

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

IN THE MATTER OF

████████████████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

*
*
*
*
*
*
*
*
*
*
*
*

CASE NO. 20-16

=====

FINAL DECISION

Appellant, a Transit Operations Supervisor (TOS) with the Department of Transportation (DOT), filed a grievance in December 2019 challenging the seniority system for scheduling TOS work shifts and days off. On March 10, 2020, Appellant filed an appeal concerning the February 26, 2020 Step 2 grievance response of the Chief Administrative Officer (CAO). The County filed a response to the appeal on May 11, 2020. (County Response). Appellant’s due date for a reply was June 1. To date, Appellant has not submitted a reply to the County’s submission.

The Appeal was reviewed and considered by the Board.

FINDINGS OF FACT

Appellant was promoted to a Transit Operations Supervisor (TOS) position with the Montgomery County Department of Transportation (DOT), Division of Transit Services, effective April 28, 2019. County Exhibit (CX) 4.

The Division of Transit Services Ride On bus service operates 22 hours a day for 365 days a year. CX 2, ¶3. This means that there is a need for TOS supervisory coverage at night and on weekends and holidays. Transit Services utilizes a shift scheduling procedure whereby TOS employees are allowed to select shifts based on seniority. Under the procedure, seniority is calculated based on time in a TOS position, not total County service. CX 2, ¶5. Because more than one TOS may have the same hire date a tie breaker was created. CX 2, ¶4 & ¶5. The tie breaker compares the sum of the last four digits of each employee’s Social Security Number, with the

employee having the higher sum deemed the more senior. The tie breaker method has been in use for about 12 years. CX 2, ¶5.

The same seniority tie breaker procedure is utilized in the collective bargaining agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO). CX 2, ¶5.¹ Although as supervisors TOS employees are not in the MCGEO bargaining unit, the Chief of the Transit Division determined that the MCGEO agreement's seniority tie breaking method was reasonable and decided to use it for purposes of scheduling TOS shifts. CX 2, ¶5 & ¶9; CX 3.

Appellant is one of three employees with a TOS hire date of April 28, 2019 and, based on the last four digits of his Social Security Number, has the lowest seniority rank of the three. CX 4. *See* CX 1, Appellant's grievance ("I had a lower Social Security Number").

Appellant was not the only TOS displeased with DOT's method of determining shift assignment seniority. A group of TOS employees, including Appellant, filed grievances which were consolidated. CX 2, ¶7. In an effort to resolve the concerns of the TOS grievants a meeting was held on September 17, 2019, between DOT management, some of the grievants, and a representative from OHR. CX 3. According to a September 27, 2019, memorandum from the Chief of Transit Services and his affidavit, the parties were able to achieve an amicable resolution to the dispute. CX 3; CX 2, ¶8. The resolution was described in the September 27 memorandum as follows:

The outcome of this discussion was agreed upon by both the Department and the Transit Operation Supervisors. As the TOS grade was previously a 19, but is currently a 21, the calculation for ranking will be based on when the employee became a TOS. An agreement was also reached that someone at a current Grade 21, who performs similar duties to a TOS could transfer to an open TOS slot and their years at the Grade 21 would count toward how they rank at the depot. Any outside person hired as a Transit Operation Supervisor will start at the bottom for "Time in Position" as a Transit Operation Supervisor. Any Transit Operation Supervisor hired on the same day, the calculation for the person with more "Time in Position" will be the standard county practice as outlined in the Personnel Regulations. These rankings will be used for each depot to allow the Transit Operation Supervisors to be able to select their work schedule and annual leave. This selection will take place each December and be effective the first pay period in January.

¹ The MCGEO collective bargaining agreement, Article 8 – Seniority, uses total County service with a tie breaker being the last four digits of employees' social security numbers to determine seniority ranking:

- § 8.1(a) states that "Length of service (seniority) for the purpose of this Agreement . . . shall be calculated based on total County service. . .".
- § 8.1(b) provides: "In the event that there is a tie between or among 2 or more employees regarding their calculated seniority, the tie will be broken on the basis of the sum of the last 4 digits of each affected employee's social security number, with the employee having the higher sum of the 4 digits being deemed the more senior."

The Department is satisfied that this arrangement will work for both parties and brings this grievance to a successful conclusion.

CX 3, p. 2.

Although some of the TOS employees may have been satisfied with the outcome it appears that others were not. Appellant filed a grievance dated December 12, 2019, alleging that the seniority system for scheduling TOS work shift assignments and days off is unfair. CX 1. *See* CX 2, ¶8. Appellant's grievance alleged that his seniority should have been calculated based on his total County service and that he "was denied length of service and lost my seniority due to the fact that I had a lower social security number." Appellant asserts that his seniority for purposes of TOS work assignment scheduling should be based on the Montgomery County Personnel Regulations (MCPR), §30, Reduction-In-Force. CX 1.

