Agenda Item 1
October 14, 2021
**Worksession**
**REVISED**

**M E M O R A N D U M**

October 13, 2021

TO: County Council

FROM: Ludeen McCartney-Green, Legislative Attorney

SUBJECT: Bill 32-21, Personnel – Employee Settlement Agreements with No-Rehire Clause – Prohibited

PURPOSE: Worksession – Committee to make recommendations on Bill

Bill 32-21, Personnel – Employee Settlement Agreements with No-Rehire Clause - Prohibited, sponsored by Lead Sponsor Council President Hucker, was introduced on July 20, 2021. The Council held a public hearing with two speakers on September 14, 2021.

Bill 32-21 would:

- prohibit county employee settlement agreements from including a "no-rehire" clause;
- provide the Chief Administrative Officer or agency head the authority to include a certain clause;
- establish a right to appeal; and
- generally amend the County law governing personnel and human resources.

## PURPOSE

The purpose of the bill is to prohibit "no-rehire" clause from County employee settlement agreements. When an employee files an employment dispute or claim against the County, and a settlement agreement is proffered, it may contain a no-rehire clause that will prevent the employee from seeking future employment opportunities with the County. This automatic bar places an undue burden on County employees who may have gained several years of knowledge, skills, and abilities with no viable option to return to County employment, even after, the dispute has been settled.

## BILL SPECIFICS

Generally, the bill would ban the County from including a "no-rehire" clause in an employee settlement agreement. However, it is important to note the bill does provide an exemption to include a "no rehire" clause, if: (1) the County and the employee mutually agree or (2) if the employee by the Chief Administrative Offer or agency head was terminated "for cause." In addition, the bill provides the option for an aggrieved employee to file an appeal with the County's Merit System Protection Board, if a decision was made to include the "no-rehire" clause in the settlement agreement.

## PUBLIC HEARING

At the September 14 public hearing, there were two speakers. Darryl Gorman, Office of Human Resources, on behalf of the Executive, testified there were no legal issues with the bill, but recommended several clarifying amendments, see testimony at page © 14. Cherri Branson, on behalf of the Montgomery County Branch of the NAACP, testified in support of the bill and described an example of a former employee who was banned from County employment due to signing a no rehire clause in a settlement agreement related to an equal employment opportunity complaint; Ms. Branson testified that the no rehire clause served as more of a retaliatory action against the employee.

## ISSUES

### 1. What are the Office of County Attorney's amendments?

The County Attorney's Office did not find any legal issues with the Bill but suggested several clarifying amendments (© 11).

A. Dismissal v. Termination

The Office of the County Attorney Memorandum (©11) and testimony from the Mr. Gorman (©14) explained the bill should appropriately refer to "dismissal from action" rather than "termination."

Under Montgomery County Personnel Regulations (MCPR) Section 29-1 (© 16), Termination is defined as, "a nondisciplinary act by a department director to end an employee's County employment for a valid reason." MCPR Section 29-2 (©16) provides an enumerated list of reasons that can result in termination, e.g. employee on probation; failure to maintain proper license, absent without leave, termed employee, etc.

Consequently, under MCPR Section 33, Disciplinary Actions is defined as, one of the following adverse personnel actions taken by a supervisor against an employee: (a) oral admonishment; (b) written reprimand; (c) forfeiture of annual leave or compensatory time; (d) within-grade salary reduction; (e) suspension; (f) demotion; or (g) dismissal.

For this bill, the concern is a non-rehire clause included in a settlement agreement when an employee is dismissed from employment, MCPR 33(g). Generally, dismissal action is based on "for cause," which occurs when an employee has been removed for misconduct, MCPR 33-5 provides a non-exhaustive list (e.g., fraud, insubordination, embezzlement, harassment, negligent in duties, violation of company policies or procedures, etc.) See page © 24 for MCPR 33-5.

**Council staff agrees** with OCA's recommendation and suggests the following amendment:

*Amend lines 17-19, as follows:*

(a) Except as provided in subsection (b), a settlement agreement may include a no-rehire clause if:

* * *

(2) the Chief Administrative Officer or agency head has made a finding that there are sufficient grounds to **[**terminate the employment**]** dismiss the employee for cause.

**Decision Point: Should the Committee adopt the amendment to remain consist with County regulation and use the language dismiss versus termination for cause?**

B. Whether to include a provision that provides an exclusion in the Bill when an employee voluntarily resigns?

Under MCPR Section 33-8,

*If an employee voluntarily resigns after a department director initiates formal disciplinary action against the employee, the department director may indicate on the employee's separation papers that:*

*(a) disciplinary action is pending against the employee; and*

*(b) the employee is not eligible for rehire.*

**Council staff agrees** with OCA's discussion point on including MCPR 33-8 to ensure consistency with County law and regulations.

*Amend lines 15 – 16, as follows*:

(a) Except as provided in subsection (b), a settlement agreement may include a no-rehire clause if:

* * *

(2) the employee voluntarily resigns after a formal disciplinary action has initiated by an agency head;

**Decision Point: Whether the Committee should adopt an amendment to align the County code to include a no rehire clause under certain circumstances?**

C. Whether to narrow the scope of the bill to employment disputes that challenge dismissal actions and provide a right to appeal under Section 33-12.

OCA duly notes the definition for employment dispute is broad…"any grievance, claim or lawsuit filed against the County," and recommends the Committee adopt language to narrow the types of employment dispute to those related to dismissal actions challenged by the employee. This would provide a limited case that would fall under the MSPB's purview for appeals related to employment matters and the jurisdiction to decide cases under Section 33 -12 and MCPR Section 35.

*Amend lines 5 – 6, as follows*:

*Employment dispute* means any grievance, claim or lawsuit filed by the employee against the County where a dismissal action is challenged.

**Decision Point: Whether the Committee should narrow the scope of employment disputes that solely challenges a dismissal action.**

D. Whether a right to appeal to the Merit System Protection Board is the best remedy for an employee to challenge a no-rehire clause in a settlement agreement?

OCA presents a few policy and legal considerations for the Committee to review if an appeal process is established specifically when a no-rehire clause is permitted in a settlement agreement, issues to consider include, what is the standard of review; who has the burden of proof; and whether is MSPB will receive issues within its purview.

The challenge with the appeal process is, although an employee under this bill would have the right to challenge the CAO's decision who may have decided to include the no-rehire clause, the appeal process defeats the whole purpose with the County proposing a settlement. The essence of a settlement is to avoid litigation. If all the terms of the settlement were reached, except for the inclusion of the no-rehire clause, the bill provides an employee the right to file an appeal with MSPB. If filed, the County and employee would then be faced with litigating the merits of the case to prove whether the clause should be included; a settlement typically avoids divulging into the merits of the case to assess guilt or admission of any wrongdoing by the employee or other party. However, an appeal would frustrate that purpose and the course of action would need to

include divulging the facts of the case to prove whether the agreement should include the no-rehire clause.

Overall, the practicality makes the process more difficult and provides more legality issues than a prudent solution for a separated employee; therefore, instead **Council staff recommends the following amendment**:

*Amend lines 21-24, as follows:*

A settlement agreement that includes a no-rehire clause as permitted under subsection (c), is valid when:

(1) the employee has knowingly and voluntarily acknowledged the clause in writing;
(2) the employee is advised, in writing, to consult with an attorney prior to executing the agreement; and
(3) the employee has been given at least 7 business days to consider the agreement.

This option provides the employee the proactive choice to dispute or negotiate the clause upfront, possibly represented by an attorney; and the employee would have notice, opportunity to consider, and make an informed decision.

**Decision Point: Should the Committee replace the right to appeal and instead require the County to provide disclosures and a certain timeframe to consider an agreement that includes a no-rehire clause?**

**2. If a court of law determines that a non-rehire clause is found to be void, unenforceable or unconstitutional will the remaining terms of the contract be in force?**

A settlement agreement that includes a "severability" clause will still prevail and provide for the remaining terms in the agreement will be in full force. Nothing in this bill waives or impairs the County Attorney ability to include such clause.

