

**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. 20-14

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ORDER OF DISMISSAL

On March 10, 2020¹, Appellant, an Income Assistance Program Specialist (IAPS) II with the Department of Health and Human Services (Department or HHS), filed an appeal concerning his January 9, 2020, email request for interpretation of a regulation by the Chief Administrative Officer (CAO). The County filed a response to the appeal on May 7, 2020. (County Response). On May 27, 2020, Appellant filed a reply. (Appellant’s Response).

The Appeal was reviewed and considered by the Board.

BACKGROUND

On March 12, 2020, the Board acknowledged receipt of the Appeal in this matter. In that letter the Board specifically addressed the Appellant’s appeal rights and urged him to consider filing a grievance:

Please be advised that the MSPB may not have jurisdiction to hear your appeal. The regulation concerning Interpretations of Personnel Regulations specifically provides that while an “employee may not grieve or appeal a written CAO interpretation,” an employee may file a grievance under § 34 of the regulations or file an appeal with the MSPB under § 35 “over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee

¹ The appeal was submitted online Monday, March 9, 2020, after the Merit System Protection Board (MSPB) office hours which are 9:30 a.m. to 3:00 p.m., therefore the appeal was officially considered to have been received on March 10, 2020.

to grieve or appeal the action.” Montgomery County Personnel Regulation (MCPR), §2-3(c)(2). Accordingly, you may wish to explore the possibility of filing a grievance before the time for doing so has expired.

Although this Appeal concerns Appellant’s request for an interpretation of a regulation by the CAO, on March 2, 2020, Appellant had filed another appeal with the Board alleging that he had been improperly denied a promotion to an IAPS III position. MSPB Case No. 20-13. Because Appellant had not applied for the position when the eligible list was created, the Board dismissed that appeal, stating:

We fail to see how Appellant can maintain a nonselection/nonpromotion direct appeal to the MSPB when he was never an applicant for the position. Instead, Appellant’s proper recourse is to file a grievance concerning the promotional process at issue. *See* MCPR § 27-4(a).

Order of Dismissal, MSPB Case No. 20-13 (March 18, 2020). The Board’s Order of Dismissal further held:

Appellant’s failure to file a grievance and to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust his administrative remedies that must result in the dismissal of this appeal. *See* MSPB Case No. 15-28 (2015). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies and is dissatisfied with the CAO’s decision.

The Board’s Order of Dismissal also mentioned that the Board had sent Appellant a letter in this appeal (MSPB Case No. 20-14) suggesting that Appellant consider filing a grievance.

FINDINGS OF FACT

Appellant, an IAPS II with the HHS, filed an appeal concerning his January 9, 2020, email request for interpretation of a regulation by the CAO. Appellant stated his grievance appeal as follows: “CAO not responding to a 60-day interpretation of County regulations as it applies to Promotions.” Appeal Form, p. 2. Appellant’s requested relief was: “Get clarification of policy as it pertains to promotions in email sent to CAO on January 9, 2020.” *Id.*

The record nowhere indicates that Appellant raised the matter with his supervisor or submitted a written grievance as required by Step One of the grievance procedure. Montgomery County Personnel Regulations (MCPR), § 34-9. There is also nothing in the record indicating that Appellant complied with Step Two of the grievance procedure by submitting a grievance to the Office of Human Resources (OHR) Labor Relations division.² It appears from an email string submitted by Appellant that he filed an EEO complaint with the OHR EEO Officer sometime in late 2019, followed by an email to her on January 8, 2020, in response to her December 30, 2019, email offering him the opportunity to meet with her before she closed out the investigation. On

² Effective June 1, 2020, the personnel regulations were amended to reflect the creation of the Office of Labor Relations (OLR) in the office of the County Executive and the movement of some OHR labor relations employees to the OLR. These changes have no bearing on this appeal as they occurred after it was filed.

January 9, 2020, Appellant sent an email directly to the CAO requesting an interpretation of MCPR § 27-4(a).

Appellant also emailed the OHR Director on February 28, 2020. The email to the OHR Director says:

The following email and the 2 attachments included are self-explanatory. As you will see I'm not in agreement or understanding of our "New" promotion procedure. Any clarification or feedback would be greatly appreciated. Ms. [M] is replacing Ms. [REDACTED]'s vacant IAPS III position.

OHR promptly responded. Appellant submitted as an exhibit a March 6, 2020, email response from the Chief of OHR's Recruitment and Selection Division.³ There is nothing in the record indicating that Appellant contested or sent the March 6 OHR response to the CAO or anyone else other than the Board. This is unsurprising as the February 28 email does not appear to be a grievance or a grievance appeal. We find that neither Appellant nor OHR considered his February 28 email to be a grievance.

ISSUE

Does the Board have jurisdiction to hear the Appeal?

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (As amended September 19, 2006, October 21, 2008, July 27, 2010, June 30, 2015 and June 1, 2020), Section 2, General Provisions:

§ 2-3. Interpretations of Personnel Regulations.

(c) CAO response to a request for interpretation.

(1) The CAO must issue an interpretation in writing within 60 calendar days of receiving the request with copies to interested County departments, offices, employees, or employee groups.

(2) An employee may not grieve or appeal a written CAO interpretation issued under (1) above. An employee may, however, file a grievance under Section 34 of these Regulations or file an appeal with the MSPB under Section 35 over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action.

Montgomery County Personnel Regulations, (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), Section 6, Recruitment and Application Rating Procedures:

§ 6-9. Eligible list. After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories.

³ The OHR Chief of Recruitment and Selection Division submitted an affidavit dated May 4, 2020, to the Board consistent with the March 6, 2020, email to Appellant. County Exhibit 3.

The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and June 1, 2020), Section 34, Grievances:

§ 34-2. Eligibility to file a grievance.