Appellant's grievance was apparently consolidated with those of several other dissatisfied TOS employees who filed a Step 2 appeal of the DOT September 27 memorandum to the CAO. County Response, p. 1. The CAO's Step 2 decision on the consolidated grievances, issued on February 26, 2020, found that because MCPR, § 30, only addressed how seniority is calculated for purposes of Reduction-In-Force, it was inapplicable to TOS shift scheduling. The CAO further found that the applicable personnel regulation was MCPR § 15-2(c), which states that "[a] supervisor may change the work schedule of an employee who reports to the supervisor." The CAO concluded that under § 15-2(c):

[T]he Department has discretion to determine work assignments and days off as operational needs warrant. The Grievants presented no evidence that the Department abused its discretion with its practice of assigning schedules and days off.

The CAO also determined that "the evidence does not establish that the Grievants have raised a matter that is grievable and even if considered grievable, they have not been able to establish a violation, misinterpretation or improper application of a law, rule, procedure or policy."

Appellant's March 10, 2020, Appeal to the Board states: "(1) I am not union member, but they used a union contract to take inappropriate action against my seniority. (2) The reason for denial was not in relation to my actual grievance. (3) If they are using the union contract, then my seniority was calculated incorrectly."

ISSUE

Did the County properly establish and implement the seniority based work schedule policy for Transit Operations Supervisors?

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, and June 30, 2015), Section 15, Work Schedules, Attendance, Hours of Work:

§ 15-2. Work schedules.

(c) Authority to change work schedule. A supervisor may change the work

schedule of an employee who reports to the supervisor. However, an employee must request a compressed work schedule, flextime, or job sharing arrangement under Section 15-4(b) or (c), as appropriate, and only the department director may approve an agreement to change to one of these types of alternate work schedules.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended May 20, 2010, July 12, 2011, and June 30, 2015), Section 30, Reduction-In-Force:

§ 30-1. Definitions.

(n) Seniority: The total length of time that an individual has been a County employee in full-time and part-time positions.

§ 30-2. Policy on RIF

(b) If RIF is necessary, a department director must base the transfer, demotion, or termination of an employee on one or more of the following:

- (1) service needs;
- (2) seniority; or
- (3) performance.

§ 30-5. Calculation of seniority in a RIF.

(a) A department director must calculate seniority for all affected employees with merit system status in the department and class by:

- (1) giving seniority credit for continuous County employment from the date of initial employment in a full-time or part-time position to a fixed date established by the OHR Director;
- (2) giving seniority credit for past periods of employment in a full-time or part-time County position if the employee had a break in service;
- (3) prorating seniority for part-time employees based on the number of hours worked per week;
- (4) giving an employee up to 5 years of seniority credit for periods of military service as required under Section 22 of these Regulations; and
- (5) giving an employee seniority credit for service before 1989 as a paid firefighter for a Montgomery County volunteer fire corporation.

(b) A department director must also give additional seniority credit to an affected employee or deduct seniority credit based on the employee's average overall performance rating over the 3 most recently completed rating periods. The department director must calculate the number of extra months of seniority credit by:

- (1) giving the employee 24 extra months of seniority for each time the employee received an overall rating of Exceptional Performance or an equivalent rating;

- (2) giving the employee 12 extra months of seniority for each time the employee received an overall rating of Highly Successful Performance or an equivalent rating;
 - (3) giving the employee no extra months of seniority credit if the employee:
 - (A) received an overall rating of Successful Performance or an equivalent rating; or
 - (B) did not receive an overall rating during the most recently completed rating period;
 - (4) deducting 12 months of seniority from the seniority calculated under (a) if the employee received an overall rating of Does Not Meet Expectations or an equivalent rating; and
 - (5) dividing the total extra months of seniority by 3 to determine the additional months of seniority that the employee must receive.
- (c) A department director must give an employee in an affected class who has been employed for less than 3 years:
- (1) the average extra months of seniority credit for the employee's last 2 overall performance ratings; or
 - (2) extra seniority credit for one overall performance rating, as appropriate.
- (d) The department director must not give affected employees seniority credit or deduct seniority credit based on performance unless the performance evaluation plan used by the department for the last 3 years:
- (1) includes 4 rating categories;
 - (2) was used uniformly to evaluate the performance of employees in the affected class;
 - (3) is consistent with Section 11 of these Regulations for non-bargaining unit employees; and
 - (4) is consistent with the appropriate labor agreement for bargaining unit employees.
- (e) To break a tie, the department director must use seniority within the affected class, as calculated above using employee performance ratings.
- (f) The OHR Director must certify the department director's final seniority calculations and confirm that the department director complied with (c) above.
- (g) Based on the certified final seniority calculations, the department director must displace employees in an affected class with merit system status by inverse seniority until the total number of positions to be abolished has been reached.

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

§ 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.

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. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

ANALYSIS AND CONCLUSIONS

The County argued that Appellant's complaint was not grievable under MCPR, § 34-4, because he did not identify any law, rule, policy or procedure that has been violated by the DOT's method of assigning supervisory work schedules and days off. Nevertheless, we find that Appellant's complaint is grievable as it is alleging a violation of policy and what he alleges to be an unfair act. Accordingly, we shall consider the merits of his grievance appeal.