**3. What is the fiscal, economic, and racial equity and social justice impact for this Bill?**

There is no material impact under the fiscal impact statement. OLO reports the Bill will have an insignificant impact on County residents and RESJ impact statement also states there would be a minimal impact because the number of residents who would be affected is relatively small.

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Bill No. 32-21
Concerning: Personnel – Employee Settlement Agreements with No-Rehire Clause – Prohibited
Revised: 7/12/21 Draft No. 2
Introduced: July 20, 2021
Expires: January 20, 2023
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. ____, Laws of Mont. Co. ____

# COUNTY COUNCIL
# FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President Hucker

**AN ACT** to:

(1) prohibit county employee settlement agreements to include a "no-rehire" clause;
(2) provide the Chief Administrative Officer or agency head the authority to include certain clause;
(3) establish a right to appeal; and
(4) generally amend the County law governing personnel and human resources.

By amending
Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-22

| | |
|---|---|
| **Boldface** | *Heading or defined term.* |
| Underlining | *Added to existing law by original bill.* |
| **[**Single boldface brackets**]** | *Deleted from existing law by original bill.* |
| Double underlining | *Added by amendment.* |
| **[[**Double boldface brackets**]]** | *Deleted from existing law or the bill by amendment.* |
| * * * | *Existing law unaffected by bill.* |

*The County Council for Montgomery County, Maryland approves the following Act:*

**Sec. 1. Section 33-22 is added as follows:**

**33-22. [Reserved] County Employee Settlement Agreements; right to appeal.**

(a) *Definitions*. For purposes of this Section, the following terms have the meanings indicated:

*Employment dispute* means any grievance, claim or lawsuit filed by the employee against the County dismissed from employment.

*No-rehire clause:* a provision prohibiting, preventing, or otherwise restricting an employee from obtaining future employment.

(b) An agreement to settle an employment dispute must not contain a no-rehire clause from County employment.

(c) Except as provided in subsection (b), a settlement agreement may include a no-rehire clause if:

(1) the provision is mutually agreed upon to end the current employment relationship;

(2) the employee voluntarily resigns before a disciplinary action has initiated; or

(3) the Chief Administrative Officer or agency head has made a finding that there are sufficient grounds to **[**terminate the employment**]** dismiss the employee **[**for cause**]**.

(d) *Appeal.* If an employee disagrees with the decision to include a no-rehire clause, within ten days from the receipt of the decision, the aggrieved employee may in writing, appeal to the County's Merit System Protection Board.

**Sec. 2. Transition.**

This Act does not apply to any County employee settlement agreement that was executed by all parties before this Act took effect.

**LEGISLATIVE REQUEST REPORT**

Bill 32-21

*Personnel – Employee Settlement Agreements with No-Rehire Clause - Prohibited*

**DESCRIPTION**: Bill 32-21 would prohibit the County from including a no-rehire clause in an employee settlement agreement unless certain circumstances apply. It also provides the County employee the right to appeal if a no-rehire clause is included in a settlement agreement.

**PROBLEM**: County employee settlement agreements contain a "no-rehire" clause that prohibits an employee from reemployment with the County. The restriction eliminates the opportunity for an employee to apply and work for the County indefinitely.

**GOALS AND OBJECTIVES:** To prohibit "no rehire" clause in County employee settlement agreements.

**COORDINATION:** Office of Human Resources and Office of County Attorney

**FISCAL IMPACT:** To be provided

**ECONOMIC IMPACT:** To be provided

**EVALUATION:** To be provided

**EXPERIENCE ELSEWHERE:** California and Vermont

**SOURCE OF INFORMATION:** Ludeen McCartney-Green, Legislative Attorney

**APPLICATION WITHIN MUNICIPALITIES:** N/A

**PENALTIES:** N/A

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**MONTGOMERY COUNTY COUNCIL**
ROCKVILLE, MARYLAND

# MEMORANDUM

To: Montgomery County Council

From: Council President Tom Hucker

Date: July 15, 2021

Re: Bill 32-21 Employee Settlement Agreement with No-Rehire Clause – Prohibited

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Bill 32-21 is a straightforward bill that seeks to limit the use of "no-rehire" clauses in employment dispute agreements. The employment disputes may include grievances, claims or lawsuits filed against the County. The bill will permit a "no-rehire" clause if the Chief Administrative Officer or agency head decide it is necessary or both parties agree to it. However, if the employee disagrees with the use of a "no-rehire" clause, they may appeal it to the County's Merit System Protection Board.

The County should not make it a standard practice to include "no-rehire" clauses in employment disputes. Unless the dispute escalates to a serious incident, individuals should have the opportunity to compete again for a job with the County. Furthermore, a "no-rehire" clause is essentially a lifetime ban and making them a standard practice can rob former employees from contributing to the County in the future.

In conclusion, this is a small change that will have an important impact. We are a County that believes in second chances, and we can uphold that value through this bill. I greatly appreciate your consideration of this legislation and look forward to discussing it further.

**Fiscal Impact Statement**
**Bill 32-21, Personnel – Employee Settlement Agreements with No-Rehire Clause - Prohibited**

1. **Legislative Summary.**

   Bill 32-21 prohibits county employee settlement agreements from including a "no-rehire" clause, with limited exceptions. The bill also establishes a right to for employees to appeal a settlement containing a "no-rehire" clause.

2. **An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.**

   The proposed legislation prohibits the inclusion of a "no-rehire" clause in county employee settlement agreements. This proposed legislation is not anticipated to have a fiscal impact.

3. **Revenue and expenditure estimates covering at least the next 6 fiscal years.**

   See response #2.

4. **An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.**

   Not applicable.

5. **Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

   Not applicable.

6. **An estimate of the staff time needed to implement the bill.**

   The bill is not expected to materially impact staff duties.

7. **An explanation of how the addition of new staff responsibilities would affect other duties.**

   Not applicable.

8. **An estimate of costs when an additional appropriation is needed.**

   Not applicable.

9. **A description of any variable that could affect revenue and cost estimates.**

   Not applicable.

**10. Ranges of revenue or expenditures that are uncertain or difficult to project.**

Not applicable.

**11. If a bill is likely to have no fiscal impact, why that is the case.**

This legislation prohibits the inclusion of a "no-rehire" clause but does not make any adjustments to the fiscal components of the settlement. This change is not expected to have an impact on the fiscal considerations of any county employee settlement.

**12. Other fiscal impacts or comments.**

Not applicable.

**13. The following contributed to and concurred with this analysis:**

Corey Orlosky, Office of Management and Budget

Joshua Watters for JRB

Jennifer Bryant, Director
Office of Management and Budget

9/8/21
Date

# Economic Impact Statement

Office of Legislative Oversight

## Bill 32-21 Personnel – Employee Settlement Agreements with No-Rehire Clause - Prohibited

## SUMMARY

The Office of Legislative Oversight (OLO) anticipates that Bill 32-21 would have an insignificant impact on economic conditions in the County due to the small number of residents who would likely be affected by the change in law. However, the Bill would economically benefit any resident who the County reemploys after entering into a County employee settlement agreement and who would otherwise receive a lower compensation package with employment outside the County.

## BACKGROUND

Bill 32-21 responds to the "no-rehire" clause in County employee settlement agreements which prohibits an employee from working for the County indefinitely. If enacted, the Bill would make the following changes to County law governing personnel and human resources:

- prohibit the no-rehire clause in County employee settlement agreements;
- provide the Chief Administrative Officer or agency head the authority to include a no-rehire clause if "there are sufficient grounds to terminate the employment for cause"; and
- establish a right to appeal for employees who disagree with the decision to include a no-rehire clause.[1]

## METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

No methodologies were used in this statement. The claims made in subsequent sections are based on the following assumption:

- **Assumption:** the number of residents who would attain reemployment with the County after entering into a County employee settlement agreement would be insufficient to have meaningful impacts on local economic conditions.

