

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

IN THE MATTER OF

[REDACTED],

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 22-33

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ORDER OF DISMISSAL

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 22, 2022¹. Appellant’s Appeal Form and the documents he submitted indicate that Appellant was promoted to a Management Leadership Service III position with the Alcohol Beverage Services Department (ABS). However, Appellant wishes to challenge the salary level he was offered.

Appellant was advised by letter from the Board’s Executive Director on February 22, 2022, that if he wishes to challenge his salary, a grievance must be filed at Step 1, appealed at Step 2 to the Chief Administrative Officer (CAO), and a copy of the CAO’s Step 2 decision be submitted to the Board. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2).

When Appellant did not file his documentation or otherwise contact the Board, on April 6, 2022, a second request for documents was emailed to Appellant, attaching the February 22 letter, and informing Appellant that if he wishes to file an appeal to the MSPB over his salary he must first follow the grievance procedure. The letter also requested that Appellant let the Board’s Executive Director know whether he will be providing the information requested in the February 22nd letter, or if he wishes to withdraw his appeal. The letter stated that failure to provide the MSPB with a copy

¹ The appeal was filed by electronic mail on Thursday, February 17, 2022, after MSPB office hours. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

of a notification of nonselection, a CAO's grievance decision, or other satisfactory explanation may result in dismissal of the appeal.

When the Board received no response from Appellant it issued an April 19, 2022, Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why he has failed to file the required documentation. Appellant filed a statement on April 25, 2022.² The County filed a response on May 11, 2022.

Failure to exhaust administrative remedies

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 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 §34-9(e). A grievance appeal to the MSPB may be filed within 10 working days after the CAO's Step 2 decision is received by the employee. MCPR §34-9(e); §35-3(a)(3). Appellant did not avail himself of either of the first two steps of the grievance procedure but, rather, is attempting to go directly to Step 3, an appeal to the MSPB.

It is a well-established principle of labor law that an employee must normally exhaust any contractual or administrative grievance procedures. MSPB Case No. 20-14 (2020); MSPB Case No. 15-28 (2015). *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

An employee's failure to exhaust the grievance procedure may be excused if the employer has repudiated the grievance procedures or if exhausting the procedures would be futile. MSPB Case No. 15-28 (2015). *See, e.g., Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 370 U.S. 524, 262-63, 266-67 (1962) (exhaustion of grievance procedure excused due to employer repudiation of grievance procedures); *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969) (excusing failure to follow grievance procedure as doing so would be futile).

Since there is no indication in this case that the County has repudiated the grievance procedure, it appears that the only exception to the principle of exhaustion that Appellant claims is futility. Appellant's argument that exhausting the grievance process would have been futile rests entirely on the fact that the CAO made the decision on Appellant's promotional salary level and is the final decision maker at Step 2. However, we cannot conclude that pursuing the grievance procedure would be a pointless exercise simply because the CAO may have made a decision on Appellant's salary level and would be the Step 2 decision maker in a grievance appeal. *See* MSPB Case No. 15-28 (2015) (No futility where CAO made a transfer decision appellant wished to challenge).

² Appellant's response was filed by electronic mail on Friday, April 22, 2022, at 4:20 p.m., a date that the Board's office was not open.

The record contains no basis to conclude that the CAO or his designees have a personal bias against Appellant, or that they would be unable to assess a Step 2 grievance fairly and objectively because the CAO's designee made a decision concerning Appellant's appropriate salary level upon his promotion. MSPB Case No. 15-28 (2015) ("Without more, such as evidence that the CAO has suggested that he is unwilling to or incapable of evaluating Appellant's grievance on the merits, we cannot conclude that pursuing the grievance procedure would be a pointless exercise."). See *Public Service Commission v. Wilson*, 389 Md. 27, 92 (2005) (No presumption that Chair of the PSC, who initially fired an employee, would be biased in an administrative appeal of the employee's subsequent firing); *Dearden v. Liberty Med. Ctr., Inc.*, 75 Md. App. 528, 534 (1988) (fact that an employee's complaint is against the official in the highest leadership position does not excuse a failure to invoke and exhaust the grievance procedure). Indeed, the CAO and his designees are entitled to a presumption of honesty and integrity. MSPB Case No. 17-23 (May 8, 2017). See *Withrow v. Larkin*, 421 U.S. 35 (1975); *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011); *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397, 410 (1999).

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. 20-14 (2020); 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 will not speculate whether any grievance Appellant files or has filed would be timely.

The Board Lacks Jurisdiction Over Appellant's Discrimination Claim


To the extent Appellant is complaining of employment discrimination based on race, color, gender, age, and disability, the MSPB does not have jurisdiction. Appellant may file discrimination complaints with the County Human Relations Commission, the Maryland Commission on Civil Rights, or the United States Equal Employment Opportunity Commission, however, claims of discrimination prohibited by Chapter 27 of the Montgomery County Code may not be filed with the MSPB. MCPR, § 35-2(d). MSPB Case No. 10-04 (2009) ("the Board is not empowered to hear claims of discrimination prohibited by Chapter 27 of the Montgomery County Code. See MCPR, Section 35-2(d).") See MCPR § 5-4(b)(1), which provides that an employee alleging discrimination "may not file a grievance under Section 34 . . . or an appeal under Section 35 [with the MSPB], unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation." MSPB Case No. 15-28 (2015).

For the above discussed reasons the Board must dismiss this matter due to Appellant's failure to exhaust administrative remedies, and because the Board lacks jurisdiction. MCPR § 35-7(c) & (e). Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-33 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*, 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.

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For the Board
June 1, 2022


Harriet E. Davidson
Chair