

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 11, 2018.³ The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was hired by the County in December 1981 and became a member of the Employees' Retirement System (ERS). Appellant retired approximately seventeen years later and began receiving pension benefits on March 1, 1998.

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

² The County submitted the following sixteen exhibits:

- CX 1 – Letter from CAO, March 7, 2018.
- CX 2 – Letter from ██████████, March 18, 2013.
- CX 3 – Notices sent by ERS to retirees regarding COLAs from 2013 to 2017.
- CX 4 – Letter from Appellant to ██████, March 25, 2013.
- CX 5 – Acknowledgement of appeal in MSPB Case No. 14-06, August 12, 2013.
- CX 6 – County response in MSPB Case No. 14-06, August 30, 2013 (excluding exhibits D – J).
- CX 7 – Final Decision and Order, MSPB Case No. 14-06, November 12, 2013.
- CX 8 – Acknowledgement of further appeal in MSPB Case No. 14-06, March 10, 2014.
- CX 9 – Final Decision and Order, MSPB Case No. 14-46, January 15, 2015.
- CX 10 – Circuit Court Opinion and Order, Civil No. 401164V (November 18, 2015), transcript of the Hearing, and briefs of the County and Appellant.
- CX 11 – Court of Special Appeals Opinion, No. 2234 (November 16, 2016).
- CX 12 – Affidavit of ██████████, May 22, 2018.
- CX 13 – ERS Benefit Formula and COLA Changes.
- CX 14 – Agenda Item 6, Bill No. 19-01, June 26, 2001.
- CX 15 – Text of Montgomery County Code § 33-35.
- CX 16 – Letter from ██████████, ██████████, Inc., with attachments, April 18, 2001.

³ Appellant's Reply included the following additional eight exhibits, some of which were also provided with the original appeal of March 26, 2018:

1. Copy of May 24, 2018 County Response, with notations.
2. April 12, 2018 Letter from MSPB Executive Director re scheduling.
3. FEDEX Tracking webpage.
4. Barcodes from FEDEX Envelope.
5. CAO's July 22, 2013 Letter.
6. Section 33-34 of the County Code.
7. Section 33-47 of the County Code.
8. Excerpt from Employees' Retirement System Summary Description.

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 18, 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 then requested a waiver of the repayment requirement. CX 4. When her request was denied by the ERS and the CAO, Appellant appealed to the MSPB, which docketed the matter as MSPB Case No. 14-06. CX 5.

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 Ms. [REDACTED]'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." CX 6, p. 1. In a footnote to that sentence the County stated:

Section 33-44(c) was 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 were 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 employees. . .

CX 6, pp. 1-2. The County included copies of the bills and legislative packets with its submission in MSPB Case No. 14-06.

The Board considered the appeal and on November 12, 2013, issued a Final Decision and Order. CX 7. As Appellant had not contested the County's interpretation of the law concerning the applicable COLA or the fact that she had received overpayments of her pension due to the County's error, the Board's decision focused on the County's efforts to recoup the overpayments. The Board granted Appellant's appeal from the CAO's determination that she was not eligible for a waiver of overpayment and finding that while Appellant could request a waiver of collection of the overpayment, she had the burden of proving that she was eligible. The County was ordered to reimburse Appellant for monies already deducted from her pension payments, and to develop proper waiver guidelines to determine if she was entitled to an adjustment or complete waiver of the overpayment.

On March 10, 2014, Appellant, now represented by counsel, filed a second appeal which she titled as a "further appeal." The appeal alleged that the County had improperly denied her waiver request and failed to comply with the Board's order in MSPB Case No. 14-06 (2013). CX 8, pp. 2-8. Appellant's appeal did not question that the County had erroneously calculated the correct COLA and overpaid Appellant. Rather, the appeal challenged whether Appellant was entitled to an adjustment or complete waiver of her repayment obligation. CX 8, pp. 2-4. The appeal was accepted and docketed as MSPB Case No. 14-46. CX 8, p. 1.

The Board issued a Final Decision and Order on January 15, 2015. CX 9. In its decision the Board concluded that Appellant was not entitled to a waiver of the overpayment based on financial hardship because she had failed to meet her burden of proof due to her refusal to provide her Federal income tax returns. MSPB Case No. 14-46 (2015).