## VARIABLES

The primary variables that would affect the economic impacts of Bill 32-21 are the following:

- number of residents the County reemploys after entering into a County employee settlement agreement; and
- total household income for residents who the County reemploys after entering into a County employee settlement agreement.

[1] Montgomery County Council, Bill 32-21, Personnel – Employee Settlement Agreements with No-Rehire Clause – Prohibited , Introduced on July 20, 2021.

## IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

### Businesses, Non-Profits, Other Private Organizations

Based on the assumption made in this analysis (see above), OLO anticipates that enacting Bill 32-21 would have no significant impacts on private organizations in the County in terms of the Council's priority indicators.[2]

### Residents

Enacting Bill 32-21 would affect households with residents who the County reemploys after entering into a County employee settlement agreement. For residents who would otherwise receive a lower compensation package with employment outside the County, their households would experience a net increase in income. However, based on the assumption made in this analysis, OLO anticipates that the Bill would have no significant impacts on other residents in terms of the Council's priority indicators.

## DISCUSSION ITEMS

Not applicable

## WORKS CITED

Montgomery County Code. Sec. 2-81B. Economic Impact Statements.

Montgomery County Council. Bill 32-21, Personnel – Employee Settlement Agreements with No-Rehire Clause – Prohibited. Introduced on July 20, 2021.

## CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

## CONTRIBUTIONS

Stephen Roblin (OLO) prepared this report.

[2] Montgomery County Code, Sec. 2-81B, Economic Impact Statements, https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md/0-0-0-80894.

# Racial Equity and Social Justice (RESJ) Impact Statement

**Office of Legislative Oversight**

## BILL 32-21: PERSONNEL-EMPLOYEE SETTLEMENT AGREEMENTS WITH NO-REHIRE CLAUSE-PROHIBITED

### SUMMARY

OLO anticipates that Bill 32-21 will have a minimal impact on racial inequities and social injustices in the County.

### PURPOSE OF RESJ STATEMENT

The purpose of RESJ impact statements is to evaluate the anticipated impact of legislation on racial equity and social justice in the County. Racial equity and social justice refer to a **process** that focuses on centering the needs, power, and leadership of communities of color and low-income communities with a **goal** of eliminating racial and social inequities.[1] Achieving racial equity and social justice usually requires seeing, thinking, and working differently to address the racial and social harms that have caused racial and social inequities.[2]

### PURPOSE OF BILL 32-21

The purpose of Bill 32-21 is to change the current "no rehire" clause in County employee settlement agreements. Bill 32-21 was introduced on July 20, 2021. If enacted, the Bill would:

- Prohibit County employee settlement agreements to include a "no rehire" clause;
- Provide the Chief Administrative Officer or agency head the authority to include a certain clause;
- Establish a right to appeal; and
- Generally amend the County law governing personnel and human resources.[3]

### ANTICIPATED RESJ IMPACTS

Since the scope of Bill 32-21's influence is estimated to impact a limited number of County employees, OLO anticipates that the bill would have a minimal impact on racial equity and social justice in the County. No changes in racial equity or social justice for County residents are anticipated under Bill 32-21.

### CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ impact statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

## CONTRIBUTIONS

OLO staffer Dr. Theo Holt, Performance Management and Data Analyst, drafted this RESJ impact statement.

[1] Adopted from definition of racial equity described in the Racial Equity Policy Scorecard included in "Applying a Racial Equity Lens into Federal Nutrition Programs," authored by Marlysa Gamblin; see the Government Alliance for Race and Equity's "Advancing Racial Equity and Transforming Government" resource guide for understanding the historical role of government in maintaining racial inequities https://racialequityalliance.org/wp-content/uploads/2015/02/GARE-Resource_Guide.pdf

[2] Adopted from racial equity definition provided by Racial Equity Tools. https://www.racialequitytools.org/glossary

[3] Montgomery County Council Bill 32-21- Personnel - Employee Settlement Agreements with No-Rehire Clause - Prohibited, Introduced July 20, 2021, Montgomery County, Maryland

OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
*County Executive*

Marc P. Hansen
*County Attorney*

M E M O R A N D U M

TO: Berke Attila, Director
Office of Human Resources

VIA: Edward B. Lattner, Chief
Division of Government Operations

DATE: September 3, 2021

RE: **Bill 32-21, Personnel - Employee Settlement Agreements with No-Rehire Clause - Prohibited CORRECTED**

Bill 32-21 provides that a no-rehire clause cannot be included in an agreement to settlement an employment dispute unless either (1) the parties agree or (2) the CAO or agency head "has made a finding that there are sufficient grounds to terminate the employment for cause." An employment dispute is broadly defined as any grievance, claim, or lawsuit filed (by an employee) against the County. The Bill would allow an employee to seek Merit Board review of the decision to include a no-rehire clause in a settlement agreement.

The Bill is legally valid, but there are some drafting and implementation issues.

First, the Bill provides that, notwithstanding the lack of an agreement between the County and the employee, the County can include a no-rehire clause in a settlement agreement if the CAO or agency head "has made a finding that there are sufficient grounds to terminate the employment for cause." It appears the intent of this provision (and the Bill in general) is to limit the use of a no-rehire clause where the County has, or is seeking to, dismiss the employee. But "termination" is a non-disciplinary action to end County employment for a valid, non-disciplinary reason (e.g., failure to perform satisfactorily, failure to maintain any necessary licensure or certification for the position, etc.). Termination is not based upon "cause." MCPR § 29-1. Dismissal, on the other hand, is a disciplinary action that must be based upon cause (e.g., misconduct). MCPR 33-3(h). This provision should refer to "sufficient grounds to dismiss the employee." [1]

[1] Section 33-8 of the personnel regulations provide that if an employee voluntarily resigns after formal disciplinary action is initiated, the agency head may indicate on the employee's separation papers that the employee is not eligible for rehire. This section does not conflict with the Bill, though it may be seen as inconsistent with the policy embodied in the Bill.

101 Monroe Street, Rockville, Maryland 20850-2580
(240) 777-6735 • TTY (240) 777-2545 • FAX (240) 777-6705 • Edward.Lattner@montgomerycountymd.gov

The second issue relates to the Merit Board's consideration of an appeal. Presumably, an employee can appeal the inclusion of a no-rehire provision only when the CAO or agency has found that there are sufficient grounds to dismiss the employee. This issue brakes down into sub-issues of (1) what types of employment disputes are covered by the Bill and will be heard by the Merit Board, (2) what standard of review will the Merit Board use to determine the propriety of including a no-rehire provision in a settlement agreement, and (3) who bears the burden of proof in those appeals. Some of these issues might be considered policy matters, but we raise them for your due consideration.

The Bill prohibits a no-rehire clause in any agreement seeking to settle an "employment dispute," which is broadly defined as any grievance, claim, or lawsuit filed (by an employee) against the County. This definition could encompass a variety of non-employment-related claims filed by an employee against the County (e.g., a negligence action unrelated to employment, tax refund dispute, etc.) or even an employment-related claim that does not involve dismissal of an employee. If the intent of the Bill is to limit the use of a no-rehire clause where the County has, or is seeking to, dismiss the employee, the prohibition against a no-rehire clause in an agreement to settle an "employment dispute" should be limited to cases where an employee is challenging (and the parties seek to settle) a dismissal action.

Because the Bill is not limited to the settlement of an appeal pending before the Merit Board challenging a dismissal action, the Bill could insert the Merit Board into disputes pending in other venues where it has no statutory role. For example, the Board could find itself reviewing the propriety of a no-rehire clause in an agreement seeking to settle a (collective bargaining) contract grievance or even civil rights suit (e.g., employment discrimination, First Amendment, etc.) brought by an employee challenging his or her dismissal. The Merit Board does not hear contract grievances; those are heard and decided by contract arbitrators. The Merit Board's jurisdiction specifically excepts discrimination claims in MCPR § 35-2(d). And the Merit Board plays no part in civil rights lawsuits between the County and its employees. Placing the Merit Board into dismissal actions that would not otherwise go to the Board could complicate the parties' efforts to reach settlement.

