

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

**IN THE MATTER OF**

████████████████████

**APPELLANTS,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE NO. 18-31**

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**FINAL DECISION**

Appellant ██████████ and 16 other Appellants who are Fire/Rescue Battalion Chiefs with the Montgomery County Fire and Rescue Services (MCFRS) filed grievances with the Office of Human Resources (OHR) claiming that they should not be considered exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). As relief Appellants seek time and a half and back pay for overtime (OT) they have worked.

On June 11, 2018, Appellants filed this consolidated appeal (Appeal) challenging a May 30, 2018, decision by the Montgomery County Chief Administrative Officer (CAO) denying their grievances.<sup>1</sup> Appellants filed the CAO decision on June 18, 2018.

The County filed a response to the Appeal on July 23, 2018 (County Response). Appellants filed final comments (Appellants' Reply) on September 17, 2018.<sup>2</sup> The appeal was considered and decided by the Board.

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<sup>1</sup>The grievances were consolidated on April 25, 2017, pursuant to Montgomery County Personnel Regulations (MCPR) § 34-9(c).

<sup>2</sup> Appellants' Reply of September 17, 2018, included the following 19 attachments as Appellant Exhibits (AX):

1. County Response of July 23, 2018, page 2.
2. MCFRS Telestaff Roster for July 5, 2018.
3. MCFRS Telestaff Roster for July 13, 2018.
4. Montgomery County Class Specification: Fire/Rescue Battalion Chief.
5. Supervisory Endorsement Notification regarding Firefighter MM's application for promotion sent to Battalion Chief ██████████ (MD) on August 8, 2018.

*(continued on next page)*

## FINDINGS OF FACT

The MCFRS is headed by a Fire Chief, who has five Division Chiefs as direct reports. The Operations Division Chief has eight Assistant Chiefs, four of whom are Duty Operations Chiefs. Appellant Battalion Chiefs report to the Duty Operations Chiefs. There are MCFRS Battalion Chiefs who did not file grievances and are not appellants.

Battalion Chiefs are high-level managers of firefighting functions and regularly supervise lower levels of classified fire and emergency personnel. The Appeal in this case was filed by “field assigned” Fire/Rescue Battalion Chiefs who claim that unlike “administrative” Battalion Chiefs, field assigned Battalion Chiefs are not FLSA exempt. There is no separate County classification or other designation for field assigned Battalion Chiefs.

The Fire/Rescue Battalion Chief classification is a Grade B3 on the Fire/Rescue Services Management Salary Schedule, along with Assistant Chief (B4) and Division Chief (B6). At all times since the filing of Appellants’ grievances in Fiscal Year (FY) 2017 the minimum salary for Battalion Chiefs has been in excess of \$76,000.<sup>3</sup>

Battalion Chiefs are managers responsible for all facets of their respective battalions. The Class Specification for Fire/Rescue Battalion Chief (CX 1; AX 4) describes the duties of Appellants as involving “command level administrative and management work,” such as:

delivery of direct firefighting, rescue, and emergency medical services (EMS) as the highest ranking officer of a district; or as manager of a countywide fire/rescue program or service. . .

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6. Supervisory Endorsement Notification regarding Firefighter MM’s application for promotion sent to Captain [REDACTED] (BM) on August 8, 2018.
  7. Collection Bargaining Agreement (CBA) with Montgomery County Career Fire Fighters Association IAFF Local 1664, Article 29 – Promotions.
  8. MCFRS Station Reference Manual.
  9. Email to Battalion Chief MD from Battalion Chief P regarding Captain K temporary station commander assignment.
  10. Email to Battalion Chief MD from Battalion Chief [REDACTED] regarding Captain K temporary station commander assignment.
  11. Email to Battalion Chief MD from Battalion Chief [REDACTED] regarding Captain K temporary station commander assignment.
  12. CBA, Article 28 – Transfers.
  13. Station Personnel Vacancy List and Transfer Processing Guidelines (Updated 9/12/2018 [REDACTED]).
  14. MCFRS Battalion Personnel Roster, 9/13/18.
  15. Transfer Request Receipt for Battalion Chief MD, 9/8/18.
  16. Transfer Request comments Notification to Captain BM, 9/8/18.
  17. CBA, Article 30 - Discipline.
  18. Battalion Chief Bump-Up, Administrative Services Labor Relations PowerPoint presentation.
  19. Email from EC regarding financial disclosure, 6/18/18.

