPB Case No. 17-11 (2017). *See* MCPR §35-7(b) (Board may dismiss an appeal if the appellant fails to prosecute the appeal). *See also* Montgomery County Code, § 2A-8(h)(4) & (10).

The County's Response to Appellant's Notice of Withdrawal of Appeal does not oppose a dismissal, but requests that the dismissal be with prejudice.

Under the authority of MCPR, § 35-7(b) & (d), and the Code, § 2A-8(h), the Board has used its discretion to dismiss voluntary dismissal cases "with prejudice."³ The Court of Appeals, in *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 420 (2007), explained the analysis that should be used to decide whether a voluntary dismissal after the filing of a responsive pleading should be with or without prejudice:

Whether a plaintiff is entitled to voluntary dismissal without prejudice, *i.e.*, the defendant would not suffer "plain legal prejudice" in the event of dismissal, is resolved traditionally by analysis according to the following four factors: (1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation, *i.e.*, whether a motion for summary judgment or other dispositive motion is pending.

¹ The County's Response states that "Appellant filed approximately 13 motions with OZAH and/or the MSPB." While the Board is aware of various motions filed by Appellant, it has not verified the exact number filed with OZAH.

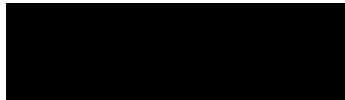
² In addition to our Order Consolidating Appeals and Referring to Hearing Examiner (February 1, 2018), we have issued an Order Dismissing Interlocutory Appeal (May 16, 2018), an Order Denying Motion for Disqualification (August 22, 2018), and an Order Denying Motion for Hearing and Disqualification (March 21, 2019).

³ *See, e.g.*, MSPB Case No. 17-18 (2017); MSPB Case No. 17-11 (2017).

In our view, application of the four factors listed in the *Aventis Pasteur* case to MSPB Case No. 18-19 favors dismissal with prejudice. Accordingly, for the above reasons, the Board hereby **ORDERS** that the above-captioned consolidated appeals be **DISMISSED**, with prejudice.

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
April 4, 2019



Michael J. Kator
Chair