The Bill does not specify the standard of review the Merit Board will apply to its review of a no-rehire clause. If "sufficient grounds" for dismissal is enough to justify inclusion of a no-rehire clause, then how will Merit Board go about determining the propriety of including a no-rehire clause without examining the merits of the underlying dismissal? This will be particularly frustrating to the parties, given that a settlement agreement seeks to save time and resources by not litigating the underlying matter. And if the losing party appeals the Merit Board's decision to the circuit court there could be further protracted litigation over the terms of a settlement agreement.

Finally, if an employee prevails in his or her appeal, we presume that the County is still bound by the remaining terms of the settlement agreement.

ebl

cc: Ken Hartman, Director, Strategic Partnerships
Dale Tibbitts, Special Assistant to the CE
Marc Hansen, County Attorney
Tammy Seymour, OCA
Ludeen McCartney-Green, Legislative Attorney
Darryl Gorman, OHR
Bruce Martin, Executive Director, MSPB
Silvia Kinch, OCA, Chief, Division of Labor Relations and Public Safety
Patricia Kane, OCA, Chief, Division of Litigation

21-004321

**TESTIMONY ON BEHALF OF COUNTY EXECUTIVE MARC ELRICH**

# Bill 32-21, Personnel - Employee Settlement Agreements with No-Rehire Clause - Prohibited

## Before the Montgomery County Council

### September 14, 2021

Good afternoon Councilmembers, my name is Darryl Gorman and I am the Senior Advisor in the Office of Human Resources. It is a pleasure for me to appear before this committee on behalf of the County Executive to discuss Bill 32-21, which amends Chapter 33 – Personnel and Human Resources of the Montgomery County Code.

This Bill prohibits adding a "no-rehire" clause to County employee settlement agreements. When an employee files an employment dispute or claim against the County,and a settlement agreement is reached between the parties, such an agreement typically contains a no-rehire clause. This clause is added to the agreement to prevent the employee from seeking future employment opportunities with the County.

This Bill would prohibit adding a no-rehire clause to a settlement agreement between the County and a County employee. However, it would not prohibit adding a no re-hire clause to a settlement agreement when the County and an employee mutually agree to do so; or if the employee was terminated "for cause" by the Chief Administrative Offer or the agency head.

Adding a no re-hire clause to a settlement agreement is not illegal. Operationally, adding a no re-hire clause may pose some administrative challenges for the County which are highlighted below.

First, the term "employment dispute" can be interpreted very broadly in the bill such that it covers non-employment related claims. The language in the bill should be focused on employment disputes where the employee is challenging their dismissal. Likewise, the bill should reference employee dismissals if it applies to cases where an employee is separated from County service "for cause". Terminations are non-disciplinary actions to end County employment and are not "for cause" actions in the County.

Second, the impact on the appeals process must be considered if a former employee appeals their dismissal to the Merit System ProtectionBoard (MSPB). It is not clear where the limits would be placed on the Board's jurisdiction. The standard for the Board's review and deciding where the burden of proof lies are issues that also should be considered.

Third, a provision in a similar 2020 California law (AB 749) provided that when an employer dismisses an employee, there needs to be a "legitimate non-retaliatory, non-discriminatory reason" for the dismissal, when the employee and the employer are allowed to enter into a no rehire agreement. There also needed to be a "good faith" finding that the employee "engaged in sexual harassment or sexual assault". Adding a finding that the employee engaged in criminal conduct to show that the no rehire clause is justified may be advisable. But certain terms must be defined if such provisions are enacted. "Protected activity" would need to be defined so that there is a showing that the employee has a basis (i.e., the employee was engaging in a "protected activity") to be eligible for re-hire. And it should be shown that the criminal conduct was related to the position that the employee held.

Finally, and to reiterate, the County believes that barring a no rehire provision in a settlement agreement is lawful and may be reasonable in certain circumstances. Such a prohibition does not impair the County's ability to reach mutually agreeable settlement agreements.

We look forward to working with the Council on this legislation. Thank you and I am pleased to answer any questions you may have.

## SECTION 29. TERMINATION

(As amended October 21, 2008)

### 29-1. Definition.

***Termination:*** A nondisciplinary act by a department director to end an employee's County employment for a valid reason. Examples of valid reasons for termination include those stated in Section 29-2.

### 29-2. Reasons for termination.

(a) A department director may terminate the employment of an employee:

(1) who is a probationary employee;

(2) who has abandoned the employee's position by failing to report for work on 3 or more consecutive workdays without having approval for the absence;

(3) who is a temporary employee if:

(A) the employee's job performance or attendance record does not warrant retention of the employee, or

(B) the employee's services are no longer needed or wanted;

(4) who is a term employee whose term of employment has ended;

(5) who does not have a current license or certification required as a minimum qualification for the employee's occupational class;

(6) who fails to perform assigned duties in a satisfactory manner as indicated by receiving the lowest overall performance rating during an annual or interim performance evaluation under Section 11 of these Regulations;

(7) who has not returned to work within 30 calendar days after exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal problem;

(8) who has used more than 12 consecutive months of LWOP; unless termination would conflict with State or Federal law;

(9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee's job; or

(10) who:

(A) is employed by Fire and Rescue Services in the firefighter/rescuer occupational series;

(B) was hired after June 30, 1999; and

(C) used a tobacco product on or off duty.

(b) Under subsection (a)(2) above, an employee has not abandoned the employee's position if the employee was:

(1) physically or mentally unable to obtain approval for the absence; or

(2) unable to report for work for reasons beyond the employee's control.

**29-3. Management responsibility for termination.**

(a) Before a department director terminates the employment of an employee with merit system status for the reason described in Section 29-2(a)(6) (failure to perform assigned duties in a satisfactory manner), the director must:

(1) give the employee advance written notice of the problem;

(2) counsel the employee on corrective action to take; and

(3) allow the employee adequate time to improve or correct the employee's performance or attendance.

(b) Before a department director terminates the employment of an employee with merit system status for the reason described in Section 29-2(a)(7) (failure to return to work within 30 calendar days of exhausting all paid leave), the director must send written notice of the possible termination to the employee at the most recent home address given by the employee at least 10 calendar days in advance of the issuance of a notice of proposed termination.

(c) A department director must not terminate a qualified employee with a physical or mental disability under 29-2(a)(9) above unless efforts at reasonable accommodation as described in Section 8 of these Regulations are unsuccessful.

**29-4. Notice of proposed termination and notice of termination for employees with merit system status.**

(a) ***Notice of proposed termination.*** A department director must give an employee with merit system status a written notice of proposed termination that includes:

(1) the reason for termination;

(2) that the employee may submit a written response to the proposed termination;

(3) the person to whom the employee may submit a response; and

(4) that the employee's response must be filed within 10 working days of the employee's receipt of the notice.

(b) ***Notice of termination.*** If a department director decides to terminate an employee with merit system status, the department director must give the employee a written notice of termination and include the following in the notice:

(1) the effective date of the termination;

(2) the reason for the termination;

(3) that the employee did or did not respond to the notice of proposed termination and, if the employee responded, whether the response, influenced the termination decision;

(4) if the employee may file a grievance or MSPB appeal; and

(5) the deadline for filing a grievance or an appeal.

**29-5. Notice of termination for probationary and temporary employees.** Before terminating the employment of a probationary or temporary employee, a department director must give the employee a written notice that states the effective date of the termination and the reason for the termination.

**29-6. Effective date of termination.**

(a) A department director may make the termination of a probationary or temporary employee effective immediately.

(b) A department director must issue a notice of termination to an employee with merit system status at least 5 working days before the effective date of the proposed termination.

**29-7. Appeal of termination.**

(a) An employee with merit system status who is terminated may appeal the termination under Section 34 or 35, unless the employee is a term employee:

(1) whose term of employment has expired; or

(2) who has completed the work the employee was employed to perform.