<sup>3</sup> According to the Fire/Rescue Services Management Salary Schedules for each fiscal year, in FY18 the minimum salary for the Battalion Chief classification was \$77,893 per year, effective October 1, 2017; in FY19 it was \$79,451; and effective November 10, 2019, in FY20 it is \$81,357.82. The FY19 maximum salary for the Battalion Chief classification was \$132,034, and for FY20, \$144,833, not counting any additional longevity pay for individuals with 20 years of service or more who meet certain conditions. See MCPR § 12-9.

supervises assigned staff; plans, conducts and coordinates work in such areas as budget, procurement, personnel administration, labor relations, training, and maintenance and security of buildings, grounds and equipment.

Battalion Chiefs may direct the activities of their battalions during emergency incidents but, unlike Captains and Lieutenants who also act as supervisors, Battalion Chiefs do not perform the work of their subordinates. Appellants' Reply did not dispute this point.

In their grievance Appellants argued that Battalion Chiefs assigned to the field must respond to emergency incidents but that administrative Battalion Chiefs are not required to respond to emergencies. The CAO decision indicated that at the Step 2 meeting evidence was presented, and that Appellants acknowledged, that they are not required to respond to every emergency. Appellants have not provided any documentary evidence supporting their allegation. Tellingly, Appellants' Reply did not dispute the CAO's finding or the contention in the County Response that field assigned Battalion Chiefs are not required to respond to every emergency.<sup>4</sup> We therefore conclude that Appellant Battalion Chiefs are not required to respond to every emergency.

Appellants suggest that they do not have the effective authority to make employment status recommendations, *i.e.*, whether to hire and fire. Although it is part of the Battalion Chief job description and duties to make employment status recommendations, Appellants note that OHR oversees the hiring process and that there are many restrictive regulations. Appellants do concede that they often sit on interview panels with other MCFRS employees, including those of lower rank, and frequently provide recommendations for hiring and discipline. However, they claim there is "no indication" that their personnel recommendations carry more decision making weight than lower level supervisors. Appellants admit that they investigate and initiate the Request for Discipline (RFD) process, but claim that they have little involvement in subsequent disciplinary procedures.

The County argues that even if Appellants do not have authority to make ultimate decisions, since employment status matters are subject to approval by the Fire Chief, their suggestions and recommendations as to promotion, firing, and other employee status matters have "particular weight." The County further asserts that the recommendations of Appellants are frequently relied upon. The

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<sup>4</sup> The County Response of July 23, 2018, included the following 8 attachments as County Exhibits (CX):

1. Classification Specification, Fire/Rescue Battalion Chief, Montgomery County. Government, revised October 2014.
2. Policies and Procedures No. 101, Montgomery County, Division of Fire and Rescue Services, "Chain of Command," 06/17 /02.
3. Email dated April 16, 2018 from [REDACTED] to [REDACTED] and [REDACTED] entitled: Grievance Memo to [REDACTED] 9-29-17. pdf.
4. Memorandum from Assistant Chief [REDACTED] to [REDACTED] dated September 29, 2017 entitled: Operational Battalion Chief Grievance.
5. Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), U.S. Department of Labor, Wage and Hour Division, Revised July 2008.
6. Fact Sheet #1 7B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA), U.S. Department of Labor, Wage and Hour Division, Revised July 2008.
7. 29 CFR 541.100 - General rule for executive employees.
8. *Mullins v. City of New York*, 653 F. 3d 104 (2d Cir. 2011).

County suggests that Appellants are only arguing that they are not sure that is the case and emphasize anecdotal examples of transactions where their recommendations might not have been followed.

