

provided with copies of the Step 2 decision, and verification of which employees have joined this appeal. Appellant provided some of the requested information on October 24, 2023. The County provided a supplemental response on October 26, 2023, (County Supplemental Response), indicating that there was not an agreed upon list and that Appellant [REDACTED] had filed a timely appeal to the MSPB.

The Appeal and submissions by the parties were reviewed and considered by the Board.

FINDINGS OF FACT

On November 25, 2022, the then ABS Division Chief of Retail Operations issued an email setting out changes to the way ABS would schedule work hours for store managers and assistant managers. County Exhibit (CX) 1. The policy changes were to go into effect on January 1, 2023.

The policy outlined in the email reduced the number of weekend days per year that assistant managers would be off work while increasing the number of weekend days per year that store managers would be off. In its entirety the policy stated the following:

We are making a change to the way we schedule hours for store management (Store Managers and Assistant Managers) going forward. These changes have been discussed with HR and are effective 1/1/2023. There are several reasons why these changes are being made. Some of these are ...

- Improving Customer Service
- Improving Coverage During Peak Hours and Hours of Largest Labor Need
- Aligning Hours to What a New Sales Forecasting and Labor Management System Will Require
- Reducing Labor Hours During Slow Times (Off Peak Hours)
- Ensuring Consistency in Schedules

At this time, these changes will impact Store Management (SM and ASM) only. Below is a detailed list of the changes that will take effect on 1/1/2023. ***Management should not change any scheduling patterns that you have been using for full time represented employees.*** Please reach out to your District Manager if you need further clarification.

• Store Manager

1 weekend off a month
Every Sunday Off

This results in an increase of weekend days off per year for store managers taking you from 52 weekend days off a year to 64 weekend days but allocates more payroll and coverage to Saturday where we need it the most. It is critical we have leadership in the stores on the busiest days of the week and this will help ensure that.

• **Assistant Manager**

- 1 weekend off a month
- 2 Additional Sundays a month

This results in a decrease of 4 weekend days off per year from 52 down to 48. Again, this gives the stores much needed leadership coverage on our busiest days of the week.

• **Schedule Standards**

As a reminder all managers (SM and ASM) should be working 2 opens, 1 middle shift and 2 closes per week or alternating between 2 closes and 3 opens one week and 3 closes and 2 opens the next week. Nobody at this point should be working one week of closing shifts and one week of open shifts.

All managers SM and ASM should work every Monday and your second day off if you're not off on the weekend should be Tuesday, Wednesday or Thursday.

SM and ASM should not be off on the same day in in the middle of the week (i.e., Both off on Tuesday. One should be off one of those three days, the other should be off on one of the remaining two days).

For the purpose of clarification these policies go into effect on the schedule starting 1/1/2023 and should not impact your full time represented employees. Any variance to this policy must be approved by the DM for that store and the Chief of Retail and will only be considered for 30 days or less, unless HR approves an extension for qualifying reasons.

CX 1 (emphasis in original).

Appellants dispute the validity of the County's claims concerning the benefits of the new scheduling policy. In support of their grievance appeals Appellants have argued that the County's five justifications for the policy change are unsupported by the evidence:

Improving Customer Service

Appellants maintain that customer service at ABS stores is excellent, citing data showing that the customer satisfaction rate remains over 90%. Appellants' Response, p. 3; Appeal Form, p. 2.

Improving Coverage During Peak Hours and Hours of Largest Labor Need

Appellants argue that coverage problems are the result of insufficient numbers of non-managerial frontline staff and the fact that individual store managers have no say in setting staffing levels at each store. Appellants' Response, p. 3; Appeal Form, pp. 2-3. Appellants further contend that the new policy over emphasizes weekend coverage because it ignores changes in customer shopping habits caused by the COVID pandemic. Appellants' Response, p. 4.

Reducing Labor Hours During Slow Times (Off Peak Hours)

Shortages of part-time (20 hours per week) employees results in excess staffing during non-peak hours. Appellants' Response, p. 3

Ensuring Consistency in Schedules

Appellants state that for over 20 years ABS store managers have had more predictable schedules like other ABS employees. Under the new policy, Appellants argue, managers are subject to schedules that are "inconsistent and erratic." The new schedule gives managers only two (2) consecutive days off once per month, which Appellants allege causes managers to be deprived of an appropriate work/life balance and results in low morale. Appellants' Response, pp. 3-4; Appeal Form, p. 3.³

Appellants also assert that by frequently denying managers and assistant managers two (2) consecutive days off in a workweek the policy is in violation of Montgomery County Personnel Regulation (MCPR) § 15-3(c) which provides that employees should be granted "2 consecutive days off in each workweek, subject to operational needs." Appellants' Response, p. 2.

