

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

IN THE MATTER OF

████████████████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 19-21

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FINAL DECISION

Appellant, an employee of the Montgomery County Department of Police (Department), filed the above captioned grievance appeal with the Merit System Protection Board (Board or MSPB) challenging the County’s decision to deny her longevity pay after she went from a Grade 24 Public Safety Shift Operations Communications Manager to a Grade 25 Public Safety Emergency Communications Manager position on September 18, 2016.¹ Appellant also alleges that the County improperly failed to continue her longevity pay beginning on September 27, 2009, when she was promoted to a Grade 23 Administrative Specialist III position.

Appellant filed a grievance concerning the denial of longevity pay on August 14, 2018 and appealed the Step 1 denial of her grievance to the Chief Administrative Officer (“CAO”). The CAO issued a Step 2 decision denying her appeal that was dated February 4, 2019, however, Appellant’s appeal states that the decision was received by her on March 6, 2019.

On March 6, 2019, Appellant filed this appeal. The County filed a response to the appeal on April 8, 2019. (County Response). The County did not dispute Appellant’s assertion that she received the CAO Step 2 decision on March 6, 2019. On April 15, 2019, Appellant filed a reply. (Appellant’s Response).

¹As will be discussed below, whether Appellant was promoted or reclassified is a primary source of contention between the parties.

After reviewing the submissions of the parties, on July 9, 2019, the Board requested that the County provide further information and clarification.² The County filed a Supplemental Response on August 1, 2019. Appellant filed a reply to the County's Supplemental Response on August 8, 2019. (Appellant's Supplemental Response).

The Appeal was reviewed and considered by the Board.³

FINDINGS OF FACT

Appellant was serving as a Grade 22 Public Safety Communications Supervisor when she received a longevity increase to her salary, effective November 9, 2008. Appellant Exhibit (AX) A;⁴ County Exhibit (CX) 1.⁵ The longevity increment is a one-time 2% increase to an employee's

² Specifically, the Board asked for:

a full explanation and appropriate documentation . . . to support the County's position that the Appellant in the above appeal was promoted rather than having her position reclassified in 2009, 2015, and 2016. The Board would like to know whether the higher-level positions were posted and if there were other applicants. The Board would also like an explanation of the significance of the "Formerly Titled" notations at the end of the Class Specifications for Public Safety Emergency Communications Manager (Code No. 103091) and Public Safety Emergency Communications Supervisor (Code No. 103092). Does this indicate that OHR reallocated a class from one pay grade to another or the creation of new classes under MCPR §9-3(b)? Are the Public Safety Communications Shift Operations Manager (Code No. 003092) and Public Safety Communications Supervisor (Code No. 003093) classes still in use? If not, will the classifications be eliminated?

³ At the end of his term of office, the Board's former Chair, Michael J. Kator, ceased to participate in the consideration or decision of this appeal. This decision is being issued by Board members Harriet E. Davidson and Angela Franco. Member Sonya Chiles, who took office on January 1, 2020, did not participate in the consideration of this Appeal.

⁴ Appellant included three attachments to her April 15, 2019, Response. We will identify those attachments as Appellant Exhibits (AX) as follows:

AX A – Personnel Action Form, November 28, 2008
AX B – Personnel Action Form, September 27, 2009 and General Salary Schedule FY2010
AX C – Core HR email re: longevity following promotion, October 18, 2018

⁵ The County's initial response included three exhibits. The County's Supplemental response included affidavits not marked as exhibits and attachments to the affidavits using the same exhibit numbering as in the initial response. To reduce confusion, we have identified the County's exhibits as follows.

CX 1 – Personnel Action Form, November 28, 2008
CX 2 – Letter confirming promotion, January 23, 2015
CX 3 – Letter confirming promotion, August 19, 2016
CX 4 – Affidavit of [REDACTED] August 1, 2019
CX 5 – Memorandum re New Occupational Class Series Creation – Public Safety Emergency Communications Specialists, December 29, 2015
CX 6 – Classification Action Form, May 13, 2016
CX 7 – Memorandum re Public Safety Emergency Communications Position Series, October 20, 2014
CX 8 – Memorandum re Classification of Public Safety Emergency Communications Specialists, October 7, 2015
CX 9 – Proposed Class Specification, Public Safety Emergency Communications Specialist I
CX 10 – Proposed Class Specification, Public Safety Emergency Communications Specialist II
CX 11 – Proposed Class Specification, Public Safety Emergency Communications Specialist III
CX 12 – Proposed Class Specification, Public Safety Emergency Communications Specialist IV
CX 13 – Proposed Class Specification, Senior Public Safety Emergency Communications Specialist

base salary. Montgomery County Personnel Regulations (MCPR), § 12-9(a) and (b). Appellant was eligible for the longevity increment because she had over 20 years of County service, was at the maximum salary of the Grade 22 pay range and had received annual performance ratings of Highly Successful or Exceptional for at least two years. MCPR § 12-9(b).