Appellant sought judicial review of the Board's decision in MSPB Case No. 14-46. CX 10, pp. 45-62 (Appellant's MD Rule 7-207 Memorandum on Appeal, May 15, 2015). Appellant presented six questions for review, but none of the questions concerned the appropriate calculation of the 60% of CPI COLA applicable to Appellant. Nor did Appellant raise a challenge to the application of the 60% of CPI COLA in the July 6, 2015, Reply Memorandum. CX 10, pp. 73-80. Indeed, the May 15, 2015, memorandum concedes that "the County applied the wrong provision for her COLA, resulting in a total overpayment of \$7,636.62 from March 1, 1998 through December 1, 2012."

The Circuit Court for Montgomery County held oral argument in Civil No. 401164V on November 10, 2015. CX 10, pp. 21-44 (transcript of hearing). During the oral argument Appellant's attorney conceded that payment of the 100% of CPI COLA was in error:

THE COURT: Well, isn't that the crux of the matter? Whether this was in fact her property or not? The payments were made. Is there really a contest as to whether they were made in error?

██████████: There was no contest about that. Everybody acknowledges that the County made an error. . . .

CX 10, p. 27, (transcript p. 8, lines 4-9).

On November 18, 2015, the Circuit Court issued an Opinion and Order in ██████████ v. *Montgomery County Merit System Protection Board*, Civil Case No. 401164V. CX 10, pp. 1-19. The Court found that the Appellant had received overpayments of her pension as the result of the County's erroneous application of the incorrect COLA: "The COLA provision that was erroneously applied was '100% with no cap,' a provision that only applied to County employees hired before 1978." *Id.*, p. 2. Among other findings, the Court concluded that Appellant's refusal to provide tax returns was unreasonable and that she had no right to the funds she received as a result of the County's error. The Circuit Court denied Appellant's petition for judicial review and affirmed the Board's order.

Appellant then appealed to the Court of Special Appeals. CX 11. Appellant's brief on appeal presented seven questions. None of the questions concerned whether the appropriate calculation of the COLA applicable to Appellant was the 60% of CPI or the 100% of CPI COLA. CX 11, pp. 25, 31. As she did in the Circuit Court, Appellant conceded that "the County applied the wrong provision for her COLA, resulting in a total overpayment of \$7,636.62 from March 1, 1998 through December 1, 2012 . . .". *Id.*, p. 32.

The Court of Special Appeals issued a decision on November 16, 2016, affirming the Board's decision. CX 11, pp. 1-22. In its decision the Court of Special Appeals found that Appellant had erroneously "been allowed a 100% annual COLA with no cap, a benefit that did not apply to employees hired after July 1, 1978." [REDACTED] v. *Montgomery County Merit System Protection Board*, 2016 WL 6876648, p. 1 (Md. Ct. Spec. App., November 16, 2016) (Unreported). In footnote 2 the Court explained in more detail:

Pursuant to section 33-44(c)(3)(A) of the Montgomery County Code ("MCC"), retirees who were hired by the County prior to July 1, 1978 were entitled to an annual COLA equal to 100% of any change in the consumer price index ("CPI") for the month preceding the end of the prior fiscal year. Retirees hired after that date, like [Appellant], were entitled to a COLA of 60% of the change in the CPI greater than 3%, with an annual cap of 5% for retirees younger than 65.

The appeal of March 26, 2018, in this case suggests that in 2013 Appellant discovered an error in her COLA calculation that was the result of the County using an incorrect code on her retirement papers. Her appeal then recounts that she appealed the County's attempt to recoup the overpayments and that the Board upheld the County's right to recover the funds in its January 2015 decision in MSPB Case No. 14-46. Appellant then states that in October 2017 she received the Montgomery County Retirees Association 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.

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 in 1998, 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. CX 1. The CAO's letter also noted that Appellant's 2013 and 2014 appeals seeking a waiver of her obligation to repay the erroneous COLA amounts "did not contest the County's determination of the error and [the] COLA you are entitled to receive." *Id.* Appellant then filed this appeal on March 26, 2018.

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).