Appellants claim that the new scheduling policy is less fair than the previous work scheduling policy and request that the previous work scheduling system be reinstated. Appeal Form, p. 6.

ISSUES

Did the County properly establish and implement the revised work schedule policy for ABS store managers and assistant managers?

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, June 30, 2015, July 25, 2017, and July 17, 2018), Section 15, Work Schedules, Attendance, Hours of Work, provides, in pertinent part:

§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. . . .

§ 15-3. Workday and workweek.

(c) ***Days off.*** A department director should grant an employee 2 consecutive days off in each workweek, subject to operational needs.

³ One of the reasons given by ABS for the change in policy, "Aligning Hours to What a New Sales Forecasting and Labor Management System Will Require," does not seem to have been addressed by Appellants.

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, provides, in relevant part:

§ 34-1. Definitions.

(c) Consolidated grievance: Two or more grievances that are filed by one employee or 2 or more different employees and which are processed as one grievance, if the grievances:

- (1) concern the same subject; and
- (2) request the same or similar relief.

§34-9. Grievance procedure.

(c) *Consolidated grievances.*

- (1) The OLR Chief may consolidate 2 or more grievances and process them together to save time.
- (2) OLR must give written notice to the employee or employees who filed the grievances that the grievances have been consolidated and will be processed together.
- (3) If the employee gives written notice to the OLR Chief that the employee objects to the consolidation of the employee's grievance with other grievances, the OLR Chief must process the employee's grievance separately. . . .
- (5) The department director or CAO, as appropriate, must ensure that:
 - (A) each employee who filed a grievance that was consolidated with other grievances receives a copy of the decision issued at that level; and
 - (B) each employee receives consistent and appropriate relief.
- (6) Each employee may decide to accept the decision and the relief offered, if any, or may file the grievance at the next level if the relief requested by the employee was not granted.

§ 34-10. Appeal of a grievance decision.

(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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, June 30, 2015, and June 1, 2020), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, provides, in pertinent part:

§ 35-3. Appeal period.

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee: . . . (3) receives a written final decision on a grievance. . .

ANALYSIS

Timeliness and Consolidation

The Appeal purports to be a consolidated grievance appeal by Appellant and ten (10) other ABS managers and assistant managers over the change in the ABS work scheduling system. *See* MCPR, § 34-1(c); § 34-9(c) (consolidated grievances).

The Step 2 decisions indicate that the grievances of 10 ABS managers were consolidated. There is some question over who the 10 Appellants addressed in the Step 2 decisions were, and there is inconsistency between Mr. [REDACTED]'s list of Appellants and the County's. The County identified the 10 Appellants addressed in the Step 2 decisions as [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Mr. [REDACTED] identified the same individuals as the County with the exception of [REDACTED].⁴ Mr. [REDACTED] also identified [REDACTED] and [REDACTED]. The record indicates that [REDACTED] did not file a grievance, and the County avers that OLR has no record of [REDACTED] filing a grievance. *Affidavit of [REDACTED], Chief of the Office of Labor Relations, ¶6.*

The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 17-28 (2017); MSPB Case No. 11-08 (2011). *See* MCPR § 35-2(b) ("An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO"). Thus, we find that only the individuals who were identified by the County as having received Step 2 grievance decisions are proper appellants to this consolidated appeal.

Ten employees provided emails to the Board verifying that they wished to participate in the appeal with Appellant [REDACTED].⁵ Those emails were not provided until after the Board asked for confirmation from Appellant that the other employees had authorized him to represent them. Because the 10-day appeal period had expired by the time those emails were sent the County Supplemental Response takes the position that despite Appellant signing his appeal by listing the other employees, only Appellant's appeal was timely filed.

⁴ Mr. [REDACTED] may not have filed a grievance at Step 1 but apparently attended the Step 2 hearing and was treated by the County as part of the consolidated grievance. We thus assume that the County has waived any procedural objections concerning the filing of a Step 1 grievance and allowed his inclusion in the consolidated grievances at Step 2.

⁵ Those were: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. However, there is nothing in the record indicating that [REDACTED] and [REDACTED] filed Step 2 grievance appeals or received Step 2 decisions. Thus, they may not be considered appellants in this consolidated grievance appeal.

While the Board generally will not waive the 10-day filing limit, the Board may waive the filing time limits for good cause shown. MSPB Case No. 18-16 (2018).

