

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

IN THE MATTER OF

[REDACTED]

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 18-13

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FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of [REDACTED] (Appellant) from the determination of Montgomery County's Office of Human Resources (OHR) Director to rescind a conditional offer of employment. The Appeal was officially filed October 30, 2017, and the County filed its response to the appeal (County Response) on December 11, 2017.¹ The Appellant did not exercise his right to make final comments in reply to the County's submission. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a position as a HVAC Mechanic I and was given a conditional offer of employment with the Montgomery County Department of General Services (DGS). The offer of employment was contingent upon Appellant's successful completion of a pre-employment medical evaluation, including drug and alcohol screening through urinalysis. County Response, p. 1. On September 29, 2017, Appellant went to the Occupational Medical Services (OMS) offices for the required physical examination and urine drug screening. County Response, Exhibit 1.

¹The appeal was filed online October 26, 2017, at 4:58:46 p.m., after Merit System Protection Board office hours. Accordingly, the appeal is considered to have been officially received the next Board business day. See MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

Appellant and the County provided similar accounts of what happened at the OMS offices when Appellant was asked to provide a urine specimen, although there is slight variation in some of the details. According to Appellant:

When I tried to submit the specimen, I accidentally voided loose stool all over the cup and myself. The collector came in and was upset and asked me to come out of the bathroom, and advised we would collect the urine specimen later. I was covered with feces, but was taken to complete the X-ray which I did. Feces was all over the office where I had been and I was very embarrassed and ashamed. A staff member then provided me with a red biohazard bag and a pair of shorts and asked me to change my clothes until the exam was over. I explained to him that I was not comfortable walking around partially unclothed and wearing someone else's shorts. I became tearful. The physician came in and asked me if I had ever provided a urine for a job, and whether or not this had happened before. I told him no. He told me he had never experienced this kind of event either, and informed me I may get a refusal letter.

Appeal, p.2. Dr. [REDACTED] of OMS described the events as follows:

On 9/29/17, [Appellant] came to OMS for a physical examination and urine drug screen for the position of HVAC mechanic. Before coming back into the clinic with the nurse, he filled out all paper work, including the authorization for the release of information related to the urine drug screen. The nurse explained the UDS process, and gave [Appellant] the cup and escorted him to the bathroom, which he entered without incident. The nurse noted that the applicant took a long time in the bathroom and came out with an empty cup, saying to the nurse, "I can't do this." He was very loud and animated, and I came down the hallway to see what was happening. [Appellant] was in the hallway, kicking around his legs and stating that he had stooled all over himself and, "I can't do this, I can't do this." In fact there was stool on his jeans which he was kicking around to the floor. We offered him some clean clothes, and to come to the men's locker room to change and then complete the drug screen. I went with him into the men's locker room. He put the clean clothes on the floor and said, "I'm leaving," I explained to him that if he left without giving the specimen and completing the process, that would be considered a refusal to test, which equates to a positive drug screen. He responded that he didn't care what I said, he was leaving, and he went straight down the hall out of the clinic.

County Response, Exhibit 1.

The differences in the specific details of the unfortunate events of September 29, 2017, are immaterial. It is undisputed that Appellant (1) began the testing process; (2) did not provide a urine specimen; (3) was warned that refusing to provide a urine specimen during that visit to OMS may result in a withdrawal of the conditional offer of employment; and, (4) left the OMS offices without providing a urine specimen. Appeal, p. 2; County Response, Exhibit 1.

By letter dated October 13, 2017, Appellant was notified by the OHR Director that the conditional offer of employment as a HVAC Mechanic was withdrawn due to his failure to pass the medical examination. Appeal, Attachment 1. Appellant was informed that the Medical Examiner had determined that he was “medically not acceptable to perform the duties of a HVAC Mechanic. *Id.*”

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Merit System Law, Section 33-9. Equal employment opportunity and affirmative action, which states in applicable part,

(c) *Appeals by applicants.* Any applicant for employment or promotion to a merit system position may appeal decisions of the chief administrative officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the chief administrative officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the merit system protection board. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

§ 6-14. Appeals by applicants. Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual’s application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015), Section 8, Medical Examinations and Reasonable Accommodation, which states in applicable part:

§ 8-1. Definitions.

(b) *Conditional offer:* An offer of County employment that the OHR Director may withdraw if the applicant fails to meet the medical requirements for the position.