(b) A term employee may appeal a termination under Section 34 or 35 unless it is a termination described in (a)(1) or (2) above.

(c) A probationary or temporary employee may not appeal a termination.

**Editor's note –** The subjects covered in this section of the Personnel Regulations are addressed for bargaining unit employees in the current collective bargaining agreements as indicated below:

| **Bargaining unit** | **Articles of current agreements with references to termination** |
|---|---|
| Firefighter/Rescuer | 23, Hours of Work<br>40, Employee Status<br>51, Pensions |
| OPT/SLT | 4, Voluntary Checkoff of Union Fees and Deductions<br>5, Wages, Salary and Employee Compensation<br>16, Leave Without Pay<br>26, Termination<br>27, Reduction-in-Force<br>30, Notices to Employees<br>44, Defined Contribution Plan |
| Police | 3, Agency Shop and Dues Checkoff<br>15, Hours and Working Conditions<br>43, Discipline<br>52, Termination |

# SECTION 33. DISCIPLINARY ACTIONS

(As amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015)

## 33-1. Definition.

***Disciplinary action:*** One of the following adverse personnel actions taken by a supervisor against an employee:

(a) oral admonishment;

(b) written reprimand;

(c) forfeiture of annual leave or compensatory time;

(d) within-grade salary reduction;

(e) suspension;

(f) demotion; or

(g) dismissal.

## 33-2. Policy on disciplinary actions.

(a) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(b) ***Prompt discipline.***

(1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.

(2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

(c) ***Progressive discipline.***

(1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:

(A) the severity of the employee's misconduct and its actual or possible consequences; or

(B) the employee's continuing misconduct or attendance violations over time.

(2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(d) ***Consideration of other factors.*** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

(1) the relationship of the misconduct to the employee's assigned duties and responsibilities;

(2) the employee's work record;

(3) the discipline given to other employees in comparable positions in the department for similar behavior;

(4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and

(5) any other relevant factors.

**33-3. Types of disciplinary actions.**

(a) ***Oral admonishment.*** An oral admonishment is:

(1) the least severe disciplinary action;

(2) a spoken warning or indication of disapproval about a specific act of misconduct or violation of a policy or procedure; and

(3) usually given by the immediate supervisor.

(b) ***Written reprimand.*** A written reprimand is:

(1) the second least severe disciplinary action;

(2) a written statement about a specific act of misconduct or violation of a policy or procedure; and

(3) included in the employee's official personnel record.

(c) ***Forfeiture of annual leave or compensatory time.***

(1) A forfeiture of annual leave or compensatory time:

(A) is the removal of a specified number of hours from the annual leave or compensatory time balance of an employee;

(B) must be at least one day but not more than 10 days.

(2) The FLSA prohibits a department director from taking compensatory time from a non-exempt employee for disciplinary purposes.

(d) ***Within-grade salary reduction***.

(1) A within-grade salary reduction:

(A) is the reduction of an employee's base salary by a specified amount for a specified period of time; and

(B) must not exceed one year.

(2) A department director must not impose a within-grade salary reduction on an exempt employee because it is inconsistent with the employee's FLSA-exempt status.

(e) ***Suspension.***

(1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct.

(2) A department director may not:

(A) suspend an employee for more than 10 days without the approval of the CAO; or

(B) suspend an employee for more than 30 days, unless:

(i) a longer suspension is imposed by a court or quasi-judicial body; or

(ii) the employee agrees to the longer suspension as part of a settlement agreement.

(f) ***Suspension pending investigation of charges or trial.***

(1) ***Purpose of suspension pending investigation of charges or trial.*** A department director may place an employee in LWOP status for an indefinite period while the employee is:

(A) being investigated by the County or a law enforcement agency for an offense that has a nexus with (is reasonably related to) County employment; or

(B) waiting to be tried for an offense that is job-related or has a nexus with County employment.

(2) ***Employee's return to work after suspension.***

(A) The CAO must allow the employee to return to work unless the County dismisses or terminates the employee or the employee is convicted by a court.

(B) The CAO must give the employee back pay and benefits, subject to subparagraph (C) below, except as provided in a separate disciplinary action imposed by the County.

(C) The CAO's approval of back pay is subject to the following:

(i) the employee must provide documentation of other earnings or income during the period of suspension and must obey all County regulations on secondary employment; and

(ii) back pay must equal the amount the employee would have earned during all or part of the period of suspension less the amount the employee earned in other employment during the period.

(g) ***Demotion.*** A disciplinary demotion is an action in which a department director places an employee in a merit system position with a lower pay grade and reduces the employee's salary under Section 10-5(d)(2) of these Regulations.

(h) ***Dismissal.*** Dismissal is the removal of an employee from County employment for cause.

**33-4. Authority to take disciplinary action.**

(a) An immediate supervisor may give an employee an oral admonishment.

(b) A department director may take any disciplinary action under these Regulations.

(c) A department director may delegate the authority to take any type of disciplinary action to a lower level supervisor. The delegation must be in writing.

**33-5. Causes for disciplinary action.** The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

(a) materially falsifies information provided on an application or on a document associated with an application for employment, promotion, transfer, or County benefits, which includes a document associated with any type of health insurance, life insurance, disability insurance, Workers' Compensation benefits, or disability retirement;

(b) refuses to take a medical examination or to provide medical records as directed;

(c) violates any established policy or procedure;

(d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment;

(e) fails to perform duties in a competent or acceptable manner;

(f) behaves insubordinately or fails to obey a lawful direction from a supervisor;

(g) knowingly makes a false statement or report in the course of employment;

(h) is negligent or careless in performing duties;

(i) abuses sick leave or disability leave;

(j) is AWOL or late repeatedly;

(k) is impaired or under the influence of alcohol or an unprescribed controlled substance while at work or when reporting to work;

(l) uses, possesses, sells, or transfers alcohol or an illegal drug to another person while on duty, on County government property, or in a County vehicle unless the employee's County employment requires such conduct;

(m) fails to observe a safety practice, which includes wearing a seat belt, protective eyewear, and protective hearing devices;

(n) damages or destroys County property or damages or destroys private property of another while on duty or in a County vehicle;

(o) takes, steals, misuses, or misappropriates County funds or property or the property of a client, patient, citizen, or other person with whom the employee deals while on duty;

(p) possesses an unauthorized dangerous weapon while on duty, on County government property, or in a County vehicle;

(q) engages in discriminatory, retaliatory, or harassing behavior;

(r) interferes with or disrupts the work of another County employee;

(s) threatens another with bodily harm while on duty, on County government property, or in a County vehicle;

(t) engages in a physical altercation or assaults another while on duty, on County government property, or in a County vehicle;

(u) fails to disclose a private interest or to disqualify himself or herself from participation in a decision or other action in which there is a conflict between the employee's official duties and a private interest in violation of Section 19A, "Ethics", of the Montgomery County Code;

(v) directs an employee to perform service or work outside of the employee's official duties;

(w) engages in a private business, trade, or occupation during official working hours in violation of County statutes, regulations, or administrative procedures;

(x) accepts, offers, gives, or promises to give money or a valuable thing, threatens to use force or to disclose another's personal affairs, or blackmails or extorts to influence a person in the performance of the person's official duties;

(y) solicits an endorsement for employment or promotion from an individual who is or may be engaged in doing business with the County Government;

(z) fails to cooperate or provide information when questioned as a witness during an investigation;

(aa) fails to cooperate or provide information when the employee is the subject of an investigation, unless the employee invokes the Fifth Amendment right against self-incrimination or refuses to give information that the employee is ethically or legally prohibited from revealing, such as attorney-client privileged material or mental health records; or

(bb) violates the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

**33-6. Disciplinary process.**

(a) ***Prior to taking disciplinary action.*** A supervisor who is considering taking a disciplinary action should:

(1) document the incident or employee's behavior that caused concern;

(2) conduct an investigation, if appropriate and necessary; and

(3) interview the employee and others who may have witnessed the conduct or have information about it.