After examining the Step 2 decisions provided by the parties the Board was troubled to find that, contrary to the dictates of MCPR § 34-10(c), all of them failed to include a statement providing directions on how to appeal to the MSPB and notice of the appeal time limits.⁶ We have previously held that notification to the employee of the time limits is a significant factor in determining whether good cause exists for waiving the appeal time limits. MSPB Case No. 18-16 (2018).⁷

MCPR § 34-10(c)(1) requires that a CAO's Step 2 decision state "how the employee may . . . file an appeal with the MSPB." Subsection (c)(2) requires that the CAO's decision also include "the time limits for appealing the grievance . . . to the MSPB." In previous decisions the Board has "strongly urge[d] the County to explicitly provide more detailed information in such notices, including a link to the Board's website, the mailing address for the Board's office, and the Board's telephone number." MSPB Case No. 18-16 (2018), footnote 6.

There is also an email from OLR on April 2, 2023, attached as an exhibit to the October 26 County Supplemental Response. It concerns the Step 2 grievance appeals and was sent to 8 of the 9 agreed upon appellants. The OLR email states, in part, that:

the facts are same [*sic*] in all cases and so not everyone has to attend this [Step 2] hearing. All those affected (including anyone who did not file a grievance) will be included in the final decision. I will send the calendar invite shortly. If there is anyone who is missing, please feel free to forward it to them.

Although it is ambiguous, the email may be suggesting that OLR was treating all employees subject to the new scheduling policy, even those who had not filed grievances, as being included in or covered by the Step 2 decision. It is possible that OLR made these statements because it assumed that a decision rescinding or altering the ABS scheduling policy would necessarily impact all managers and assistant managers. This unfortunate language may have done a disservice to employees who received a forwarded copy of the OLR email and a calendar invite since they may have assumed that they were parties to the grievance and had no need to file their own grievances. We reluctantly conclude that the author's authority to make the statements is unclear and that the email is too ambiguous for us to consider it as waiving or extending the filing time limits for Steps 1 and 2 of the grievance procedure. *See* MCPR § 34-9(a)(5). We urge OLR to use greater care and precision in its communication with employees.

⁶ The County admits that all the grievants in the consolidated Step 2 appeal to OLR were sent identical Step 2 decision letters (except for the addressee). *Email to MSPB Executive Director from ██████████, November 14, 2023.*

⁷ "The factors in determining whether good cause exists for waiving the time limits include: (1) the length of the delay; (2) whether the employee was notified of the time limit; (3) whether there were circumstances beyond the employee's control affecting his or her ability to comply with the time limit; (4) the degree to which the employee was negligent; (5) whether any neglect was reasonably excusable; (6) whether there was unavoidable casualty or misfortune that could not reasonably have been prevented; and, (7) the extent and nature of prejudice to the agency that would result from a waiver of the time limit." MSPB Case No. 18-16 (2018).

We will, however, address the County's argument that Mr. ■■■ is the only one of the Appellants to have filed a timely appeal to the Board.

Applying the factors to consider in deciding whether to waive the time limit to appeal to the Board, as outlined in MSPB Case No. 18-16, we conclude that:

(1) The length of any delay was not egregious under the circumstances. Neither the June 15, 2023, Step 2 decision nor the April 2, 2023, OLR email provided accurate appeal guidance to the Appellants. Appellants are all *pro se* and may have assumed that once their grievances were consolidated at Step 2, they remained consolidated with Mr. ■■■ for purposes of appeal to the Board. In any event, Appellants provided written ratification that they authorized Mr. ■■■'s representation in a consolidated appeal promptly when verification was requested by the Board.

(2) Appellants were not properly notified of the time limit because the Step 2 decision failed to include information concerning the timing and method of appeals as required under MCPR § 34-10(c)(1). This reason alone justifies waiver of the appeal time limits to the Board.

(3) The factor concerning circumstances beyond the employee's control is not applicable.

(4) Because of the failure to provide proper notice of the appeal requirements to any of the Appellants they were not negligent.

(5) There was no neglect to be excused.

(6) The factor concerning unavoidable casualty or misfortune is not applicable.

(7) Finally, we see no significant prejudice to the agency that would result from a waiver of the time limit.

We thus find that under these circumstances there is good cause to waive the appeal time limits for the Appellants and treat this matter as a consolidated grievance appeal.

Appellants Have Not Met Their Burden of Proof

Appellants bear the burden of proof to show by a preponderance of the evidence that the ABS schedule change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2); MSPB Case No. 20-16 (2020); MSPB Case No. 17-21 (2017).

