

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

IN THE MATTER OF	*	
	*	
5 FIRE AND RESCUE	*	
SERVICE EMPLOYEES,	*	
APPELLANTS,	*	CASE NO. 22-13
	*	
AND	*	
	*	
MONTGOMERY COUNTY	*	
GOVERNMENT,	*	
	*	
EMPLOYER	*	
	*	

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FINAL DECISION

Appellants are management employees of the Montgomery County Fire and Rescue Service (MCFRS). They have filed grievance appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County’s Chief Labor Relations Officer dismissing their COVID-19 differential pay appeals as untimely.¹ By Order dated October 4, 2021, the Board consolidated MSPB Case Nos. 22-04, 22-06, 22-09, 22-10, and 22-11 and required that the consolidated appeals be docketed and referenced as MSPB Case No. 22-13.²

The County submitted a response to the appeals on November 1, 2021. (County Response). Appellants filed a response to the County’s submission on December 20, 2021. (Appellants’ Response). The Appeal was reviewed and considered by the Board.

FINDINGS OF FACT

On March 5, 2020, the Governor issued a proclamation declaring a state of emergency and catastrophic health emergency in response to the COVID-19 pandemic. Appellants’ Exhibit (AX) 1, p. 4. The Governor’s emergency declaration was renewed on March 17th and numerous times

¹ COVID-19 differential pay was available to certain County employees from March 2020 until February 14, 2021. “Front facing” work was that which involved physical interaction with the public that could not be performed with appropriate social distancing.

² The Appellants are Battalion Chief [REDACTED] (Case No. 22-04), Division Chief [REDACTED] (Case No. 22-06), Assistant Chief [REDACTED] (Case No. 22-09), Division Chief [REDACTED] (Case No. 22-10), and Battalion Chief [REDACTED] (Case No. 22-11).

thereafter as the devastating pandemic continued. However, the Montgomery County Executive did not officially declare a state of emergency. *Id.*

On April 3, 2020, the County entered into agreements with three unions, including the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), providing for COVID-19 differential compensation. County Exhibit (CX) A. *See* CX B. The agreements provided for additional COVID-19 compensation for bargaining unit members retroactive to March 29, 2020. The additional compensation was to be paid for the duration of the declared state of emergency related to COVID-19. CX A.

The Agreement with IAFF provided that hours worked from March 29, 2020, were to be compensated at the rate of \$10 per hour, except for those hours teleworked. CX A. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX B.

All Appellants are MCFRS management level employees, *i.e.*, at the rank of Battalion Chief or above, and are not members of the IAFF bargaining unit covered by the collective bargaining agreement or the April 3, 2020, agreement concerning COVID-19 differential pay. AX 1; CX A & C. On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the Management Leadership Service (MLS), the Police Leadership Service (PLS), and the fire rescue services management. CX D, pp. 10 & 22. The timekeeping guidance memorandum was revised on April 11, 2020. *Id.*, pp. 12-23.

Eighty-three non-bargaining unit public safety management employees, including 23 fire rescue services management employees, filed grievances seeking COVID-19 differential pay. AX 1. After their grievances were denied at Steps 1 and 2 of the grievance procedure the 23 MCFRS employees filed appeals with the MSPB between late January and early March 2021. On July 19, 2021, settlements were reached between those appellants and the County. AX 1.

Appellants in this case each filed their grievances within 30 days of the July 19, 2021, settlement agreements, but five to six months after the end of the program under which they claim they are entitled to a pay differential.³ On their grievance forms all five Appellants asserted that they are entitled to the pay differential based on their assertions that they had only recently learned of grievances filed by other MCFRS managers and claim that they too should receive the same COVID-19 differential pay as other MCFRS employees, who had filed their grievances in 2020:

1. MSPB Case No. 22-04 (“I recently became aware that many of my colleagues filed a grievance to overturn the incorrect and unfairly applied decision to deny differential pay related to the COVID-19 pandemic. I am an operational Battalion Chief for MCFRS and I believe that I am entitled

³ Two of the Appellants learned of the pending settlement earlier and filed their grievances about a week prior to the settlement being executed. Appellants’ Response, p. 4, n. 3. The grievance in MSPB Case No. 22-11 was filed on July 11, 2021, and Case No. 22-04 on July 13, 2021. The other grievances were filed after July 19. The grievance in Case No. 22-10 was filed on August 5, 2021, Case No. 22-06 on August 10, 2021, and Case No. 22-09 on August 19, 2021. CX C; Appellants’ Response, p. 4.