Timeliness

Appellant's Reply urges that the County response should be disregarded as untimely. The Board denies this request as the County filed its submission with the Board on May 24, 2018, the due date. Appellant's receipt of the submission the next day does not constitute a late filing or prejudice to Appellant.

Res Judicata and Collateral Estoppel

This is Appellant's third appeal to the Board concerning her retirement benefits COLA. In MSPB Case Nos. 14-06 and 14-46 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. The County contended that she was overpaid from March 1, 1998, through December 1, 2012. 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, not 100%.

The Board decided in MSPB Case No. 14-06 that Appellant was eligible to apply for a waiver of the overpayment collection. In its decision in MSPB Case No. 14-06, 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. 14-06 (2013). *See* MSPB Case No. 14-05 (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. 14-06.

In MSPB Case No. 14-46 the Board determined that while Appellant was eligible to apply for a waiver of the overpayment collection, the waiver was properly denied because of her refusal to submit a copy of her tax return for review. Appellant sought judicial review of that finding but did not challenge the County’s calculation of her COLA. Indeed, Appellant expressly conceded during oral argument that payment of the 100% COLA was in error:

THE COURT: Well, isn’t that the crux of the matter? Whether this was in fact her property or not? The payments were made. Is there really a contest as to whether they were made in error?

██████████: There was no contest about that. Everybody acknowledges that the County made an error. . .

CX 10.

The Board’s decision in MSPB Case No. 14-46 was affirmed by the Circuit Court and the Court of Special Appeals. In its decision, the Court of Special Appeals specifically found:

Pursuant to section 33-44(c)(3)(A) of the Montgomery County Code (“MCC”), retirees who were hired by the County prior to July 1, 1978 were entitled to an annual COLA equal to 100% of any change in the consumer price index (“CPI”) for the month preceding the end of the prior fiscal year. Retirees hired after that date, like [Appellant], were entitled to a COLA of 60% of the change in the CPI greater than 3%, with an annual cap of 5% for retirees younger than 65.

██████████ v. *Montgomery County Merit System Protection Board*, 2016 WL 6876648, p.1, n.1 (Md. Ct. Spec. App., November 16, 2016) (Unreported).⁴

Appellant is now for the first time challenging the County’s calculation of her COLA, arguing that in 2001 the County Council enacted Bill No. 25-01 (Chapter 21, Laws of Montgomery

⁴ Because we rely on an unreported decision of the Court of Special Appeals for its preclusive effect with regard to the same parties, and not as precedent within the rule of *stare decisis* nor persuasive authority, Maryland Rule 1-104 is inapplicable.

County 2001), which amended § 33-44(c)(3)(B), effective November 1, 2001, to provide for a COLA calculation of 100% of the CPI up to 3% and 60% for amounts over 3% up to 7.5%. The County has applied the 60% COLA to Appellant's benefits since May 2013.

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

Appellant could have challenged the COLA calculation in her 2013 and 2014 appeals (MSPB Case Nos. 14-06 and 14-46), but instead conceded (as she did in her subsequent appeals to the Circuit Court and Court of Special Appeals) that the 60% calculation applied to her and that payment of the 100% COLA was in error. The Board and the courts specifically addressed the issue 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 Nos. 14-06 and 14-46; (2) the subject matter (calculation of the 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 avoid the requirements of *res judicata* by arguing her own failure to 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 would also be 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 Nos. 14-06 and 14-46 decided the identical COLA calculation at issue in this appeal. There was a final judgment on the merits that was affirmed by the Court of Special Appeals. The parties are the same, and Appellant was represented by counsel and had a fair opportunity to be heard on the issue in the prior litigation.

Finally, Appellant is also precluded by the principles of judicial estoppel from taking a position in this appeal that differs from the admission she made in the prior appeal. Appellant represented to the Circuit Court and the Court of Special Appeals that there was "no contest" that the County had erroneously calculated her COLA at the 100% level; having made these representations to the courts, she cannot be heard now to argue that the County had in fact correctly calculated her COLA at the level. *See* MSPB Case No. 17-20 (2018).

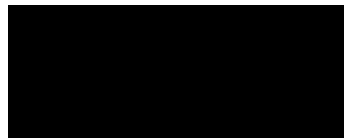
For these reasons, the Board need not reach the merits of Appellant's arguments to affirm the CAO's decision.

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