Appellants allege that the new scheduling policy has a negative impact on work/life balance, forces managers to work erratic schedules, and dictates that they only receive two consecutive days off once a month. Appeal Form, p. 2. Appellants also assert that the Chief of Retail Operations and his staff "have acted and continue to act maliciously against ABS Retail Management" and have engaged in "abuse of power." Appeal Form, p. 1.

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. 20-16 (2020) ("supervisors have wide discretion to determine work schedules"); MSPB Case No. 17-21 (2017).

Appellants contend that the scheduling policy is “arbitrary, capricious, and discriminatory against ABS Retail Store Management by subjecting **ONLY** us to the volatile effects from the implementation of this policy while leaving all other full time employees set schedules in place.” Appellant Response, p. 2 (emphasis in original).

However, there is no merit to Appellants’ argument that treating managers differently from non-managerial employees for purposes of scheduling is arbitrary, capricious, or discriminatory. While in practice the County may often apply the same policy standards to managers and non-managerial employees, that is not always the case, nor is it required. Non-supervisory employees are subject to various rules and policies that vary from those governing supervisory management employees.⁸ Appellants are not similarly situated to non-supervisory ABS employees for purposes of work scheduling.

Appellants also assert that the new scheduling system is in violation of MCPR §15-3(c), which provides, in part, that “A department director should grant an employee 2 consecutive days off in each workweek, subject to operational needs.”⁹

While giving employees two consecutive days off should be the norm, it is not mandatory. The terms “shall” or “must” are used to indicate a mandatory obligation to act or to establish a mandatory requirement. Use of the word “should” in this regulation rather than “shall” or “must” indicates that the obligation or requirement is not mandatory. The term “should” is a best practice recommendation, as opposed to the more permissive “may.” *See, e.g.*, Code of Maryland Regulations (COMAR) 05.04.02.02B(56). (“Should’ is a term that indicates minimum good practice but does not impose an obligation to act.”).

There is no indication in the record that the regulation has ever been interpreted to make two consecutive days off mandatory. Indeed, it appears that the opposite is true. The regulation concerning two consecutive days off has been in place for some time, and as far as we can tell it has never been considered mandatory when the needs of the workplace required otherwise. For example, §A.6, *Work Schedules: Attendance; Hours of Work*, subsection 6.2, *Work Day and Work Week*, of the Personnel Regulations for Montgomery County (approved December, 1980), stated that the normal work week would be established by the Chief Administrative Officer and “*Whenever practicable*, the policy of two consecutive days off shall be followed...”. (emphasis added).

⁸ Supervisors and managers are not members of a collective bargaining unit and thus subject to the terms of the collective bargaining agreement.

⁹ We note that the MCGEO Collective Bargaining Agreement does *not* apply to Appellants. Even so, the MCGEO agreement also makes the two consecutive days off rule subject to agency operating requirements:

13.2 Work Day and Work Week

(a) . . . The normal work week for full-time County employees is 40 hours (excluding all meal periods), Sunday through Saturday. *Whenever practicable*, 2 consecutive days off shall be granted to employees *unless work load requirements and/or demonstrated operational need, require otherwise*. The County shall provide reasonable advance notice of any change in the days off. (emphasis added).

The County does not deny that under the new ABS scheduling policy Appellants might not be granted two consecutive days off in each workweek. Rather, the CAO's designee found in the Step 2 decision that the department provided an adequate explanation that the policy was justified by operational needs.

The policy itself sets out the justifications for the new scheduling system. A central justification appears to be to ensure that managers are on duty for more weekend days when ABS suggests that the stores are the busiest. Thus, store managers are required to work all but one Saturday per month while getting Sundays off, while assistant managers will have to work more weekend days per year, including Sundays. All managers will only have one weekend off per month. Under this approach there will be greater management coverage in the ABS retail stores on Saturdays. Notwithstanding Appellants' argument that post-pandemic ABS stores are less busy on weekends than in the past they do not contend that weekends, especially Saturdays, are less busy than weekdays. On this record we must find that ABS has presented a valid justification for the policy that is not in violation of any County law, regulation, or policy.

As noted above, Appellants bear the burden of proof to show by a preponderance of the evidence that the scheduling policy change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2). The County provided justification for its action, and based on this record there is no reason to conclude that the store manager scheduling policy is arbitrary, capricious, or discriminatory.


As Appellants have not demonstrated that the County's implementation of the work scheduling policy for managers and assistant managers violates any applicable provision of law, regulation, or policy, or was arbitrary, capricious, or discriminatory, the grievance appeals must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the consolidated appeals in Case No. 23-15 be and hereby are **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
December 19, 2023


Harriet E. Davidson
Chair