

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

██████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

CASE NO. 18-24

=====

FINAL DECISION AND ORDER

██████████ (Appellant) is a former Montgomery County employee who, effective January 1, 1999, retired and began receiving pension benefits.

On March 26, 2018, Appellant filed this appeal challenging a March 7, 2018, decision by the Montgomery County Chief Administrative Officer (CAO) of the annual cost of living (COLA) calculation applied to her monthly retirement benefit. On March 27, 2018, the Board acknowledged receipt of the appeal and requested that Appellant submit a copy of the CAO's decision. Appellant provided a copy of the CAO decision on April 9, 2018.¹

¹ In addition to the CAO's decision, Appellant included five attachments with her appeal letter dated March 21, 2018. We will designate the unmarked attachments and the CAO's decision as Appellant Exhibits (AX):

- AX 1 - Excerpt from Employees' Retirement System Summary Description, November 2001.
- AX 2 - Excerpt from Employees' Retirement System Summary Description, July 2010.
- AX 3 - Excerpt from Employees' Retirement System Summary Description, October 2015.
- AX 4 - Montgomery County Employee Retirement Plans (MCERP) presentation materials, October 2017.
- AX 5 - Bill 25-01, pp. 1-2, 27-32.
- AX 6 - Letter from CAO, March 7, 2018.

The County filed a response to the appeal (County Response) on May 24, 2018,² and Appellant filed final comments (Appellant's Reply) on June 18, 2018.³ The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was hired by the County and became a participant in the Employees' Retirement System (ERS) on February 27, 1983. Effective January 1, 1999, Appellant retired from her County position as an Office of Human Resources benefits specialist and began receiving retirement benefits.

In 2013, the County asserted that an audit had revealed that the ERS had erroneously applied an incorrect COLA calculation to Appellant's benefits. The County determined that Appellant had been allowed a 100% annual COLA with no cap or maximum, a benefit that the County maintained only applied to employees hired prior to July 1, 1978. It was the County's view that employees hired on or after July 1, 1978, like Appellant, were only entitled to an annual COLA of 60% of the change in the Consumer Price Index (CPI) greater than 3%, with an annual cap of 5% for retirees younger than 65. Montgomery County Code (MCC) § 33-44(c)(3)(A).

On March 13, 2013, the County notified Appellant of the error and advised her that she must repay the most recent three years of overpayments. CX 2. Appellant requested a waiver of the repayment requirement by letter dated March 27, 2013. CX 4. In her letter Appellant challenged the County's effort to recover the overpayments but admitted that the correct COLA calculation was 60%: "I was receiving 100 percent of the COLA instead of the 60 percent to which I was

² The County submitted the following thirteen County Exhibits (CX):

- CX 1 – Letter from CAO, March 7, 2018.
- CX 2 – Letter from [REDACTED], March 13, 2013.
- CX 3 – Notices sent by ERS to retirees regarding COLAs from 2013 to 2017.
- CX 4 – Letter from Appellant to [REDACTED], March 27, 2013.
- CX 5 – Acknowledgement of appeal in MSPB Case No. 14-05, August 12, 2013.
- CX 6 – County response in MSPB Case No. 14-05, August 30, 2013 (excluding exhibits D – J).
- CX 7 – Appellant response in MSPB Case No. 14-05, September 6, 2013.
- CX 8 – Final Decision and Order, MSPB Case No. 14-05, November 19, 2013.
- CX 9 – Affidavit of [REDACTED], May 22, 2018.
- CX 10 – ERS Benefit Formula and COLA Changes.
- CX 11 – Agenda Item 6, Bill No. 19-01, June 26, 2001.
- CX 12 – Text of Montgomery County Code § 33-35.
- CX 13 – Letter from [REDACTED], [REDACTED], Inc., with attachments, April 18, 2001.

³ Appellant's Reply included two exhibits, which we will designate as follows:

- AX 7 – Letter from Appellant to MSPB, August 8, 2013.
- AX 8 – Letter from MCERP to Appellant, November 25, 2013.

entitled . . . I am in agreement to having my monthly pension reduced to the correct amount on May 1, 2013.” CX 4.

When Appellant’s request was denied by the ERS and the CAO Appellant filed an online appeal to the MSPB on August 2, 2013, and the matter was docketed as MSPB Case No. 14-05. CX 5.

Following her online appeal, Appellant sent an August 8, 2013, letter to the Board concerning her case. AX 7. In that letter Appellant argued the reasons why she should receive a waiver of any obligation to repay the County,⁴ but conceded that she had improperly received the higher COLA: “I was only eligible to receive 60% instead of 100% of the COLA. . . I consider this to be a nonfault overpayment on my part. . . these overpayments were created through no fault on my part.” AX 7.