We find that Appellants investigate employee conduct violations and initiate discipline through an RFD, which is sent to the Fire Chief via the Assistant Chief for Labor Relations. Ranks below Battalion Chiefs (such as Captains) are not authorized to take discipline recommendations directly to the Fire Chief and must instead obtain Battalion Chief approval by way of an RFD. As to hiring, Appellant Battalion Chiefs serve on interview panels and their recommendations are given particular weight by hiring panels.

### **APPLICABLE STATUTES AND REGULATIONS**

**Montgomery County Personnel Regulations, Section 1. Definitions,** (As amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016).

**§ 1-4. Base hourly salary:** The base hourly salary for an employee is an amount equal to the annual salary for the employee's position, divided by the number of work hours per year normally assigned to the position. Base hourly salary is calculated on the basis of full-time salary and full-time work hours per year for a given position. The base hourly salary includes only pay differentials that apply even if the employee is not in work status, as, for example, if the employee is on paid leave. The base hourly salary does not include overtime or differentials, such as shift differentials, that are paid only if an employee is in work status.

**§ 1-5. Biweekly base salary:** An employee's biweekly base salary is calculated by multiplying the employee's base hourly salary by the number of hours that the employee is normally scheduled to work in a pay period. (The use of an hourly salary to calculate the biweekly base salary of an FLSA-exempt employee does not imply that the employee is an hourly employee.)

**§ 1-23. Exempt employee:** Incumbent of a position that is not eligible for overtime pay under the Fair Labor Standards Act (FLSA) because of an exemption in the law.

**§ 1-44. Non-exempt employee:** An incumbent of a position that is eligible for overtime pay under the FLSA.

**Montgomery County Personnel Regulations, Section 10. Employee Compensation,** (As amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015)

#### **§ 10-1. Definitions.**

**(i) Overtime compensation threshold:** The point after which the County must compensate an employee for performing overtime work.

**(j) Overtime work:** Duties performed by an employee outside of a normal workday of at least 8 hours or a normal workweek of at least 40 hours.

#### **§ 10-6. Overtime policy.**

(f) An employee must not file a grievance under these Regulations to enforce Federal or State wage and hour statutes that are enforceable by filing a claim with the appropriate Federal or State agency.

**§ 10-7. Overtime compensation.**

(a) **Overtime compensation threshold.** A department director must compensate an employee with overtime pay or compensatory time if the employee’s total hours in a pay status during a workday or workweek exceed the overtime compensation threshold.

(b) **Applicable overtime compensation thresholds.** The applicable overtime compensation thresholds for County positions are reflected in the table below:

| <b>Normal Overtime Compensation Thresholds for County Employees</b> |   |   |   |
|---|---|---|---|
| <b>Type of position</b>   | <b>Threshold during regular workday</b>                                 | <b>Threshold during regular workweek</b>  | <b>Threshold if employee must work on holiday, in general emergency, or on employee’s day off</b> |
| *   | *   | *   | *   |
| <b>Firefighter/ rescuer at rank of battalion chief or above</b>     | number of hours in regular workday for full-time employee, plus 5 hours | 53 hours or number of hours in regular workweek for full-time employee plus 5 hours | 48 hours or number of hours in regular workweek for fulltime employee                             |

\* \* \*

**(c) Normal overtime pay rates**

(3) **For an exempt employee.** When an exempt employee is eligible for overtime compensation under these Regulations, the County must compensate the employee as follows:

\* \* \*

(A) an exempt employee at grades 24 and under must be compensated at the rate of time and a half the employee’s regular hourly salary for each hour in a pay status greater than the overtime threshold; and

(B) an exempt employee at grades 25 and higher must be compensated on an hour for hour basis for every hour in a pay status greater than the overtime threshold.

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**(d) Exception to normal overtime pay rates.**

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(2) If an employee has an unscheduled absence the day after having worked an overtime work assignment, then the County must compensate the employee at the regular (straight time) pay rate for the number of hours of the unscheduled absence, except when the FLSA requires such employee to receive overtime compensation at the time and a half rate. . .