(b) ***Statement of charges.***

(1) Before taking a disciplinary action other than an oral admonishment, a department director must give the employee a statement of charges that tells the employee:

(A) the disciplinary action proposed;

(B) the specific reasons for the proposed disciplinary action including the dates, times, and places of events and names of others involved, as appropriate;

(C) that the employee may respond orally, in writing, or both;

(D) who to direct the response to;

(E) the deadline for submitting a response; and

(F) that the employee may be represented by another when responding to the statement of charges.

(2) The department director must allow the employee at least 10 working days to respond to the statement of charges.

(3) If the employee responds to the statement of charges, the department director must carefully consider the response and decide:

(A) if the proposed disciplinary action should be taken;

(B) if no disciplinary action should be taken; or

(C) if a different disciplinary action should be taken.

(4) The department director must issue a new statement of charges if the department director decides that a more severe disciplinary action is appropriate.

(c) ***Notice of disciplinary action.***

(1) A notice of disciplinary action must contain the following information:

(A) the type of disciplinary action that will be taken;

(B) the date on which the disciplinary action will take effect;

(C) the specific reasons for the disciplinary action including dates, times, places, and names of others involved, as appropriate;

(D) whether the employee responded to the statement of charges and if the response influenced the decision on the disciplinary action; and

(E) whether the employee may appeal the action by filing a grievance or an appeal to the MSPB; and

(F) the deadline for filing a grievance or an appeal.

(2) A department director must issue a notice of disciplinary action at least 5 working days before the effective date of the proposed action.

**33-7. Immediate removal of an employee from duty.**

(a) An immediate or higher level supervisor may immediately relieve an employee from duty for serious misconduct or if the presence of the employee will cause or continue a disruption in the workplace.

(b) The supervisor who took the action must submit a recommendation for appropriate disciplinary action to the department director by the end of the workday following the day the employee is relieved from duty.

(c) A supervisor must ensure that an employee removed from duty is either on administrative leave or on another appropriate type of leave until the department director takes disciplinary action against the employee or allows the employee to return to work. An employee who is ill or otherwise medically unfit for duty during the period of time before a disciplinary action is taken may be required to use sick or annual leave or LWOP.

**33-8. Employee resignation after disciplinary action is initiated.** If an employee voluntarily resigns after a department director initiates formal disciplinary action against the employee, the department director may indicate on the employee's separation papers that:

(a) disciplinary action is pending against the employee; and

(b) the employee is not eligible for rehire.

**33-9. Right of an employee to appeal a disciplinary action.**

(a) ***Grievance rights.***

(1) With the exception of an oral admonishment, an unrepresented (non-bargaining unit) employee may file a grievance under Section 34 of these Regulations over any disciplinary action and the penalty associated with the disciplinary action, such as the length of the suspension, the amount of leave or compensatory time taken from the employee, or the salary reduction associated with a demotion or within-grade salary reduction.

(2) A bargaining unit employee may file a grievance over a disciplinary action by using the grievance procedure in the appropriate collective bargaining agreement.

(b) ***Right to appeal a disciplinary action to the MSPB.***

(1) ***Right to file a direct appeal to the MSPB.*** An employee with merit system status may appeal a demotion, suspension, or dismissal by filing an appeal directly with the MSPB under Section 35 of these Regulations. An employee who files a direct appeal must not also file a grievance on the same disciplinary action.

(2) ***Right to appeal a grievance decision to the MSPB.*** An employee, other than a probationary employee or temporary employee, may appeal a decision on a grievance over a disciplinary action to the MSPB.

**33-10. Right of a Volunteer Firefighter or Rescuer to appeal a disciplinary action to the MSPB.** A volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may file a direct appeal with the MSPB under Section 35 of these Regulations, as if the individual were a County merit system employee.

**Editor's note –** The subjects covered in this section of the Personnel Regulations are addressed for bargaining unit employees in the current collective bargaining agreements as indicated below:

| Bargaining unit | Articles of current agreements with references to disciplinary actions |
|---|---|
| Firefighter/Rescuer | 5, Management Rights<br>23, Hours of Work<br>30, Discipline<br>38, Contract Grievance Procedure<br>40, Employee Status<br>48, Job Sharing Program |
| OPT/SLT | 2, Management Rights<br>5, Wages, Salary and Employee Compensation<br>6, Service Increments<br>10, Grievances<br>13, Work Schedules; Attendance; Hours of Work<br>16, Leave Without Pay<br>24, Demotion<br>28, Disciplinary Actions<br>30, Notices to Employees<br>34, Safety and Health<br>Appendix IV, Dept. of Corrections and Rehabilitation |
| Police | 4, Prevention of Substance Abuse/Employee Rehabilitation<br>15, Hours and Working Conditions<br>28, Service Increments<br>43, Discipline<br>53, Performance Evaluation<br>54, Demotion<br>55, Job Sharing Program |

# SECTION 35. MERIT SYSTEM PROTECTION BOARD APPEALS, HEARINGS, AND INVESTIGATIONS

(As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, June 30, 2015, and June 1, 2020)

## 35-1. Definitions.

(a) ***Appeal:*** The written request of an applicant for employment or employee for review of an administrative decision on a grievance, disciplinary action or other personnel action for which appeal privileges are provided that adversely affects employment, opportunity for employment, or promotion.

(b) ***Appellant:*** The County employee, applicant for employment, or volunteer firefighter or rescuer who files an appeal with the MSPB.

(c) ***De novo:*** The MSPB's examination of an appeal anew, regardless of any prior proceedings.

(d) ***Responding party:*** The party against whom the charges have been brought.

(e) ***Hearing:*** An employee's appearance before 2 or more members of the MSPB or a designated hearing officer to present evidence or arguments concerning the employee's appeal.

(f) ***Deposition:*** Testimony given under oath before both parties prior to a hearing that is submitted in writing as evidence in lieu of requiring the witness to appear.

(g) ***Rebuttal:*** The charging party's response to evidence submitted by the responding party.

(h) ***Surrebuttal:*** The responding party's response to rebuttal evidence.

(i) ***Working days:*** All days except Saturdays, Sundays and official or special County holidays.

## 35-2. Right of appeal to MSPB.

(a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the 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.

(c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

(d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

(e) An employee or applicant for County employment who alleges discrimination on the basis of political affiliation may file a direct appeal with the MSPB.

(f) A volunteer firefighter or rescuer may file an appeal with the MSPB over an adverse final action of the Fire Chief or local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire rescue activities, as if the individual were a County merit system employee. A volunteer firefighter or rescuer is entitled to a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal or involuntary resignation. The MSPB must hear and decide each such appeal except for an appeal of a personnel matter subject to an employee grievance procedure under a collective bargaining agreement.

(g) An employee with merit status may file an appeal with the MSPB alleging a personnel action in retaliation for:

(1) refusing to obey an instruction involving an illegal or improper action; or

(2) disclosing to a Federal, State, or County official or employee, information concerning illegal or improper action in County government with a reasonable good-faith belief that the information disclosed is accurate.

**35-3. Appeal period.**

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

(1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal;

(2) receives a notice of termination;

(3) receives a written final decision on a grievance;

(4) resigns involuntarily; or

(5) knows or should have known of a personnel action

(b) An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position.

(c) Per Chapter 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the MSPB within 30 days after receiving a final notice of disciplinary action unless another law or regulation requires that an appeal be filed sooner.

**35-4. Appeal filing requirements.**

(a) An employee or applicant must file an appeal with the MSPB in writing, providing the following information:

(1) appellant's name, signature and date;

(2) home address, telephone number, and email address;

(3) title of position;

(4) department, agency, or office, if applicable;

(5) concise description of the action or decision being appealed;

(6) reason why the appellant disagrees with the action or decision; and

(7) relief requested, subject to later modification by the appellant.

(b) Alternatively, an employee or applicant may complete the MSPB Appeal Form (Appendix V) and provide the information requested on the Form.

