

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

IN THE MATTER OF

████████████████████

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 18-20

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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 ██████████ (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 February 5, 2018.¹ Because the appeal did not include a copy of the notification of non-selection, the Board stayed the processing of the appeal until Appellant provided the necessary document. Appellant subsequently provided a copy of notification of non-selection dated January 19, 2018, (Appellant Exhibit (AX) 1). The County filed its response to the appeal (County Response) on April 2, 2018, which included one exhibit (County Exhibit (CX) 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 Community Services Aide III with the Department of Health and Human Services (DHHS or Department) and was given a conditional offer of employment. The offer of employment was contingent upon Appellant’s successful completion of

¹The appeal was filed online on Friday, February 2, 2018, at 5:59 p.m., after normal business hours on a day that the Merit System Protection Board office is closed. 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). On February 6, 2018, the Board also received a letter expressing Appellant’s desire to appeal.

a pre-employment medical evaluation, including drug and alcohol screening through urinalysis. County Response, p. 2. On December 26, 2017, Appellant went to the Occupational Medical Services (OMS) offices for the required physical examination and urine drug screening. County Response, p. 2; CX 1.

According to Appellant:

I was unaware that I had to take a hearing and vision test before to *[sic]* medical exam. I thought it was just a urine exam. I informed the staff when I arrived I had to go to work later that day. I was in the office for over two hours. If I had known I would had *[sic]* planned accordingly.

Appeal, p. 2. As relief Appellant requests that he be allowed to retake the medical examination. *Id.*

The County maintains that Appellant began the testing process, but when he turned in a cold urine specimen he was told that he would have to provide a urine specimen while he was being observed. County Response, p. 2; CX 1. According to the progress notes of the Registered Nurse, Appellant's "behavior changed" and he said he could not stay because of child care issues. *Id.* Appellant was warned that by leaving before an acceptable specimen was provided he would be considered to have refused to test. *Id.* Appellant nevertheless left the OMS offices without providing an acceptable specimen. *Id.*

By letter dated January 19, 2018, Appellant was notified by the OHR Division Manager that the conditional offer of employment as a Community Services Aide III with the Department of Health and Human Services was withdrawn due to his failure to pass the medical examination. AX 1; County Response, p.2.

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 . . .

(iii) failing to provide a urine specimen for a drug test . . .;

(iv) in the case of a directly observed or monitored specimen collection for a drug test, failing to permit the observation or monitoring of the collection of a specimen; . . .

(vi) failing or refusing to take an additional drug test the employer or collector has directed the employee to take;

(viii) failing to cooperate with any part of the testing process, such as refusing to empty pockets when so directed by the collector, behaving in a confrontational way that disrupts the collection process, or engaging in conduct that obstructs the drug or alcohol testing process or makes the test impossible; . . .

(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

The County initially asserts that the appeal was untimely filed, arguing that the Appeal of the January 19, 2018, nonselection decision was due on February 2, 2018. County Response, p.2. It is the Board's view, however, that Fridays, when the Board's offices are closed, do not count as "working days" for purposes of MCPR § 35-3, and that the deadline for submission of the appeal was therefore February 6, 2018. *See* Montgomery County Code, § 1-301(c)(3). The County's motion to dismiss is thus denied.

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. 18-13 (2018); 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. It is notable that despite expressly being given the opportunity, Appellant did not dispute the County's assertions or, indeed, provide any reply to the County's submission.

The County OMS was acting in conformance with its authority when it asked Appellant to take an additional urine specimen under observation. MCPR § 32-3(h)(18)(A)(iv) and (vi). Appellant's decision to leave the OMS testing site without providing an acceptable, testable specimen, despite being warned as to the consequences, constituted a refusal under the Personnel

Regulations. MCPR § 32-3(h)(18) & (20); MSPB Case No. 18-13 (2018) (Failure to provide testable urine sample constitutes a sufficient basis to rescind a conditional 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 an acceptable 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. Moreover, 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 and that Appellant has failed to meet his burden. Accordingly, the OHR Director’s decision was not arbitrary, capricious, or otherwise unlawful.

ORDER

The County’s motion to dismiss the Appeal as untimely is **DENIED**.

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 Community Services Aide III with the Department of Health and Human Services.

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, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 7, 2018



Angela Franco
Chair