The County provided a response to the appeal on August 30, 2013. CX 6. In addition to argument concerning Appellant’s repayment obligation and the waiver process, the County response included a review of the legislative history of the COLA and an explanation of how the Code applied to Appellant. The response stated “At the time of [Appellant’s] retirement, Section 33-44(c) of the County Code provided for an annual COLA of 60% of the cost of living adjustment up to a total adjustment of 5 percent in any year except at age 65 at which point the maximum does not apply.” CX 6, p. 1. In a footnote on that page the County stated:

Section 33-44(c) was subsequently amended as a result of collective bargaining in 1999 (for police officers) and 2001 (for all other participants) through Bills 18-99 and 25-01. These provisions applied to those participants retiring after those dates and not those retired. While the County Code does not specify that this provision applies only to active employee participants, legislative history indicates the intent to apply the COLA to only active participants . . . [Appellant] is not challenging the amount of the COLA.

CX 6, p. 1, n. 1. The County included copies of the bills and legislative packets with its submission in MSPB Case No. 14-05.

Appellant filed a response to the County submission dated September 6, 2013. CX 7. In that response Appellant did not contest the County’s calculation of the COLA applicable to her. The only mention of the law concerning the COLA calculation was Appellant’s argument that the law was unnecessarily ambiguous:

It was stated that Section 33-44 Pension Payment Options and COL’s Adjustments in the Code was amended. However, the amendment failed to make it clear that it only impacted active employee participants. It is now 2013. Looking back on past laws, neglecting to include every provision, the door was left open to interpretations

⁴ Appellant challenged the County effort to recover the overpayment based on the length of time before the error was discovered, the fact that she was not to blame, and the hardship the recovery would cause.

and relying on standard operating procedures (SOP). It would seem to be in the best interest of the County to close that door.

CX 7, p. 1.

The Board considered the appeal and on November 19, 2013, issued a Final Decision and Order. CX 8. The Board granted Appellant's appeal from the CAO's determination that she was not eligible for a waiver of overpayment and found that she had provided evidence sufficient to carry her burden of proof. The Board held that Appellant was eligible for a waiver of collection of the overpayment because she was not at fault for the error and on the basis of financial hardship. The County was ordered to reimburse Appellant for monies already deducted from her pension payments, and to waive recoupment of past overpayments of her pension benefits. CX 8, p. 6.

Although the Board's decision focused on Appellant's eligibility for a hardship waiver of the County's efforts to recoup the overpayments, the Board made the following finding with regard to application of the COLA law to Appellant:

At the time of Appellant's retirement, Section 33-44(c)(3) of the County Code provided for an annual COLA of 60% of the COLA up to a total adjustment of 5 percent in any year, except at age 65 at which point the maximum does not apply. . . . An administrative error by the County resulted in Appellant receiving the wrong COLA. She received a COLA of 100% with no cap . . . This COLA, in the County Code Section 33-44(c)(3)(A) only applies to participants hired before 1978.

CX 8, p. 2.

The appeal of March 26, 2018, in this case suggests that the error in her COLA calculation was the result of the County using an incorrect code on her retirement papers. Her appeal then relates that in October 2017 she received the Montgomery County Retirees Association (MCREA) newsletter that caused her to investigate the basis for the calculation of her COLA. Upon her review of various materials, including the County Code, she contends that the County was in error in 2013 when it determined that the annual COLA of 60% of the CPI was applicable to her.

Appellant's Reply to the County's submission states that in 2013 she "acknowledged that I was paid 100% of the Cost of Living" and that she immediately appealed the monthly deduction the County made to her pension benefits to recoup the overpayment. Appellant explains that subsequent to the Board's decision in her favor on the waiver issue her research revealed that the County has misinterpreted the legal effect of Bill 25-01 and improperly calculated her COLA since July 1, 2002. Accordingly, she requests that her COLAs for the past 17 years be recalculated at the 100% level instead of at 60%, and that she be reimbursed for the difference, with interest.

Pursuant to MCC § 33-56(a), Appellant requested that the CAO provide a written interpretation of the applicability of the Code's current COLA provision. On March 7, 2018, the CAO issued a letter stating that because Appellant retired January 1, 1999, the law applicable to

her provides for an annual COLA of 60% of the COLA up to a total adjustment of 5% in any year, except that at age 65 the maximum or cap does not apply. AX 6, CX 1. The CAO's letter also noted that during Appellant's 2013 appeal seeking a waiver of her obligation to repay the erroneous COLA amounts she "questioned the COLA because the COLA had been amended in Bill 25-01." The CAO went on to note that in 2013 the County provided a detailed explanation of the legal basis for its position on the COLA and that the Board's decision included a finding that she was not entitled to the 100% COLA Appellant seeks. Appellant then filed this appeal.

APPLICABLE LAW

Montgomery County Code [language prior to November 1, 2001]

§ 33-44. Pension payment options and cost-of-living adjustments.

* * *

(c) *Cost-of-living adjustment.* A retired member or beneficiary . . . must receive an annual cost-of-living adjustment in pension benefits computed as follows:

* * *

(3) The percentage cost-of-living adjustment of pension benefits must be obtained by dividing the most recent index determined under paragraph (2) by the next preceding index multiplied by 100 less 100.

(B) A member enrolled on or after July 1, 1978, must receive 60 percent of the cost-of-living adjustment up to a total adjustment of 5 percent in any year. The 5-percent annual limitation does not apply to :

(i) a retired member who is disabled; or

(ii) a pensioner aged 65 or older for a fiscal year beginning after the date the pensioner reaches age 65.

