

**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. 23-07

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FINAL DECISION

Appellant is a Deputy Chief of Security & Facilities/Acting Deputy Warden of Operations for the Montgomery County Department of Correction and Rehabilitation (DOCR). Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) challenging the decision of the County’s Chief Labor Relations Officer denying him differential pay during the COVID-19 pandemic.

The County submitted a response to the appeal on January 23, 2023. (County Response). To date, Appellant has not filed any response to the County’s submission.

The appeal was reviewed and considered by the Board.

FINDINGS OF FACT

On March 5, 2020, in order to control and prevent the spread of COVID-19, the Governor of Maryland issued a proclamation under the authority of the Maryland Constitution and Title 14 of the Public Safety Article, declaring a state of emergency and catastrophic health emergency. County Exhibit (CX) 3. The Governor’s emergency declaration was renewed on March 17th and numerous times thereafter as the pandemic continued. On March 13, 2020, the President of the United States issued a Proclamation declaring COVID-19 to be a National Emergency. CX 4.

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 MLS, the Police Leadership Service (PLS), and the fire rescue services management. CX 7, pp. 7 & 10. The timekeeping guidance memorandum specifically states: “Note: MLS employees are not eligible

for on-site COVID-19 differential pay. CX 7, p. 7 (emphasis in original). The timekeeping guidance memorandum was revised on April 11, 2020, and repeated the statement that MLS employees were not eligible for COVID-19 differential pay. CX 8, p. 8. The timekeeping guidance memorandum was distributed to Executive Branch Department and Office Directors and copied to many other employees including those in the MLS. Similar timekeeping guidance with the specific exclusion of MLS employees from COVID-19 differential pay eligibility was issued every two weeks through February 2021.¹

On April 10, 2020, the County Executive issued a press release publicly announcing that the County had reached an agreement with the three unions representing County employees providing for COVID-19 differential compensation. CX 5. The press release specifically noted that “under provisions of existing county bargaining agreements . . . the unions could have insisted on much larger benefits, but they understood the importance of the ongoing fiscal health of the county.” CX 5.

On February 13, 2021, the County Executive announced that COVID-19 differential pay would end effective February 14, 2021. CX 6

Governor Hogan issued an Executive Order on June 15, 2021, terminating the various emergency proclamations and orders he had previously issued during the COVID-19 pandemic, effective July 1, 2021. Governor’s Executive Order 21-06-15-01 (June 15, 2021).

Twenty-three (23) MCFRS managers filed grievances concerning COVID-19 differential pay and settled with the County. *See* MSPB Case Nos. 21-33 and 21-114 (2021). Similar grievances were filed by 15 managers in the Montgomery County Sheriff’s Office, 45 managers in the Montgomery County Police Department, and 16 Department of General Services managers. *See* MSPB Case Nos. 21-109, 21-110, 21-111 and 21-112. The County settled a total of 99 appeals.² As part of the settlement agreements the County paid COVID differential pay in exchange for waiver of claims to emergency pay.

The County Council held public hearings concerning the settlements, including sessions on November 30 and December 7, 2021. On December 14, 2021, the County Council voted to approve the settlements. Appeal Form, p. 3; CX 1; Council Resolution 19-1101 (adopted December 14, 2021); County Council Minutes, December 7, 2021, Item 7, p. 6; County Council Minutes, December 14, 2021, Item 19.5, p. 9.

Appellant, Deputy Chief of Security & Facilities and Acting Deputy Warden of Operations with DOCR’s Pre-Release Services and Detention Services units and an MLS III employee, alleges that he only became aware that other public safety managers had filed grievances seeking COVID differential pay, and that the County Council approved settlements to provide such pay to public safety managers, as a result of a “casual conversation with another Montgomery County employee.” Appeal Form, p. 3. Appellant filed his grievance on February 15, 2022, a few days after that conversation. CX1; Appeal Form, p. 3. The Office of Labor Relations (OLR) Chief

¹ *See* Montgomery County Department of Finance, MCTime Prior Timekeeping Guidance, found at: https://montgomerycountymd.gov/mctime/guidance_archive.html.

² The grievance filing dates for these appeals were as follows: MSPB Case No. 21-33 (10/15/20); MSPB Case No. 21-114 (10/2/20 to 12/6/20); MSPB Case No. 21-109 (9/23/20 to 10/6/20); MSPB Case No. 21-110 (10/25/20 to 2/26/21); MSPB Case No. 21-111 (10/5/20); MSPB Case No. 21-112 (9/30/20).

denied the grievance as untimely on December 12, 2022. CX 2. Appellant filed this appeal on December 21, 2022.

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.

ISSUE

Did Appellant file a timely grievance?

ANALYSIS AND CONCLUSIONS

Appellant's appeal seeks "fair and equal treatment to that of my Public Safety Senior Manager counter parts and please grant me the COVID-19 hazard pay." Appeal Form, p. 3. Appellant alleges that he only became aware that other public safety managers had filed grievances seeking COVID differential pay, and that the County Council approved settlements to provide such pay to public safety managers, as a result of a "casual conversation with another Montgomery County employee." Appellant filed his grievance on February 15, 2022, a few days after that conversation. CX1; Appeal Form, p. 3.

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, including Appellant, every two weeks. The memorandum contained language specifically stating that MLS employees such as Appellant were not eligible for COVID front facing pay. Appellant does not deny receiving the timekeeping guidance memoranda or suggest that he was unaware that bargaining unit employees were receiving the additional COVID-19 pay between March 29, 2020 and February 14, 2021.

Appellant filed his grievance asserting entitlement to the differential pay a full year after the program had already ended in February 2021. Appellant admits that he filed his grievance only after learning that the grievance appeals of other management employees were ultimately settled. Appellant argues that time limit for filing a grievance over what he characterizes as the unfair treatment only began when he became aware of the County's decision to settle with other employees and give them COVID-19 differential pay.

Although Appellant makes a generalized claim that the settlements of other public safety managers constitute unfair treatment of him, we surmise that he is making a contention based 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*). Under this interpretation, the relevant date to calculate the time limit for filing a grievance might be argued to be July 29, 2021, when the settlements became public, or December 14, 2021, when the County Council approved the settlements. In either case, settlement of an appeal by one employee or group of employees and not including other employees who were not parties to the litigation does not constitute a change in policy. Nor can it be considered a “grievable act.” *See* MSPB Case No. 22-13 (2022).

Moreover, 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. MSPB Case No. 22-13 (2022); MSPB Case No. 01-07 (2001). *See* 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.”).


Appellant’s argument that his grievance, filed a year after the COVID-19 differential pay program ended, and two months after the settlements were publicly approved by the County Council, is without merit and must be denied.

ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 23-07 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
March 14, 2023


Harriet E. Davidson
Chair