(3) If an employee is in a public safety class that is not on the general salary schedule, a department director must compensate the employee as follows:

(C) an exempt employee in pay grades 25 and higher who is:

\* \* \*

(ii) a firefighter/rescuer at the rank of battalion chief or above;

**(f) Form of overtime compensation.** A department director must provide compensation to employees for eligible overtime work performed. A director must provide overtime compensation at the specified rate in the form of overtime pay or compensatory time earned at the overtime rate.

(1) A department director must pay a non-exempt employee overtime pay for completed overtime work except when:

(A) the employee requests to receive compensatory time in lieu of pay and the supervisor approves the request; or

(B) the department director determines that the cost of overtime pay cannot be accommodated within the department's existing budget appropriations and the FLSA does not require the department director to give overtime pay.

**Montgomery County Personnel Regulations, Section 15. Work Schedules, Attendance, Hours of Work,** (As amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, June 30, 2015, and July 25, 2017).

**§ 15-3. Workday and workweek.**

**(e) Alteration to normal workweek.**

(2) A supervisor may grant an employee's request for a short-term alteration to the regular workday or workweek on an hour-for-hour basis, but must not pay overtime to the employee unless overtime pay is required under the FLSA.

**Montgomery County Personnel Regulations, Section 34. Grievances,** (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015).

**§ 34-1. Definitions.**

(c) **Consolidated grievance:** Two or more grievances that are filed by one employee or 2 or more different employees and which are processed as one grievance, if the grievances:

- (1) concern the same subject; and
- (2) request the same or similar relief.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. Grievances,** provides in pertinent part:

**§ 34-2. Eligibility to file a grievance.**

(a) A merit system employee who has successfully completed the probationary period and has merit system status . . . may file a grievance on a matter described in Section 34-2.

**§ 34-4. Reasons for filing a grievance.** An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged: . . . (e) improper disciplinary action, which includes a written reprimand . . .

**§ 34-9. Grievance procedure.**

(c) **Consolidated grievances.**

- (1) The OHR Director may consolidate 2 or more grievances and process them together to save time.
- (2) OHR must give written notice to the employee or employees who filed the grievances that the grievances have been consolidated and will be processed together.
- (3) If the employee gives written notice to the OHR Director that the employee objects to the consolidation of the employee's grievance with other grievances, the OHR Director must process the employee's grievance separately.
- (4) If a consolidated grievance includes grievances from more than one department, the OHR Director may designate one department director to respond to the consolidated grievance at Step 2 of the grievance procedure.
- (5) The department director or CAO, as appropriate, must ensure that:
  - (A) each employee who filed a grievance that was consolidated with other grievances receives a copy of the decision issued at that level; and
  - (B) each employee receives consistent and appropriate relief.
- (6) Each employee may decide to accept the decision and the relief offered, if any, or may file the grievance at the next level if the relief requested by the employee was not granted.

(d) Burden of proof. . .

(2) The grievant has the burden of proof in a grievance on any other issue.

**Code of Federal Regulations (C.F.R.), Title 29. Labor, Subtitle B. Regulations Relating to Labor, Chapter V, Wage and Hour Division, Department of Labor, Subchapter A. Regulations.**

**29 C.F.R. § 541.3**

**(b)(1)** The section 13(a)(1) exemptions and the regulations in this part also do not apply to . . . fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, . . . and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; . . . conducting investigations or inspections for violations of law; . . . or other similar work.

**(2)** Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a . . . fire fighter whose primary duty is to . . . fight fires is not exempt under section 13(a)(1) of the Act merely because the . . . fire fighter also directs the work of other employees in the conduct of . . . fighting a fire.