(c) A bargaining unit employee may not file a grievance under this section over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.

§ 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;
- (b) improper or unfair act by a supervisor or other employee . . . ;
- (c) improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, RIF, promotional action that was arbitrary and capricious or in violation of established procedures, or denial of an opportunity for training;
- (d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential, overtime pay, leave, insurance, retirement, or a holiday . . .

§ 34-9. Grievance procedure.

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

(e) *Steps of the grievance procedure.* The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of individual*
1	Employee	Present job-related problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor within 30 calendar days.
		If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.
	Department Director	Give the employee a written response within 15 working days after the written grievance is received.

2	Employee	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department's response.
	CAO's Designee	Must meet with the employee, employee's representative, and department director's designee within 30 calendar days to attempt to resolve the grievance.
	Employee and Dept. Director	Present information, arguments, and documents to the CAO's designee to support their positions
	CAO's Designee	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	CAO	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.
3	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under Section 35 of these Regulations
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

Montgomery County Personnel Regulations (MCPR), 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:

§ 35-2. Right of appeal to MSPB.

(b) 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 CAO. . . .

ANALYSIS AND CONCLUSIONS

Lack of Jurisdiction

In this appeal Appellant is asking the Board to review the failure of the CAO to respond to his request for an interpretation of a regulation within 60 days. While MCPR § 2-3(c)(1) does say that the CAO must issue an interpretation of a regulation within 60 days, subsection (c)(2) provides:

An employee may not grieve or appeal a written CAO interpretation issued under (1) above. An employee may, however, file a grievance under Section 34 of these Regulations or file an appeal with the MSPB under Section 35 over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action.

Unlike the County grievance procedure MCPR § 2-3(c) does not provide that a failure to respond within the time limit may be treated as a denial and be appealed to the next step. Indeed, there is no next step as the regulation specifically states that there is no right to “grieve or appeal” the CAO’s interpretation. An employee may only grieve and appeal an action taken on the basis of a CAO interpretation. Appellant cannot be heard to argue that a grievable action has been taken on the basis of the CAO’s failure to provide an interpretation.

The Board can see no basis for us to assert jurisdiction over a matter that cannot be appealed to us under the regulations. Therefore, the Appeal must be dismissed for lack of jurisdiction.⁴

Failure to Exhaust Administrative Remedies

The basis for the Appeal is that the CAO did not issue an interpretation of the promotion regulations within 60 days. Appellant did not file a grievance contesting that failure and instead appealed directly to the Board.

To the extent the Appeal is really an objection to the promotional process for the 2020 IAPS III vacancy there has been a failure to exhaust administrative remedies by filing and pursuing a grievance. The promotional process involved the creation of an eligible list and the selection of 11 applicants from that list in mid-2019. Appellant believes that there was a failure to adequately notify all eligible employees that the list would be used for multiple vacancies over a six-month period from June 12, 2019 until December 12, 2019. He also objects to the selection of Ms. M off the list in February 2020, when he asserts the list had expired.

The County Response argues that the Appeal should be dismissed for failure to exhaust administrative remedies because he did not raise the matter with his supervisor or submit a written grievance as required by Step 1 of the grievance procedure, and because he also did not comply with Step 2 by submitting the grievance to OHR Labor Relations.

Appellant is not directly challenging what he has suggested to be the County’s improper promotional process because, as far as we can tell, he has not filed a grievance, appealed it to the CAO at Step 2 of the grievance procedure, and then filed an appeal of the CAO’s decision to the Board.

The County grievance procedure is designed to promote dispute resolution “at the lowest level” under “specific and reasonable time limits for each level or step.” MCPR § 34-3(a). The time within which to file a grievance is 30 calendar days after the date on which an employee knew or should have known of the occurrence or action on which the grievance is based, or the date on

⁴ The union (MCGEO) filed two grievances concerning the IAPS III promotional process on behalf of County employees eligible for promotion to IAPS III, which includes Appellant. The first grievance was apparently denied in September 2019 and not appealed further. The second grievance was filed by the union on March 18, 2020, and dealt more specifically with the promotion of Ms. M. The grievance claims that the County violated the Collective Bargaining Agreement’s (CBA) provisions regarding vacancy announcements and the more general policy on promotions. Those grievances may not be considered by the Board. MCPR § 34-2(c) provides that an employee “may not file a grievance under this section [MCPR § 34] over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.” The Board has held that it has no jurisdiction over grievances concerning the CBA. *See* MSPB Case No. 16-05 (2015); MSPB Case No. 14-07 (2013).

which he received a notice specifically required by the County regulations. MCPR § 34-9(a)(1). Step 1 of the grievance procedure provides that an employee shall initially file a grievance with the employee's immediate supervisor. Step 2 requires that "within 10 calendar days after receiving the department's response" an employee may file the grievance with the CAO. MCPR §34-3(e). A grievance appeal to the MSPB may be filed within 10 working days after the CAO's step two decision is received by the employee. MCPR §34-3(e); §35-3(a)(3).

We agree that Appellant's failure to file a grievance and to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust his administrative remedies that must result in the dismissal of this appeal. MSPB Case No. 15-28 (2015). *See Public Service Commission v. Wilson*, 389 Md. 27, 89 (2005). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies. We do not know, and will not speculate, whether any grievance Appellant files or has filed would be timely.

At each step of this Appeal the Board made a point of explaining Appellant's options and rights to due process and encouraged him to consider filing a grievance. Because the Appeal concerns a matter outside the Board's jurisdiction and Appellant did not file a grievance and exhaust his administrative remedies, we must dismiss the Appeal.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-14 be and hereby is **DISMISSED**.

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
September 8, 2020


Harriet E. Davidson
Chair