§ 8-3. Medical requirements for employment.

(a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position. . . .

§ 8-6. Required medical examinations of applicants; action based on results of required medical examinations.

(a) Medical and physical requirements for job applicants.

- (1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class.
- (2) An applicant who receives a conditional offer of employment in a County position must:
 - ...
 - (B) undergo other medical examinations or tests as required by the medical exam protocol that the EME has determined is appropriate for the County position.

§ 8-11. Appeals by applicants and grievance rights of employees.

- (a) A non-employee applicant or employee applicant who is disqualified from consideration for a position or rated as medically unfit for appointment to a position may file an appeal directly with the MSPB under Section 35 of these Regulations.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended July 12, 2005, October 21, 2008, July 12, 2011, July 24, 2012, and June 30, 2015), Section 32, *Employee Drug and Alcohol Use and Drug and Alcohol Testing*, which provides, in pertinent part:

§ 32-1. Purpose. This section of the Personnel Regulations is intended to: . . .

- (c) establish the conditions under which applicants and employees may be tested for alcohol or drug use. . . .

§ 32-3. Prevention of Prohibited Drug Use and Alcohol Misuse by County Employees under County Regulations.

(h) Drug and alcohol testing of job applicants and employees.

(18) *Refusal to take a drug or alcohol test.*

- (A) Any of the following on the part of an employee is considered a refusal to submit to drug or alcohol testing and is considered to be the same as a verified positive drug test result or an alcohol test with an alcohol concentration of 0.02 or higher:

(ii) failing to remain at the testing site until the testing process is complete, but this does not apply to an applicant who leaves the testing site for a pre-employment drug test before the testing process begins . . .

(B) A department director must not select an applicant for a position that requires a pre-employment drug test if the applicant refuses to be tested for drugs.

(20) Rights of job applicants and employees subject to drug or alcohol testing.

(B) If the applicant or employee refuses to be tested, OMS must tell the applicant or employee of the consequences for refusing.

(21) Appeal rights of job applicants and employees subject to drug or alcohol testing.

(A) A job applicant may appeal to the MSPB under Section 35 of these Regulations if the applicant was denied employment or assignment to the position sought because of a verified drug test result, alcohol test result, or refusal to take a drug test.

ISSUE

Was the County's decision to rescind the conditional offer of employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factor?

ANALYSIS AND CONCLUSIONS

Appellant has the burden of proving that the County's decision to rescind its conditional offer of employment was arbitrary, capricious, or based on other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 15-01 (2015). The County argues that Appellant cannot meet his burden of proof under the Personnel Regulations and County Code to show that the County's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors. The Board agrees and concludes that Appellant has failed to meet this burden.

Although Appellant's embarrassing accident while attempting to provide a urine specimen may have been unintended and unfortunate, his decision to leave the OMS testing site without providing a testable specimen, despite being warned as to the consequences, constituted a refusal under the Personnel Regulations. MCPR § 32-3(h)(18) & (20). *Cf.* MSPB Case No. 15-01 (2015) (Failure to provide complete and accurate information during the application process constitutes a sufficient basis to rescind an offer of employment). The County acted appropriately and in conformance with the Personnel Regulations when it warned Appellant that his refusal to remain at the test site until he could provide a urine sample would likely result in a withdrawal of the conditional offer of employment.

Appellant nevertheless requests that he be given another opportunity to complete the testing process. Appeal, p. 2. The County correctly argues that the Personnel Regulations contain no obligation that the County allow Appellant to try again. County Response, p. 2. Indeed, MCPR § 32-3(h)(18)(A)(ii) specifically provides that after the pre-employment drug testing process begins, an applicant who fails “to remain at the testing site until the testing process is complete” shall be considered to have refused to have submitted to the test.

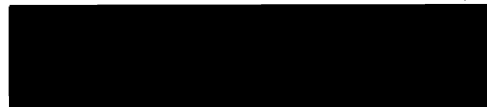
The Board finds that the County was reasonable in rescinding the conditional offer of employment to Appellant based on his failure to provide a urine specimen and his refusal to remain at the test site until he could provide a sample. Accordingly, the OHR Director’s decision was not arbitrary, capricious, or otherwise unlawful.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant’s appeal from his nonselection for the position of HVAC Mechanic.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
February 12, 2018



Angela Franco
Chair