**(3)** Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

**(4)** Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some . . . fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

**29 C.F.R. § 541.100**

**(a)** The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week . . . exclusive of board, lodging or other facilities;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and



(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

**29 C.F.R. § 541.102. Management.**

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

**29 C.F.R. § 541.105. Particular weight.**

To determine whether an employee’s suggestions and recommendations are given “particular weight,” factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee’s suggestions and recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

**29 C.F.R. § 541.700 Primary duty.**

(a) To qualify for exemption under this part, an employee’s “primary duty” must be the performance of exempt work. The term “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty

requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

### ISSUE

Did Appellants demonstrate by a preponderance of the evidence that the County Chief Administrative Officer erred when he found that the County policy treating “field assigned” MCFRS Battalion Chiefs as Fair Labor Standards Act exempt was not arbitrary, capricious, or discriminatory, or in violation of a law, regulation, or policy?

### ANALYSIS AND CONCLUSIONS

#### *The Board’s Jurisdiction*

As this Board has ruled in numerous cases, the Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”). *See also 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 were 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).

Appellants have the burden of proof on the issue of jurisdiction. MSPB Case No. 18-16 (2018); MSPB Case No. 17-16 (2017). Although the parties did not raise either the issue of the Board’s jurisdiction or of the grievability of this dispute, the Board may raise the issue of its jurisdiction *sua sponte*. MSPB Case No. 09-08 (2009).

In a 1998 decision the MSPB found that it did not have jurisdiction over FLSA cases. MSPB Case No. 86-130 (1998). The Board relied on a Court of Special Appeals decision that was reversed by the Court of Appeals in *Robinson v. Bunch*, 367 Md. 432, 444 (2002) (FLSA substantive provisions apply to State employees, but remedial provisions are governed by Maryland’s statutory administrative and judicial review remedy). *See Maryland Military Dept. v. Cherry*, 382 Md. 117 (2004) (grievance procedure was the sole means by which former employees could have obtained relief under the FLSA, even if the former employees were no longer able to file a grievance at the

time of suit). However, the bar of Eleventh Amendment immunity to suit in federal courts against states does not extend to counties. *Zimmer-Rubert v. Bd. of Educ.*, 179 Md. App. 589, 596 (2008). Moreover, the Maryland Declaration of Rights, Article 2, provides that “The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof . . . shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.”

Nevertheless, MCPR § 10-6(f) provides that “An employee must not file a grievance under these Regulations to enforce Federal or State wage and hour statutes that are enforceable by filing a claim with the appropriate Federal or State agency.” This provision would seem to divest the Board of jurisdiction over a grievance appeal *if* Appellants were only seeking to enforce FLSA provisions not incorporated into County law *and* there was a Federal or State agency with jurisdiction. Thus, it appears that Appellants and the County implicitly agree that the substantive overtime provisions of the FLSA are incorporated into the County’s pay policies, and that the Board has jurisdiction to hear the appeal.

The County personnel regulations contain numerous references to compliance with the FLSA, and it appears that the FLSA has generally been incorporated into the regulations. *See, e.g.*, MCPR § 1-23 (Defining “Exempt employee” as one “that is not eligible for overtime pay under the Fair Labor Standards Act (FLSA) because of an exemption in the law”); MCPR § 1-44 (Defining “Non-exempt employee” as someone in “a position that is eligible for overtime pay under the FLSA”); MCPR § 15-3(e)(2) (“A supervisor . . . must not pay overtime . . . unless overtime pay is required under the FLSA”). Thus, we are not deciding this appeal directly under the FLSA, but rather under the County’s personnel regulations which appear to incorporate FLSA standards.<sup>5</sup>

### ***Burden of Proof***

Appellants bear the burden of proof to show by a preponderance of the evidence that the DFRS policy on overtime compensation for Battalion Chiefs was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR, § 34-9(d)(2); MSPB Case No. 17-21 (2017).

### ***Application of Law to the Facts***

As Fire/Rescue Battalion Chiefs, Appellants are high-level managers of firefighting functions who regularly supervise lower ranks of fire and emergency personnel. The County personnel regulations, MCPR § 10-7(b) & (d), specifically provide that the County’s overtime standards must be applied to “Firefighter/rescuer at rank of battalion chief or above.” There is no separate County classification specification or other designation for “field assigned” Fire/Rescue Battalion Chiefs.