On September 27, 2009, Appellant was promoted to a Grade 23 Administrative Specialist III position. AX B. Appellant was promoted to a Grade 24 Public Safety Operations Manager position, effective February 8, 2015. CX 2.

In 2015 and 2016 the County engaged in a process to create new occupational classifications for public safety communications specialists. CX 5 through CX 16. On December 29, 2015, the County submitted a request to the Board concerning the creation of a new occupational classification series for Public Safety Emergency Communications Specialist. CX 5.⁶ In accordance with MCPR, § 9-3(b)(3), the Board reviewed the proposal and had no comments or objections to the creation of the new Public Safety Emergency Communications Specialist classification series.

After the new Public Safety Emergency Communications classifications were created, the Department conducted a recruitment for various positions, including Public Safety Emergency Communications Manager. The recruitment notice for the Grade 25 positions (IRC22436) was posted on July 11, 2016, and applications were due by July 25, 2016. CX 19. Appellant submitted an application for the promotion. CX 20 and CX 21.

Although Appellant argues that she was reclassified and not promoted, the County points out that Appellant applied for the position by submitting a resume and received an August 19, 2016, letter advising of her “promotion to the full-time position of Public Safety Emergency Communications Manager, Grade 25.” CX 18; County Response, p. 3. Furthermore, Appellant was required to serve a promotional probationary period, CX 18, and both the Personnel Action Form of August 31, 2016, and her salary history indicate a “promotion” effective September 18, 2016. CX 1, CX 3, CX18. *See* Affidavit of [REDACTED], ¶15. CX 17

ISSUE

Did Appellant demonstrate by a preponderance of the evidence that the County Chief Administrative Officer erred when he found that denial of longevity pay was not arbitrary, capricious, or discriminatory, or in violation of a law, regulation, or policy?

CX 14 – Proposed Class Specification, Public Safety Emergency Communications Supervisor
CX 15 – Proposed Class Specification, Public Safety Emergency Communications Manager
CX 16 – Quantitative Evaluation System (QES III) Factor Evaluation Sheets
CX 17 – Affidavit of [REDACTED], August 1, 2019
CX 18 – Letter confirming promotion, August 19, 2016
CX 19 – Vacancy Posting, IRC 22436
CX 20 – Applicant Listing, IRC 22436
CX 21 – Appellant resume

⁶ We note that in a February 18, 2016, memorandum to the Board the County’s request was amended in a way that is not material to this appeal.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations, § 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, February 23, 2016, and July 17, 2018), provides in pertinent part:

§ 1-63. Promotion: The formal assignment of an employee to a position:

- (a) in a higher-graded occupational class; or
 - (b) on a different salary schedule accompanied by an increase in salary.
- The reclassification or reallocation of a position to a higher-graded occupational class under Section 9 of these Regulations is not a promotion.

Montgomery County Personnel Regulations, § 6, Recruitment and Application Rating Procedures, (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010 July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), which provides, in applicable part:

§ 6-2. Announcement of open jobs.

- (a) The OHR Director:
 - (1) must announce and electronically post notice of vacant positions that are open for competition among qualified candidates;
 - (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;
 - (3) may announce a vacancy to the general public or may restrict the vacancy to some or all County employees;

§ 6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion. . . .
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

Montgomery County Personnel Regulations, § 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), which provides, in relevant part:

§ 10-5. Salary-setting policies.

(a) **General.** A department director must ensure that an employee's base salary does not exceed the pay rate or range for the pay grade or pay band assigned to the employee's class, unless the department director:

- (1) demoted the employee because of reduction-in-force or disability under Section 10-5(d); or
- (2) reclassified or reallocated the employee's position to a lower pay grade or pay band under Section 10-5(f). . . .

(c) **Salary on promotion.**

(1) Compensation for a regular (non-temporary) promotion.

(A) A department director must ensure that an employee's base salary following promotion is not less than the minimum or more than the maximum salary for the new pay grade or pay band.

(B) A department director must give a merit system employee who is promoted at least a 5 percent increase in base salary

Montgomery County Personnel Regulations, § 12, Service Increments, (as amended January 18, 2005, February 14, 2006, December 11, 2007, October 21, 2008, July 12, 2011, and June 30, 2015), which provides, in applicable part:

§ 12-2. Eligibility for service increment.

