

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

**IN THE MATTER OF**

**[REDACTED]**

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**CASE NO. 19-07**

=====

**ORDER OF DISMISSAL**

On September 12, 2018, [REDACTED] (Appellant) a supervisor in the County Office of Public Information’s MC311 unit, filed an appeal of a written reprimand. Attached to the appeal form was a September 6, 2018, memorandum with the subject line “Statement of Charges – Written Reprimand.” Appellant alleged in his Appeal that although Manager K.J. told him on September 11, 2018, that the Statement of Charges would be rescinded, she “changed her mind on 9/12/18 as a retaliation for my appeal.”

On September 13, 2018, the Board sent a letter to Appellant advising him that it was unclear whether the September 6 document he had filed with his appeal, as required under Montgomery County Personnel Regulations (MCPR), § 35-4(d)(1), was the Notice of Disciplinary Action (NODA) he intended to appeal. The letter noted that the document submitted purported to be a Statement of Charges and did not appear to contain the applicable appeal rights required to be included with a NODA under MCPR § 33-6(c)(1)(E) & (F). The appeal was held in abeyance pending receipt of Appellant’s clarification or submission of a NODA. The September 13 MSPB letter to Appellant also stated:

Please be advised that the Merit System Protection Board (MSPB) only has jurisdiction over disciplinary appeals involving a demotion, suspension, termination, dismissal, or involuntary resignation. MCPR, § 35-2(a). An employee with merit system status may file an appeal with the MSPB over other matters after receiving

an adverse final decision on a grievance from the Chief Administrative Officer (CAO). MCPR, § 33-9(a)(1), MCPR § 33-9(b)(2), MCPR, § 34-4(e), MCPR § 35-2(b), and MCPR § 35-4(d)(2). Please review the Montgomery County Personnel Regulations carefully to protect your appeal rights.

On September 18, 2018, Appellant submitted a NODA, dated September 12, 2018, imposing a written reprimand. Although the NODA advises Appellant that he has the right to file a grievance, he has not indicated whether he has done so.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). *See* MCPR § 35-6(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction.").

The right of a merit system employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal is granted by § 404 of the Montgomery County Charter. The Montgomery County Code, § 33-12(a), provides that merit system employees who have been "notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board. . .".

The Board takes seriously any allegation that there may be retaliation against a County employee for attempting to exercise his right to appeal to the Board. However, there is no right of direct appeal to the Board with regard to a written reprimand. MSPB Case No. 18-26 (2018); MSPB Case No. 15-10 (2015). In such a circumstance, a grievance is a prerequisite to the filing of an appeal to the Board. MCPR, § 33-9(b)(2); § 35-2(b) (a merit system employee may appeal to the Board "after receiving an adverse final decision on a grievance from the CAO."). As we have no record of a grievance being filed over the written reprimand, or of any adverse final decision of the Chief Administrative Officer for the Board to review, the Board lacks jurisdiction to hear an appeal of the written reprimand due to a failure of Appellant to exhaust his administrative remedies. MSPB Case No. 18-26 (2018).<sup>1</sup>

If he has not done so already, Appellant may file a grievance concerning the written reprimand, including any allegations of retaliation. He may then appeal the written reprimand and any retaliation claim to the CAO. Should an adverse CAO decision be issued regarding the written

---

<sup>1</sup> This Board has held that where an employee otherwise has the right to file a direct appeal of discipline to the Board they may also raise retaliation claims against the same individuals who were involved in the disciplinary action. MSPB Case No. 07-17 (October 1, 2007). Allegations of retaliation in connection with lesser discipline, such as a written reprimand, should normally be addressed through the grievance process. *See also* MCPR § 34-7, which addresses complaints of harassment or retaliation for filing a grievance. This decision should not, however, be interpreted as deciding that there are no circumstances under which we will accept a direct appeal of a retaliation claim by an employee attempting to utilize the Board's appeals process.

reprimand or alleged retaliation, Appellant may then timely file an appeal to the MSPB.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-07 is dismissed without 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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
October 4, 2018

A solid black rectangular box used to redact the signature of the Board member.

Angela Franco  
Chair