The County’s personnel regulations also specifically presume that Battalion Chiefs are FLSA exempt:

If an employee is in a public safety class that is not on the general salary schedule, a department director must compensate the employee as follows: . . . (C) an exempt

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<sup>5</sup> We note that the Maryland Wage and Hour Law does not apply because the County is not an “employer” within the meaning of Labor and Employment Article, § 3-401.

employee in pay grades 25 and higher who is: . . . (ii) a firefighter/rescuer at the rank of battalion chief or above. . .

MCPR § 10-7(d)(3)(C)(ii).

Appellants contend, however, that they should not be considered exempt from the overtime requirements of the FLSA under the exemption from its OT requirements for “bona fide executive, administrative, or professional” employees. 29 U.S.C. § 213(a)(1). The County asserts that Battalion Chiefs meet the requirements for “bona fide executive capacity” and are thus exempt employees.

Under the FLSA regulations an employee falls within the executive exemption where he or she: (1) receives a salary of not less than \$445.00 a week; (2) has a primary duty of management of the enterprise of the employer; (3) customarily or regularly directs the work of two or more other employees; and (4) “has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.” 29 CFR § 541.100.

Since 2004 the FLSA regulations have also contained a provision specifically applicable to first responders, such as police officers and firefighters. The first responder regulation provides that the FLSA exemptions do not apply to firefighters, regardless of rank or pay level, who perform work such as preventing, controlling, or extinguishing fires of any type; rescuing fire, crime or accident victims; . . . or other similar work.” 29 C.F.R. § 541.3(b). While a firefighter whose primary duty is to fight fires is not an exempt employee merely because the firefighter also directs the work of other employees in the conduct of fighting a fire, a high-ranking employees such as a fire battalion chief may still be exempt under the executive exemption. *U.S. Department of Labor (DOL) Opinion Letter FLSA 2005-40* (October 14, 2005) (Despite the clear language of § 541.3(b)(1) mandating that certain public safety employees are non-exempt “regardless of pay or rank,” DOL carves out an exception for fire battalion chiefs and above and opines that they may be exempt).

Federal courts have given deference to DOL’s interpretation of the first responder regulation and have found high-level fire officials to be exempt executive or administrative employees if, in addition to satisfying the other requirements of the § 541.100 executive exemption, their primary duty is performing managerial tasks. *Mullins v. City of New York*, 653 F.3d 104, 113-17 (2d Cir. 2011) (high level firefighters may be exempt under the primary duty standard).

The United States Court of Appeals for the Fourth Circuit, which has federal appellate jurisdiction over Maryland, addressed the first responder regulation’s application to firefighters in *Morrison v. County of Fairfax*, 826 F.3d 758, 767, 769, 772 (4th Cir. 2016), noting that “the first responder regulation . . . clarifies the application of the primary duty test to first responders. . .”. The court looked for guidance to 29 C.F.R. § 541.700(a), which describes an employee’s “primary duty” as “the principal, main, major or most important duty that the employee performs,” “based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.” 826 F.3d at 769. The court went on to explain that “[i]t may be appropriate to think of a fire official responsible for ‘high-level direction of operations’ rather than ‘front-line firefighting’ as a manager first and a firefighter second. . .”. 826 F.3d at 772 (*citing Mullins*, 653 F.3d at 115). *See, Smith v. City of Jackson*, 954 F.2d 296, 297, 299 (5th Cir. 1992) (battalion chiefs who supervised captains, responded to only some types of calls, and rarely performed “hands on” firefighting are exempt

employees). *Cf., Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115, 141-42 (2008) (Correctional Lieutenants, Captains and Majors are FLSA exempt because they perform duties that require discretion and independent judgment, including preparing shift and assignment schedules; providing specific guidance, direction, and supervision of subordinates; preparing written investigative reports and employee evaluations; counseling subordinates; and recommending changes to policy directives).

The Supreme Court has recently clarified that exemptions under the FLSA should be given a “fair (rather than a ‘narrow’) interpretation.” *Encino Motorcars, LLC v. Navarro*, 584 U.S. \_\_\_, 138 S.Ct. 1134, 1142 (2018) (citation and internal quotation marks omitted). Accordingly, as we review the four-part test for an exemption from the FLSA under the 29 C.F.R. § 541.100, rather than narrowly construing the exemptions, as some courts have in the past, we are instead required to apply a “fair reading” to the FLSA exemptions.