- to receive Front-Facing pay just as the IAFF members who work in the same capacity have.”) CX C, p. 20.
2. MSPB Case No. 22-06 (“I am aware that many FRS Chief Officers filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. I am a Division Chief for MCFRS and believe I am entitled to receive Front-facing pay just as the IAFF members and FRS Chief Officers who work in the same capacity have, or will be, based on the recent grievance settlement.”) CX C, p. 16.
 3. MSPB Case No. 22-09 (“I have just become aware that many FRS Chief Officers filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. . . I am requesting relief in the form of COVID-19 differential pay equal to all others working in FRS from the first date I was eligible. . .”) CX C, p. 8.
 4. MSPB Case No. 22-10 (“I have just become aware that many FRS Chief Officers filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. . . I am requesting relief in the form of COVID-19 differential pay equal to all others working in FRS from the first date I was eligible. . .”) CX C, p. 12.
 5. MSPB Case No. 22-11 (“I recently became aware that many of my colleagues filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. . . I am requesting relief in the form of COVID-19 differential pay comparable to all others working in FRS Operations. . .”). CX C, p. 4,

In his Step 1 grievance responses the Fire Chief indicated that he agreed that Appellants should receive the COVID-19 differential pay, but stated that he did not have the authority to grant the requested relief due to direction given by the Chief Administrative Officer (CAO). AX 3.

Appellants note that the settlement agreements of the prior COVID appeals were discussed publicly during Montgomery County Council meetings, including a November 30, 2021, session. Appellants’ Response, p. 4. *See* AX 4.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and June 1, 2020), § 34, Grievances, which provides, in pertinent part:

§34-9. Grievance procedure.

(a) Time limit for filing a grievance.

- (1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or

(B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

* * *

(6) The OLR Chief may extend the time limits stated in the grievance procedure for compelling reasons. The OLR Chief must give the parties prompt notice of an extension.

(b) Technical and procedural review of grievances.

(1) An employee must submit a written grievance on the OLR-approved grievance form (Appendix Q) and must provide the information requested on the form.

* * *

(5) The OLR Chief must review the grievance and decide if the grievance:

(A) presents an issue that is grievable under Section 34-4;

(B) was timely filed; and

(C) otherwise complies with this section.

(6) If the grievance does not satisfy the requirements of Section 34-9(b)(5) the OLR Chief must dismiss the grievance.

(7) The department that the grievance was filed against should not respond to the grievance if OLR advises the department that the issue is not grievable or the grievance is not timely filed.

* * *

(9) The OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process.

* * *

(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 OLR, submit the written grievance to the OLR Chief.
	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 OLR 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.		

* * *

(k) Limit on relief.

- (1) A grievant must not receive relief in a grievance from a date more than one year before the grievance was filed.
- (2) If a grievance involves a continuing violation, the grievant is only entitled to relief going back 30 days before the grievance was filed.
- (3) The above restrictions on relief are not intended to limit the remedial authority of the MSPB under Section 33-14(c) of the County Code.

§34-10. Appeal of a grievance decision.

- (a) An employee with merit system status may appeal a grievance decision issued by the CAO to the MSPB under Section 35 of these Regulations.
- (b) A probationary or temporary employee may not appeal a grievance decision by the CAO to the MSPB.
- (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.

MCPR §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.

ISSUE

Did the Appellants file timely grievances? If so, are they entitled to COVID-19 differential pay?

ANALYSIS AND CONCLUSIONS

The timeliness of the grievances filed by Appellants is the sole issue of these consolidated appeals. There was no consideration or determination by the CAO or the Chief Labor Relations Officer on the merits of Appellants' grievances.⁴

⁴ Although MCPR §34-1(b) defines a CAO's designee as "an OLR staff member or other individual designated by the CAO," the decisions issued by the OLR Chief do not state that the OLR Chief was acting as the CAO's Step 2 designee. Under the personnel regulations, direct appeals to the MSPB from OLR Chief decisions are limited to grievability (MCPR §34-6(b)) and harassment or retaliation (MCPR §34-7). Such direct appeals do not expressly include the OLR Chief's timeliness determination. *But see* MSPB Case No. 07-01 (2006). We also note that a decision of the OLR Chief regarding denial of official time to prepare a grievance is "final," suggesting that if the MCPR provisions were supposed to include timeliness determinations by the OLR Chief as final the MCPR would say so. MCPR §34-3(g). Nevertheless, the MSPB will permit the OLR Chief's decisions to be appealable to the Board under these circumstances. The OLR Chief's decisions told Appellants that their next step was to appeal to the MSPB. We have no interest in penalizing the Appellants for following those instructions. *See* MSPB Case No. 17-16 (2017) ("We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.").