The authority to establish employee schedules is vested in supervisors under the County's personnel regulations. MCPR § 15-2(c) ("A supervisor may change the work schedule of an employee who reports to the supervisor."). See MSPB Case No. 17-21 (2017). There is no County Code or MCPR provision requiring the use of seniority for scheduling work days and days off for supervisory employees.

To support his seniority argument, Appellant cites MCPR § 30(n), a provision dealing with RIFs (Reductions-in-force) and furloughs, which defines seniority as “total length of time that an individual has been a County employee.” The seniority calculation for a RIF is quite detailed and extensive. MCPR § 30-5. In a RIF seniority may be increased or decreased based on employee performance, and may even be set aside due to operational needs. MCPR § 30-5(b) - (e); § 30-6.²

Because supervisors have wide discretion to determine work schedules they may opt to use the parts of the RIF personnel regulation as a basis for calculating seniority for that purpose, but the RIF seniority calculation in MCPR, § 30, is not referenced, adopted or mandated to be used in work scheduling or any other provisions of the personnel regulations.

We did find one provision in County law that expressly requires the use of the RIF seniority calculation for a non-RIF purpose. The Montgomery County Code, § 33-42A(g), adopted the RIF seniority calculation for tie breaking in the 2010 Retirement Incentive Program: “If more members apply to participate in the program than the number of positions abolished, the participants must be approved in order of County seniority calculated under the RIF personnel regulation in the following order: (1) participants who applied for the proposed 2009 Retirement Incentive Program; and (2) all other participants.” In that context the use of the RIF calculation made good policy sense as a purpose of the Retirement Incentive Program was to encourage employees to retire during a fiscal crisis and, perhaps, reduce the number of involuntary RIFs. However, besides that unique circumstance we are unaware of any law that would compel the County to use the RIF personnel regulation seniority provisions for any other purpose.

We thus conclude that Appellant’s argument that he was entitled to seniority for his total County service, as opposed to his time in a TOS position, lacks merit.

We also find no merit in Appellant’s contention that use of the last four digits of employee Social Security Numbers as a seniority tie breaker was improper because he was not a member of the MCGEO bargaining unit. The Transit Division Chief acknowledged all along that while use of that tie breaker was not required, he used his supervisory discretion to adopt that approach because he deemed it “reasonable.”

We do not find the Transit Division Chief’s exercise of discretion to be in violation of any County law, regulation, or policy. Nor, based on this record, do we have reason to conclude that it was arbitrary, capricious, or discriminatory. In addition to the MCGEO collective bargaining agreement there is a long history in labor relations of using various methods of seniority tie breaking. Some of those methods essentially rely on chance. *See* Abrams, Roger I. and Nolan, Dennis R., “Seniority rights under the collective agreement” (1986). *Northeastern University School of Law Faculty Publications*, pp. 113-14, (“seniority preference may be determined by the time of hiring interview, clock number, lowest (or highest) social security number, alphabetical order, or toss of a coin. . .”); Board of Education of Prince George’s County Maryland and ACE/AFSCME, Local 2250, AFL-CIO, (July 1, 2018 - June 30, 2022), Section 27, Transportation Employees, J.1.e, p. 27, (“Seniority among individuals with the same date of hire will be

² Similarly, in setting leave schedules for bargaining unit employees seniority may be overridden by operational needs. The MCGEO collective bargaining agreement, § 14.7, provides that “[t]he County will schedule vacation days of employees, provided however that employee timely vacation preferences will be honored on a seniority basis when the County determines that services and operating efficiency are not substantially impaired.”

determined by a drawing of names”); 2 Education Law, § 6E.03 *Reductions in Force* (2020) (“Tie breakers may include an employee’s start date, actual date or order of hire (rather than start date), and even a drawing by lots.”); *Crafts v. GMC*, 192 F. Supp. 2d 310, 318 (D. Del. 2002)(use of “alphabetic position of the employee’s last name as a seniority tie-breaker” in CBA reasonable and not violation of union’s duty of fair representation).

We nevertheless urge the Transit Division Chief to consider using his discretion to adopt a seniority tie breaking policy using another approach. For example, simply rotating the seniority status among those employees with the same TOS hire date would be straightforward, easy to implement, and likely to be considered equitable by the employees themselves.

Finally, we note that it is significant that despite being provided with the opportunity, Appellant did not contest the County’s Response to his appeal. *See* MSPB Case No. 20-11 (2020); MSPB Case No. 16-01 (2015).


Appellant bears the burden of proof to show by a preponderance of the evidence that the schedule change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2). The County provided a justification for its action, and that justification does not appear to be arbitrary, capricious, or discriminatory. As Appellant has not demonstrated how the County’s implementation of the shift assignment procedure for Transit Operations Supervisors violates any applicable provision of law, regulation, or policy, or was arbitrary, capricious, or discriminatory, the grievance appeal must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-16 be and hereby is **DENIED**.

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
August 25, 2020


Harriet E. Davidson
Chair