#### *Salary of Not Less Than \$445.00 a Week*

Battalion Chiefs are at Grade B3 on the Fire/Rescue Services Management Salary Schedule. MCFRS Assistant Chiefs (B4) and Division Chiefs (B6) are also on the Fire/Rescue Services Management Salary Schedule. The County points out that the minimum salary for Battalion Chiefs has at all times relevant to this Appeal been significantly in excess of the \$23,660 minimum required by the FLSA.

Appellants claim that they do not meet the salary test because there are variations in actual pay based on assignments and those differences are calculated using hourly pay rates. However, MCPR § 1-5 specifically provides that:

biweekly base salary is calculated by multiplying the employee’s base hourly salary by the number of hours that the employee is normally scheduled to work in a pay period. (The use of an hourly salary to calculate the biweekly base salary of an FLSA-exempt employee does not imply that the employee is an hourly employee)

Appellants’ suggestion that they are not salaried because the County may provide them with overtime, leave payouts, or other such benefits calculated using an employee’s base hourly salary is unpersuasive. We find Appellants’ argument that they are not salaried employees to be meritless.

#### *Primary Duty of Management*

For purposes of the FLSA an employee’s “primary duty” is his or her “principal, main, major or most important duty.” 29 C.F.R. § 541.700(a). Factors considered in determining an employee’s primary duty are the relative importance of exempt duties compared to other duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and wages paid to other employees for the kind of nonexempt work.

The first responder regulation, 29 C.F.R. § 541.3, does not alter the primary duty test. *Morrison*, 826 F.3d at 767. High-level employees who perform some first responder duties may nonetheless be exempt if their primary duty is managerial. When Battalion Chiefs are directing operations at an emergency scene, for example, they are performing a managerial duty. Only if they engage in the same front-line activities as their subordinates on a daily basis would their managerial

status be in doubt. *Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 829 (10th Cir. 2012). There is no evidence in the record that Battalion Chiefs perform front-line fire activities on a regular basis.

High-level fire officials are exempt if their primary duty is performing managerial tasks, and they have discretion to determine whether and where their assistance is needed. *Morrison*, 826 F.3d at 767. For that reason, the Fourth Circuit said that the question is whether the employee is a “manager first and a firefighter second.” *Morrison*, 826 F.3d at 772.

“Management” under FLSA includes, but is not limited to:

- Interviewing, selecting, and training employees;
- Setting and adjusting hours of work;
- Directing employees work;
- Maintaining records for supervision or control;
- Appraising employees for recommending promotions or other status changes;
- Handling employee complaints and grievances;
- Disciplining employees;
- Planning work;
- Determining techniques to be used;
- Apportioning work;
- Determining materials, supplies, machinery, equipment or tools to be used;
- Controlling the flow and distribution of materials or supplies;
- Providing for safety and security of employees or property;
- Planning and controlling the budget; and
- Monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102.

The Class Specification for Fire/Rescue Battalion Chief (CX 1; AX 4) describes in detail that the duties of a Battalion Chief involve “command level administrative and management work,” such as the “delivery of direct firefighting, rescue, and emergency medical services (EMS) as the highest ranking officer of a district; or as manager of a countywide fire/rescue program or service.” A Battalion Chief also “supervises assigned staff; plans, conducts and coordinates work in such areas as budget, procurement, personnel administration, labor relations, training, and maintenance and security of buildings, grounds and equipment.”

Battalion Chiefs are managers generally responsible for all aspects of their battalions. They may direct the activities of their battalions during emergency incidents but, unlike Captains and Lieutenants who also act as supervisors, Battalion Chiefs do not perform the work of their subordinates. This is a key indicator that the primary duty of Battalion Chiefs is management. Significantly, Appellants’ Reply does not dispute this point.