(c) Any employee who is eligible to receive a service increment and whose position is reclassified or reallocated to a higher pay grade is still eligible to receive a service increment on the effective date of the position's reclassification or reallocation. In this case, the OHR Director must change the employee's service increment date to the effective date of the reclassification or reallocation of the employee's position.

§ 12-9. Twenty-year longevity/performance increment.

(a) A 20-year longevity/performance increment is a one-time increase to an employee's base salary.

(b) A department director must award a one-time 20-year longevity/performance increment of 2 percent of base salary to an employee in a position on the General salary schedule if the employee has:

- (1) a base salary equal to the maximum salary of the pay range; and
- (2) has 20 years of actual County service; and
- (3) received an annual overall performance rating of Highly Successful Performance or Exceptional Performance for the 2 most recent consecutive years.

(c) An employee is eligible to receive only one 20-year longevity/performance increment.

(d) Awarding longevity/performance increments to promoted employees.

(1) When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's prior base salary before the promotional increase is added; or,

(B) if (A) does not apply, then the employee may be eligible to receive a 2% longevity/performance increment as outlined in Section 12-9(b); however,

(C) whether (A) or (B) applies, the employee's new base salary cannot exceed the maximum salary of the new pay range.

(2) When an employee receives a promotion from a non-bargaining unit position to a bargaining unit position:

(A) the 20-year longevity/performance increment is added to the employee's base salary before the promotional increase is added;

(B) the new base salary cannot exceed the maximum salary of the new pay range; however,

(C) if the employee's new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.

(3) When an employee receives a promotion from a bargaining unit position to a non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's base salary before the promotional increase is added;

(B) the employee is eligible to receive a 2% longevity/performance increment under Section 12-9(b); and,

(C) the employee's new base salary cannot exceed the maximum salary of the new pay range.

(e) An employee who has a 20 year longevity/performance increment and who:

(1) transfers from a non-bargaining unit position to another non-bargaining unit position, the longevity/performance increment remains the same;

(2) transfers from a non-bargaining unit position to a bargaining unit position is eligible to receive a bargaining unit 20-year longevity increment as provided in the respective collective bargaining agreement; or,

(3) transfers from a bargaining unit position to a non-bargaining unit position:

(A) the longevity/performance increment is added to the employee's base salary except when the employee's base salary exceeds the maximum salary of the non-bargaining unit pay range; then,

(B) the employee's base salary must be reduced to the maximum salary of the pay range.

Montgomery County Personnel Regulations, § 27. Promotion, (as amended June 30, 2015), which provides, in applicable part:

§ 27-2. Types of promotion.

(a) **Competitive promotion.** Prior to making the final selection for promotion, the department director must ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

§ 27-3. Compensation for a promotion. A department director must compensate an employee for a promotion as described in Section 10-5(c).

§ 27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

(c) An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.

Montgomery County Personnel Regulations, § 34, Grievances, (as amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), which provides in pertinent part:

§ 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:

(a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy; . . .

(c) improper, inequitable, or unfair act in the administration of the merit system . . .

(d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential . . .

§ 34-10. Appeal of a grievance decision.

(c) A written grievance decision must include information about:

(1) how the employee may appeal the decision to the next step of the grievance procedure or file an appeal with the MSPB, if applicable; and

(2) the time limits for appealing the grievance to the next step, or to the MSPB.

Montgomery County Personnel Regulations, 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-3. Appeal period.

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

(3) receives a written final decision on a grievance. . . .

§ 35-7. Dismissal of an appeal.

(a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.

ANALYSIS AND CONCLUSIONS

Appellant is challenging the County's application of the longevity and performance increment rules after her September 18, 2016, appointment to a Grade 25 Public Safety Emergency Communications Manager position.

The parties dispute the issue of whether Appellant was placed in the higher-level position by reclassification or promotion. The County submitted affidavits, the job posting, and other documentation to support its position that Appellant was competitively promoted to the higher-level position. CX 17 - 21.

Appellant left position number 013339 when she was promoted from a Grade 24 Public Safety Operations Manager to position number 018058 as a Grade 25 Public Safety Emergency

Communications Manager. CX 2 and 3. This further supports the County's position, as a promotion involves the assignment of an employee to a higher level position while a reclassification entails a change in the classification of a position. *See* MCPR § 1-63, § 9-4(f).

Appellant asserts that although she was required to apply and submit a resume in response to the IRC 22436 vacancy posting the promotional process was not competitive and she did not serve a probationary period. Appellant's Supplemental Response, p. 1.