COVID-19 front facing differential pay began March 29, 2020, and ended on February 14, 2021. Starting in early April 2020, OHR distributed a timekeeping guidance memorandum. The guidance memorandum was sent to County management employees every two weeks. CX D. The memorandum contained language specifically stating that MCFRS management employees were not eligible for COVID front facing pay. Appellants do not deny receiving the timekeeping guidance memoranda. Appellants also do not suggest that they were unaware that MCFRS bargaining unit employees were receiving the additional COVID-19 pay between March 29, 2020 and February 14, 2021, or that Appellants were not receiving the differential pay.

Appellants filed grievances asserting their entitlement to the differential pay between five (5) and six (6) months after the program had already ended, significantly more than 30 days after Appellants knew or should have known of the basis for a grievance.

Appellants admit that they filed their grievances only after learning that the earlier grievance appeals of other MCFRS management employees were ultimately settled. Appellants argue that the County's decision to settle with these other employees and give them COVID-19 differential pay was a grievable act. Appellants' Response, p. 5. They appear to base this contention on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy.**" (*emphasis added*). Appellants argue that under this interpretation, the relevant date to calculate the time limit for filing a grievance was July 19, 2021, when the settlements became public.

The allegations seem to characterize the settlements as a change in County policy. Appellants argue that these settlements somehow amounted to new County policy when they became public during Council hearings on the settlements, and that the County was somehow admitting that all employees may have been entitled to emergency pay. Settlement of an appeal by one group of employees and not including other employees who were not parties to the litigation in the settlement does not constitute a change in policy. Nor can it be considered a "grievable act."

Longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. For example, in MSPB Case No. 01-07 (2001) the Board held:

As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use as knowledge of another employee's grievance an alternate operating date from which the time to file a grievance runs. (*See* MSPB Case No. 89-02, the Appeal of . . . ; MSPB Case No. 97-11, the Appeal of . . . et. al; MSPB Case No. 98-04, the Appeal of . . . ; MSPB Case No. 99-21, the Appeal of . . . ; and MSPB Case No. 00-05, the Appeal of . . . In all of these cases, the Board ruled that the complaints were not timely filed.

See also MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Furthermore, this Board has held that settlement agreements involving other employees may not be used even in an analysis of whether employees in similar positions have received comparable discipline for comparable behavior. MSPB Case No. 19-16 (2019); MSPB Case No. 18-06 (2019). Underlying those decisions was a respect for the public policy in favor of compromise and settlement, and a recognition that not taking into account settlements as part of a consideration of otherwise similar situations is necessary to avoid a chilling effect on the settlement of disputes. *See Bergh v. Department of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir.) *cert. denied*, 479 U.S. 950 (1986) (rejecting a disparate treatment claim based on an agency's settlement with other employees).

That policy is similarly applicable to grievances. Indeed, the County and the settling MCFRS managers expressly agreed that “the terms of [their] Agreement do not constitute a precedent or practice.” AX 1, p. 5. *See* Advisory Committee Notes to Fed Rules Evid R 408 (“it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. [t]his . . . situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.”).⁵

With regard to the treatment of continuing violations, it is true that a “time limitation may be waived . . . if the otherwise untimely allegation is part of a ‘continuing violation,’ *i.e.*, a related series of acts, at least one of which occurred within the limitations period.” MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February 2021. The earliest of the grievances was filed in July 2021, five months after the end of the COVID-19 differential pay policy.⁶ Accordingly, we must find that the grievances do not allege and meet the standard for a continuing violation. *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

Finally, we note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that “[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process.” §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 (“The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it.”). However, the record indicates that unlike the MCFRS managers who filed their grievances in 2020, before the end of the program, and then settled their grievance appeals and received COVID-19 differential pay in 2021, Appellants simply did not file timely grievances. There is no evidence in the record suggesting that the MCFRS managers who filed grievances in 2020 and settled with the County had access to different or better information about the COVID-19 differential pay issue. In essence, by not filing grievances until many months after the COVID-19 differential pay program ended Appellants

⁵ Maryland Rule 5-408 is comparable to Federal Rule of Evidence 408.

⁶ The grievance in MSPB Case No. 22-11 was filed on July 11, 2021. CX C.


waived their rights to claim COVID-19 pay while many of their colleagues chose to grieve and assert their rights while the program was still in effect. Appellants have not provided any justification for late filing that would constitute “good cause” for the Board to exercise its authority to extend the time limits for the initial filing of a grievance.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-13 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*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
April 18, 2022


Harriet E. Davidson
Chair