Appellants argue that Battalion Chiefs assigned to the field must respond to emergency incidents while “administrative” Battalion Chiefs are not required to respond to emergencies. However, the CAO’s decision points out that evidence was presented, and that Appellants acknowledged, that they are not required to respond to every emergency. Significantly, Appellants’ Reply to the County Submission made no attempt to dispute this fact.

Having the discretion not to respond to an emergency is an indicator that the primary duty of a Battalion Chief is management. *Morrison*, 826 F.3d at 769-70 (Captains' primary duty is front line firefighting since they do not have discretion to not respond to an emergency, engine cannot leave the station without a captain, they spend the same amount of time on an emergency as subordinates). Notwithstanding certain limitations on their authority, and the supervision they receive, Appellants have significantly more authority and discretion than Captains.

A duty that is discretionary is not primary duty. Because Appellants have some discretion whether to show up to certain emergencies it cannot be said that responding to emergencies is their primary duty. Moreover, when they are at an emergency scene they are directing operations, not typically engaging in the front-line firefighting activities. We conclude that the primary duty of Appellant Battalion Chiefs is managerial.

#### *Supervise Two or More Employees*

Battalion Chiefs supervise two or more employees. Appellants do not appear to dispute this factor.

#### *Authority to Hire and Fire*

The County presented evidence indicating that even though Appellants do not have authority to make ultimate decisions as to promotion, firing, and other employee status matters, their suggestions and recommendations on employee status matters carry "particular weight." Appellants, for example, investigate conduct violations and initiate discipline through a Request for Discipline (RFD) to the Fire Chief through the Assistant Chief for Labor Relations. Captains, on the other hand, cannot send discipline recommendations directly to the Chief and instead must get Battalion Chief approval by way of an RFD.

Appellants dispute having authority to make employment status decisions and suggest that their recommendations are not given particular weight. Appellants note that OHR oversees the hiring process and that there are many restrictive personnel regulations. However, they concede that Battalion Chiefs sit on many interview panels with other MCFRS employees, including those of lower rank, and do provide recommendations for hiring and discipline. Appellants claim there is "no indication" that their personnel recommendations carry more decision making weight than lower level supervisors. Appellants admit that they investigate conduct violations and initiate the RFD process, but claim that they have little involvement in the subsequent disciplinary process.

Determining whether an employee's suggestions and recommendations are given "particular weight" depends on factors such as whether it is part of the employee's job description or duties to make such recommendations; the frequency with which such recommendations are made or requested; and the frequency with which the recommendations are relied upon. 29 CFR § 541.105; *DOL Opinion Letter FLSA 2005-40*.

The undisputed record reflects that Battalion Chiefs frequently serve on hiring and promotional interview panels. Appellants point to some specific personnel decisions where their recommendations might not have been followed, but their allegation that their recommendations are not given particular weight is speculative. The County provided support for its position that recommendations from Battalion Chiefs are given particular weight (*e.g.*, CX 3), and correctly contends that the FLSA executive exemption regulations do not require that the recommendations of

Battalion Chiefs always be followed. *Holt v. City of Battle Creek*, 925 F.3d 905, 912 (6<sup>th</sup> Cir. 2019) (FLSA executive exemption applied where battalion chiefs' input regarding personnel decisions was given particular weight by fire chief).

We find it more likely than not that the Fire Chief does give particular weight to the personnel recommendations of Battalion Chiefs.

*Conclusion*

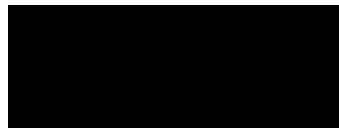
The County provided sufficient justification for its policy of treating Battalion Chiefs as exempt under the FLSA, and that justification is not arbitrary, capricious, or discriminatory. As Appellants have not demonstrated how the County's implementation of the overtime policy for Battalion Chiefs violates any applicable provision of law, regulation, or policy, the grievance appeal must be denied.

**ORDER**

Based on the foregoing, the Board **DENIES** Appellants' appeal from the CAO's Step 2 decision.

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  
December 30, 2019



Michael J. Kator  
Chair