ISSUE

Did the County err in denying Appellant's request to calculate her annual COLA based on 100% of the CPI instead of 60% of CPI?

ANALYSIS AND CONCLUSIONS

The CAO's Interpretation of the Retirement Statute is Entitled to Deference, if Reasonable.

The County Council has vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. MSPB Case No. 14-33 (2015). *See Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO's interpretation is predicated on an error of law, no deference is appropriate. *See Dep't of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App.

593, 602 (1995); MSPB Case No. 18-09 (2019); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

Res Judicata and Collateral Estoppel

This is Appellant's second appeal to the Board concerning her retirement benefits COLA. In MSPB Case No. 14-05 she appealed the determination of the CAO that she was obligated to reimburse the County for overpayments due to an error in the calculation of her COLA.⁵ The County contended that she was overpaid from July 1, 1999, through April 1, 2013.

The Board decided in MSPB Case No. 14-05 that Appellant was eligible to receive a waiver of the overpayment collection. In its decision, the Board also found that "[a]t the time of Appellant's retirement, Section 33-44(c)(3) of the County Code provided for an annual COLA of 60% of the COLA up to a total adjustment of 5 percent in any year, except at age 65 at which point the maximum does not apply." MSPB Case No. 14-05, p. 2. *See* MSPB Case No. 14-06 (2013) (same). The Board went on to say that an "administrative error by the County resulted in Appellant receiving the wrong COLA. She received a COLA of 100% with no cap. . . This COLA, in the County Code Section 33-44(c)(3)(A) only applies to participants hired before 1978." MSPB Case No. 14-05, p. 2.

The County contends that the 100% COLA does not apply to Appellant since she retired prior to the 2001 amendment, that the proper COLA was already the subject of an appeal to the Board, and that she conceded the 60% COLA calculation was correct in her 2013 appeal. The County argues that Appellant's current challenge to the COLA calculation is barred by *res judicata* and collateral estoppel.

While Appellant could have challenged the COLA calculation in her 2013 appeal, MSPB Case No. 14-05, she instead conceded that the 60% calculation applied to her and that payment of the 100% COLA was in error. AX 7, CX 4. Although Appellant did not contest the County's position that she had been paid sums in error, or that the correct COLA calculation should have been 60% of the CPI instead of 100%, her submission to the Board dated September 6, 2013, did address and briefly discuss what she believed to be the ambiguity of the statute. CX 7.

Thus, the record demonstrates that not only did Appellant have the opportunity to raise the issue of the proper COLA calculation applicable to her, she did raise it to the Board, albeit without much vigor. The Board specifically addressed the issue in its decision and found that it was an error for the County to give her a 100% COLA.

Appellant's claim is thus precluded because the elements of *res judicata* are satisfied: (1) the parties are the same as in MSPB Case No. 14-05; (2) the subject matter (calculation of the

⁵ Appellant argues that Bill No. 25-01 (Chapter 21, Laws of Montgomery County 2001), which amended § 33-44(c)(3)(B), effective November 1, 2001, to provide for a COLA calculation of 100% of the CPI for retirees age 65 and over, applies to her.

COLA) is the same as that which could have or should have been litigated in the prior cases; and (3) there was a final judgment on the merits.

Appellant cannot argue that she failed to raise the issue of the proper COLA calculation, nor may she avoid the requirements of *res judicata* by her own failure to effectively challenge the COLA calculation in the prior case. *See* MSPB Case No. 14-38 (2014):

Res judicata restrains a party from litigating the same claim repeatedly and ensures that courts do not spend time adjudicating matters that have been decided or could have been decided fully and fairly. Almost 130 years ago, the Supreme Court made this point in *Cromwell v. County of Sac*, 94 U.S. 351, 358 (1876): “The plea of [*res judicata*] applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” . . .

“The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.” *MPC, Inc. v. Kenny*, 367 A.2d 486 (Md. 1977) (quoting *Alvey v. Alvey*, 1,71 A.2d 92, 94 (Md. 1961)); *see also Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 710 (1982) (“A party cannot escape the requirements of. . . *res judicata* by asserting its own failure to raise matters clearly within the scope of a proceeding.”).

Appellant’s claim is also precluded under the doctrine of collateral estoppel. *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359 (2016), holds that when an issue is litigated and decided by an administrative agency, and the determination was essential to that decision, the determination may be conclusive in a subsequent administrative action between the parties, whether on the same or a different claim. MSPB Case No. 17-15 (2017).

The Board in MSPB Case No. 14-05 decided the identical COLA calculation at issue in this appeal. There was a final judgment on the merits. The parties are the same, and Appellant had a fair opportunity to be heard on the issue in the prior litigation.

For these reasons, the Board need not reach the merits of Appellant’s arguments to affirm the CAO’s decision.

ORDER

Based on the foregoing, the Board **DENIES** Appellant's appeal from the CAO's interpretation of the statute concerning calculation of Appellant's Cost of Living Adjustment.

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

June 24, 2019



Michael J. Kator
Chair