(c) An employee or applicant may instead choose to file an appeal electronically by completing the MSPB Appeal Form found on the MSPB County website.

(d) Depending on the nature of the appeal, an employee or applicant must include the following documentation with the appeal:

(1) If the employee is contesting a disciplinary action, a copy of the Notice of Disciplinary Action must be provided to the Board;

(2) If the employee is contesting a decision by the Chief Administrative Officer (CAO), a copy of the CAO's decision must be provided to the MSPB; or

(3) If the employee or applicant is contesting a nonselection/nonpromotion decision, a copy of the notification of nonselection/nonpromotion must be provided.

**35-5. Service requirements for a party to an appeal.**

(a) Each party to an appeal must send to every other party a copy of every paper filed with the MSPB.

(b) A party to an appeal must indicate on every paper filed with the MSPB that a copy was sent to the other party to the appeal.

**35-6. Appeal does not act as automatic stay of action.**

(a) The filing of an appeal does not automatically stay the action at issue in the appeal.

(b) The MSPB on its own motion may stay the action or grant a stay requested by the appellant based on reasons that the MSPB believes are proper and just.

(c) If the MSPB orders a stay, it must give written notice of its action to all parties.

**35-7. Dismissal of an appeal.**

(a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.

(b) The MSPB may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. The MSPB must give the County and the appellant prior notice of its intent to dismiss for lack of prosecution or compliance with an MSPB rule or order.

(c) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.

(d) The MSPB may dismiss an appeal if the appeal becomes moot.

(e) The MSPB may dismiss an appeal based on the appellant's failure to exhaust administrative remedies.

(f) The MSPB may dismiss an appeal for any other reason in compliance with applicable laws, rules and regulations.

**35-8. Notification, response and submission of record in appeal.**

(a) The MSPB must promptly notify the CAO, County Attorney, OHR Director, OLR Chief, and department director in writing that a County merit system employee filed an appeal and provide the County Attorney and OLR Chief with a copy of the appeal.

(b) The MSPB must promptly notify the CAO, County Attorney, OHR Director, OLR Chief, Fire Chief, and Local Fire and Rescue Department in writing that a volunteer firefighter or rescuer filed an appeal and provide the County Attorney, the OLR Chief and the head of the Local Fire and Rescue Department with a copy of the appeal.

(c) An appellant must respond to an MSPB request for documentation in support of an appeal within 15 working days. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.

(d) The OLR Chief and County Attorney must respond to an appeal filed by a County merit system employee within 30 calendar days and forward a copy of the action or decision appealed and all relevant reports, papers, and documents to the MSPB. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.

(e) The OLR Chief and County Attorney must respond to an appeal filed by a volunteer firefighter or rescuer challenging an action taken by the Fire Chief within 30 calendar days and forward a copy of the action or decision appealed and

all relevant reports, papers, and documents to the MSPB. In all other appeals filed by a volunteer firefighter or rescuer, the Local Fire and Rescue Department must respond within 30 calendar days and forward a copy of the action or decision appealed and all relevant reports, papers, and documents to the MSPB. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.

**35-9. Appellant's right to representation.** The appellant has the right to be represented by an individual of the appellant's choosing.

**35-10. Appellant's right to review; right to hearing.**

(a) (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.

(2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.

(b) A volunteer firefighter or rescuer is entitled to a de novo hearing before 2 or more members of the MSPB or a designated hearing officer on appeal from a demotion, termination, dismissal or involuntary resignation. In all other cases, the MSPB may choose to decide the appeal on the basis of a written record without an evidentiary hearing.

(c) The appealing party, the County Attorney, and the OLR Chief must be served with a written notice of the time, date, and place of the prehearing conference.

(d) The MSPB may assign a hearing officer to hear any case appealed to the MSPB. If the MSPB refers an appeal to a hearing officer, the hearing officer must issue a notice of hearing within 15 working days. The hearing officer must issue the notice at least 30 working days prior to the date of the hearing. Within 20 working days of completion of a hearing, the hearing officer must submit written findings and recommendations to the parties and the MSPB. Within 15 working days of receipt of the hearing officer's report, the MSPB may schedule oral arguments.

(e) The MSPB or hearing officer designated by the MSPB must conduct hearings under the Administrative Procedures Act, Chapter 2A of the County Code (Appendix D).

(f) The MSPB or hearing officer may:

(1) administer oaths;

(2) issue subpoenas for witnesses and documents enforceable by injunction by the party requesting the subpoena(s) in a court of competent jurisdiction;

(3) rule on petitions to revoke subpoenas;

(4) rule on motions and offers of proof;

(5) dispose of procedural requests or similar matters;

(6) call, examine and cross-examine witnesses;

(7) accept evidence by stipulation of facts;

(8) maintain an orderly procedure at all times;

(9) set the time limits for a hearing or part of a hearing; and

(10) take any action necessary to assure a fair disposition of the appeal.

(g) A hearing must not be open to the public unless the appellant requests it in writing at the time of the prehearing submissions.

**35-11. Prehearing procedure in appeal; motions; requests for reconsideration of preliminary matters; conduct of hearing; continuances.**

***(a) Prehearing procedure in appeal.***

(1) In all cases where the MSPB conducts an evidentiary hearing, the County must submit the following information to the MSPB or hearing officer and to any other party at least 20 calendar days before the prehearing conference:

(A) complete list of charges;

(B) copy of all written reports, documents, photographs, charts, hearing;

(C) names and addresses of all prospective witnesses and a summary of their anticipated testimony;

(D) names and addresses of witnesses, documents, and records requiring service of a subpoena; and,

(E) estimated time required for presentation of the case.

(2) The Appellant must submit the same information except for a complete list of charges to the MSPB or hearing officer and the County at least 10 calendar days before the prehearing conference.

(3) Requests, after stated deadlines, to call witnesses or to use documentation not contained in the prehearing submission may be granted only on good cause shown.

(4) ***Motions.*** Any motion to the MSPB seeking a determination of a preliminary matter including, but not limited to, motions to compel discovery, motions to exclude evidence (motions in limine), and motions to quash subpoenas, must be in writing. The opposing party has 10 calendar days from the date of the motion to respond to the motion before the Board rules on the motion.

(5) ***Requests for reconsideration of MSPB decisions on preliminary matters.*** Any request to the MSPB to reconsider its ruling on a preliminary matter must be in writing and must be filed within 5 calendar days from the date of the ruling. The opposing party has 5 calendar days from the date of the request for reconsideration to respond to the request before the Board issues a written decision on the request. This preliminary ruling by the Board is not a final decision for purposes of judicial review and appeal.

(b) ***Conduct of a hearing.*** The order of procedure in the conduct of a hearing is usually:

(1) disposition of preliminary motions and matters, if any;

(2) opening statements, which must be a summary of the appeal to be presented;

(3) presentation of the factual case for the party making the charges and cross examination of all witnesses;

(4) presentation of the factual case for the responding party and cross examination of all witnesses;

(5) rebuttal evidence of the charging party;

(6) surrebuttal evidence of the responding party; and

(7) closing arguments.

(c) ***Continuances.*** A party must submit a request for continuance in writing to the MSPB or hearing officer with a copy to the opposing party at least 5 calendar days before the hearing date. The MSPB or hearing officer may grant the request for a continuance where good cause is shown. The MSPB, on its own motion, may decide to continue a hearing less than 5 calendar days before the hearing date if it determines a continuance is in the interest of justice.

**35-12. Testimony of witnesses at hearing; interrogatories and depositions.**

***(a) Testimony of witnesses at hearing.***

(1) All witnesses must testify under oath and only witnesses having direct knowledge of the facts on which the charges are based will be heard. The MSPB or hearing officer will hear testimony:

(A) directly related to the charges;

(B) indirectly related to the charges, provided a relevant relationship has been established; and

(C) of past work record, but only for the purpose of determining degree of penalty, if any.

(2) Each party must have a reasonable amount of time to examine and cross-examine witnesses and to submit evidence. The MSPB or hearing officer may examine witnesses as deemed appropriate.