Appellant suggests that notwithstanding the August 19, 2016, promotion letter (CX 3, CX 18), "the letter like every step in this process was just part of the technical process required of the four (4) Public Safety Shift Operations Managers." Appellant's Supplemental Response, p. 1. Appellant admits that she was told that she would have to re-apply for her current position "since it was technically a promotion." *Id.* Appellant further notes that the application for a promotion to Public Safety Emergency Communications Manager was limited to candidates who were in Public Safety Communications Shift Operations Manager positions. *Id.* There is, however, nothing improper about a promotional recruitment process that is limited to certain County employees with those qualifications. MCPR § 6-2(a)(3) ("may restrict the vacancy to some or all County employees"). The County properly established and provided the required announcements of the competitive promotional qualifications and the rating process. *See* MCPR § 6-2(a)(2); § 6-5(a) & (b); § 27-2(a). *See* MSPB Case Nos. 19-22 and 19-27 (2020).

As there is a complete absence of any evidence supporting Appellant's view that she was reclassified rather than promoted, we must conclude that she was promoted. *See* MSPB Case Nos. 19-22 and 19-27 (2020). Accordingly, we examine the application of the longevity increment regulations to her promotion.⁷

Under MCPR § 12-9, if an employee has reached the maximum salary for their grade, has high performance ratings, and has at least 20 years of service, they may be eligible for a "longevity increment." A longevity increment provides for a salary 2% above the grade maximum. MCPR § 12-9(a) further provides that the longevity increment is a "one-time increase to an employee's base salary." The regulation also specifies that "[a]n employee is eligible to receive only one 20-year longevity/performance increment." MCPR § 12-9(c). It is undisputed that Appellant received a longevity increment to her salary effective November 9, 2008.

⁷ To the extent Appellant may allege that she has also been the victim of age discrimination, the Board lacks the authority to adjudicate claims of discrimination under these circumstances. MCC §27-19; MCPR §35-2(d). *See* MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance "employment matters for which another forum is available to provide relief." MCC §33-12(b). Appellant unquestionably had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 93-25 (1993) (Interpreting §33-12(b)'s "another forum available" limitation as applying to discrimination claims). *See also* MCPR §5-4(b)(1) (An employee alleging discrimination "may not file a grievance under Section 34 of these Regulations or an appeal under Section 35, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation.").

The longevity increment regulation states that when a non-bargaining unit employee who is receiving the longevity increment (such as Appellant) is promoted the new base salary is the maximum of the new grade:

When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position: . . . the employee's new base salary cannot exceed the maximum salary of the new pay range.

MCPR § 12-9(d)(1)(C).⁸ Similarly, the compensation regulations also provide that “[a] department director must ensure that an employee’s base salary following promotion is not . . . more than the maximum salary for the new pay grade or pay band.” MCPR § 10-5(c)(1)(A).⁹ Appellant was promoted to the maximum salary for Grade 25. CX 3, CX 18.

Appellant alleges that she received less than a full 5% salary increase upon her 2016 promotion. Appellant’s Supplemental Response, p. 2. However, she was not entitled to receive the full 5% promotional increase set forth in § 10-5(c)(1)(B) because it is expressly limited to the maximum of the salary grade in both § 10-5(c)(1)(A) and § 10-5(a). Thus, the 5% promotional increase rule does not override the salary grade maximum limitation.

More importantly, after receiving a longevity increase in 2008 Appellant received two undisputed promotions in 2009 and 2015. Either one of those two promotions would have required the end of a longevity increment added to her salary. At the time of her promotion in 2016, Appellant properly received a salary increase to the maximum salary for Grade 25. CX 3 and CX 18. Because Appellant had received a “one-time” longevity increment in 2008, she was certainly not entitled to another longevity increment upon her 2016 promotion.

Accordingly, because Appellant had received a “one-time” longevity increment in 2008, upon her 2009, 2015, and 2016 promotions she was properly denied another longevity increment. MCPR § 12-9(d)(1)(C). *See* MSPB Case Nos. 19-22 and 19-27 (2020).

Appellant has not met her burden of proof that the County’s application of the longevity increment regulation was arbitrary and capricious or in violation of an established procedure. MCPR § 34-9(d)(2). On this record the Board finds that Appellant’s appeal lacks merit and must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-21 be and hereby is **DENIED**.

⁸ Significantly, while MCPR § 12-9(d)(1)(C) specifically prohibits an employee such as Appellant who is promoted from a non-bargaining unit position to another non-bargaining unit position from receiving a salary above the grade maximum, another subsection of the regulation, § 12-9(d)(2)(C), specifically allows an employee promoted from a non-bargaining unit position to a *bargaining unit position* to get the longevity increment: “if the employee’s new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.”

⁹ The promotional regulation governing compensation specifically provides that the compensation regulations are to be applied: “§ 27-3. **Compensation for a promotion.** A department director must compensate an employee for a promotion as described in Section 10-5(c).”

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
April 6, 2020



Harriet E. Davidson
Chair