(3) A witness under oath who intentionally falsifies material facts or willfully and falsely testifies in a hearing is subject to the penalties of perjury under State law and, if a County employee, dismissal.

(b) ***Interrogatories and depositions.*** The MSPB or hearing officer may accept a statement of a witness taken by written interrogatory or a deposition made under oath. This does not preclude a party from taking a deposition or interrogatory of a witness prior to the hearing for impeachment or discovery purposes as authorized by the Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7(b). A party must file a true copy of an interrogatory, answer, or deposition with the MSPB or hearing officer.

**35-13. Payment of witnesses for appearance.**

(a) A department director must reimburse a County employee who is required to appear as a witness with pay or compensatory time under applicable laws and regulations.

(b) If the witness is not a County employee, the MSPB must determine a reasonable fee that must be paid to a witness by the party that subpoenaed the witness.

**35-14. Record of MSPB proceedings.** The MSPB must record hearings.

**35-15. MSPB may enforce settlement agreements.**

(a) If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.

(b) If the parties settle a case while in proceedings before the MSPB, the parties may agree to enter the settlement agreement into the record. If requested to enter the agreement into the record, the MSPB will retain jurisdiction to enforce the terms of the agreement.

**35-16. MSPB decisions.**

(a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB.* The MSPB may order appropriate relief, which includes but is not limited to the following:

(1) retroactive appointment, promotion or reclassification with or without back pay;

(2) change in position status, grade, work schedule, working conditions, and benefits;

(3) priority consideration for an employee found qualified before other candidates are considered;

(4) reinstatement with or without back pay, although the CAO may reinstate an employee either to a position previously held or to a comparable position of equal pay, status, and responsibility;

(5) cancellation of a personnel action found to be in violation of law or personnel regulation, but any cancellation must not, without following any process otherwise required, adversely affect the employment rights of another employee;

(6) participation in an employee benefit previously denied, such as training, an educational program or assistance, preferential or limited work assignments and schedules, overtime pay, or compensatory time;

(7) removal from administrative or personnel records of any reference or document pertaining to an unwarranted disciplinary or personnel action;

(8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale; and

(9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.

(b) The MSPB must:

(1) issue written decisions that set forth findings of fact and conclusions of law;

(2) include a statement of each party's appeal rights and the time limit for filing an appeal;

(3) send a copy of each decision to:

(A) the appellant or appellant's counsel of record;

(B) the CAO;

(C) the County Attorney;

(D) the OHR Director;

(E) the OLR Chief;

(F) the department director; and/or

(G) the Fire Chief and the local fire and rescue department in a case where the appellant is a volunteer firefighter and rescuer.

(c) An MSPB decision is final and binding unless appealed to a court of competent jurisdiction;

(d) A court of competent jurisdiction may enforce an MSPB decision.

**35-17. Request for rehearing or reconsideration of MSPB final decisions.**

(a) A party may submit a written request to the MSPB for rehearing or reconsideration of a final decision within 10 calendar days after the MSPB's final decision is issued. After the 10-day period, the MSPB must not grant reconsideration except in a case of fraud, mistake, or irregularity.

(b) A party must submit a request for rehearing or reconsideration in writing with supporting reasons and must provide a copy to any opposing party or the opposing party's representative. The opposing party may respond to the request for rehearing or reconsideration. Any response must be filed within 5 calendar days from receipt of the request.

(c) A party's timely request for reconsideration stays the time for any further judicial appeal until the MSPB makes a decision on the request. A request for rehearing or reconsideration does not stay the operation of any order in the MSPB's final decision unless the MSPB so states. The MSPB must issue a written decision on the request. If the MSPB does not grant a reconsideration request within 10 calendar days after it receives the request, the request is deemed denied.

**35-18. Appeals to court of MSPB decisions.** A party may appeal a final MSPB decision by filing a petition for appeal to a court as provided in Section 33-15 of the County Code.

**35-19. Penalties for unauthorized interference with MSPB.** A person who intimidates, bribes,

or attempts to coerce or influence an MSPB member, MSPB staff, or MSPB hearing officer, or a

witness is subject to appropriate criminal charges and, if a County employee, is subject to dismissal.

**35-20. MSPB audits, investigations, and inquiries.**

(a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

(b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate action as set forth in Section 3-2 of these Regulations.

**35-21. Prohibited practices; protections for employees.**

(a) ***Prohibited practices.*** It is unlawful for any person to:

(1) coerce or attempt to coerce any merit system employee into taking an illegal or improper action;

(2) retaliate against or penalize an employee, or threaten an employee with retaliation or penalty because of that employee's:

(A) refusal to obey an instruction involving an illegal or improper action;

(B) disclosure of information to a Federal, State, or County official or employee concerning illegal or improper action in County government with a good faith belief that the information disclosed is accurate; or

(C) providing information to, cooperating with, or in any way assisting the Inspector General or the Office of Legislative Oversight.

***(b) Protection for employee.***

(1) The MSPB must protect a merit system employee from any retaliatory or coercive action for:

(A) refusing to obey an instruction involving an illegal or improper action; or

(B) disclosing information to a Federal, State, or County official or employee concerning illegal or improper action in County government that the employee had a reasonable good-faith belief:

(i) was accurate; and

(ii) concerned an illegal or improper action.

(2) The MSPB must not protect the employee if it is determined that:

(A) the employee's actions were frivolous, unreasonable, and without foundation, even though not brought in bad faith;

(B) the employee, without good cause, did not comply with applicable regulations concerning the making of such disclosures; or

(C) the employee was the subject of an otherwise proper personnel action that would have been taken regardless of the employee's disclosure of information concerning illegal or improper action in County Government.

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**35-22. Due process protections.**

(a) If the MSPB determines that an investigation pursuant to Section 35-20 of these Regulations is warranted, the MSPB must prepare a memorandum before the start of the investigation stating the legal authority, scope, and beginning date of the investigation.

(b) At least 5 working days before an employee is expected to participate as a witness, custodian of records, or possible subject, the MSPB or a special personnel investigator appointed by the MSPB must give the employee a written request to participate that includes the following:

(1) date of the request;

(2) name of the employee whose participation is requested;

(3) whether the employee is requested to participate as a witness, custodian of records, or possible subject of the investigation;

(4) name of the investigative authority;

(5) name of the individual conducting the investigation;

(6) law or regulation authorizing the investigation and the request for participation;

(7) subject areas to be covered in the investigation;

(8) if the employee is a possible subject, a clear and detailed statement of all allegations of misconduct;

(9) notice that the employee has the right to be assisted by legal counsel; and

(10) signature of the chairperson of the MSPB certifying that the MSPB has officially initiated an investigation and requested the employee's participation.

(c) Within 30 days after the employee's participation, the MSPB or a special personnel investigator appointed by the MSPB must provide the employee with a copy of:

(1) a transcript or recording of all questions asked to the employee and the employee's responses;

(2) a complete set of notes of all questions asked to the employee and the employee's responses, if there is no verbatim transcript or recording; and

(3) all documents that the employee has been asked to identify or review.

(d) Within 90 days after the employee's participation, the MSPB must, if applicable, serve the employee with written notice of intent to take an action that may adversely affect the employee' terms and conditions of employment. The written notice must include a statement of appeal rights and the time limit for filing an appeal.

(e) After the investigation is finished, the MSPB must deliver to each employee requested to participate:

(1) a statement that the investigation is finished; and

(2) a complete description of all actions taken or planned that may adversely affect the employee's employment.

**Editor's note –** The subjects covered in this section of the Personnel Regulations are addressed for bargaining unit employees in the current collective bargaining agreements as indicated below:

| **Bargaining unit** | **Articles of current agreements with references to MSPB** |
|---|---|
| Firefighter/Rescuer | 38, Contract Grievance Procedure |
| OPT/SLT | 10, Grievances<br>46, Records |
| Police | 34, Grievance Representation<br>51, Personnel Files<br>52, Termination |