

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

IN THE MATTER OF

████████████████████

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

*
*
*
*
*
*
*
*
*
*
*
*
*

CASE NO. 18-22

=====

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the February 14, 2018, appeal of ██████████ (Appellant) challenging a determination by the Office of Human Resources (OHR) Director to rescind a conditional offer of employment. Appellant's Appeal included a copy of a December 18, 2017, conditional offer of employment letter from OHR (Appellant Exhibit (AX) 1). On March 16, 2018, the County filed its response to the appeal (County's Response), which included four attachments.¹ Appellant replied to the County's Response on April 9, 2018 (Appellant's Reply) and included one exhibit.² On April 9, 2018, the Board asked the parties to provide a copy of the job announcement for the position. Later that day the County provided a copy of job announcement IRC26519. CX 5. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Transit Bus Operator with the Department of Transportation (DOT or Department) and was given a conditional offer of employment by email

¹ The County's attachments were: County Exhibit (CX) 1 - Email containing a November 13, 2017, conditional offer of employment; CX 2 - January 24, 2018, letter and January 26 email enclosing a copy of Appellant's background investigation report; CX 3 - OHR's January 31, 2018, letter to Appellant withdrawing the contingent job offer; and, CX 4 - multiple pages of print outs from the U.S. Equal Employment Opportunity Commission website.

² AX 2 - Email of January 2, 2018, from OHR enclosing an offer of employment letter

on November 13, 2017, which was updated by letter dated December 18, 2017, addressing Commercial Driver's License requirements. County's Response at 2; CX 1; Appeal, p. 1; AX 1. The offer of employment was contingent upon Appellant's successful clearance of a background investigation. *See* CX 1 (offer contingent upon "successful background check") and CX 5 (position requires "criminal background clearance").

On January 2, 2018, DOT sent Appellant an email containing a formal offer of employment with a proposed start date of January 8, 2018. Appellant Reply; AX 2. However, Appellant admits that an hour after the January 2 email containing the offer was sent he received a telephone call from the DOT Administrative Specialist who had sent the email "informing me not to accept the formal offer because my background investigation had not yet been received by her office." Appeal, p.1. Appellant does not allege that he accepted the January 2 offer before or after the telephone call.

The background check revealed that Appellant had a felony manslaughter conviction in 2008. The crime was apparently committed in July 2007, while Appellant was serving a prison term for a previous first degree murder conviction. Appellant was given a copy of the background check results on January 26, 2018, and an opportunity to review and contest or comment on background investigation report. CX 2.

By letter dated January 31, 2018, the OHR Director notified Appellant that the conditional job offer was being withdrawn because he did not pass the background investigation. CX 3.

APPLICABLE LAW

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 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:

§ 6-4. Reference and background investigation requirement; Review of application.

(a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.

(2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.

(3) All applicants and employees must comply with established reference and investigation requirements.

(b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if: . . .

(5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

§ 6-14. Appeals by applicants. Under Section 33-9 of the County Code, a non-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.

ISSUE

Was the County's decision to deny Appellant employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

ANALYSIS AND CONCLUSIONS

The County has the right to establish appropriate job-related qualifications for a position and conduct background investigations before finalizing the selection of an applicant for a position. MCPR § 6-4(a)(1). In this case, the vacancy announcement clearly stated that the Bus Operator position required "criminal background clearance," and Appellant received a conditional offer of employment for the position that was expressly contingent on successful clearance of a background investigation. CX 1; CX 5; AX 1.

It is undisputed that Appellant's background investigation found that he was convicted of felony manslaughter in 2008 while serving a sentence for first degree murder, received a ten-year sentence, and was released from prison on January 11, 2017. County Response, p. 2; CX 2.

Appellant concedes the accuracy of the background report, but claims that the County cannot consider criminal convictions that occurred more than seven years ago. Appellant Reply, p.1.³ Moreover, Appellant asserts that he has been rehabilitated and deserves the opportunity to obtain employment with Montgomery County. *Id.*

The County is authorized under MCPR § 6.4(b)(5) to withdraw an offer of employment “at any time in the hiring process” if “there is evidence of a job-related factor that would hinder or prohibit the applicant’s satisfactory performance of the duties and responsibilities of the position.” We have previously found that Bus Operator “is a position where service to the user public is direct, and one in which a concern for the public’s safety is paramount.” MSPB Case No. 04-09 (2004). Because of public safety concerns, the County need not risk hiring a bus operator with a criminal history. MSPB Case No. 15-03 (2014) (upholding nonselection for a Bus Operator based on misdemeanor assault and theft convictions). *See* MSPB Case No. 17-13 (2017) (Because bus operators have direct public contact public safety is a concern); MSPB Case No. 17-15 (2017) (same); MSPB Case No. 10-06 (2009) (County has a right to review background material before finalizing an offer of employment). We are unaware of any hard and fast rule or policy under federal, state, or County law limiting consideration of felony convictions to a certain time period, and Appellant has not identified any such limitation.

While the Board is sensitive to the concerns of former offenders who are seeking reentry into the workforce, and acknowledges that employment of a rehabilitated felon may be appropriate for some County jobs under certain circumstances, the County may legitimately decide that a Bus Operator position, with its requirement of regular and continuous contact with the public, is not one of those positions. Indeed, a compelling argument could be made that hiring Appellant to drive a County Ride-On bus, notwithstanding his serious criminal convictions, would be negligent.

We need not address the question of what standard of analysis we should apply had Appellant accepted the January 2 formal offer of employment before it was withdrawn. Appellant does not claim that he accepted the erroneous offer of employment before it was withdrawn by telephone an hour later. Nor does he assert that he attempted to accept the offer at any time prior to the formal letter of January 31, 2018, withdrawing the conditional job offer. Withdrawal of the employment offer prior to Appellant accepting the offer resulted in a denial of the appointment and the non-selection of Appellant for the position. *See Sapla v. Department of Navy*, 118 M.S.P.R. 551 (2012).

The Board finds the County was reasonable in its actions when it rescinded the conditional offer of employment based on the results of the background investigation. Given Appellant’s felony conviction, coupled with the fact that the position in question requires direct interaction with the public, the County must be allowed to make employment decisions that are in the best interest of public safety. *See* MSPB Case No. 15-03 (2014). Appellant has not carried his burden of showing that the County’s decision to deny him employment in a public contact position as a

³ Appellant’s Reply states: “The background report was correct. My manslaughter conviction was disposed of in 2008; however, the conviction started in 2007. Therefore, the 2007 date is the date that should have been used in your time elapsed consideration.”

Transit Bus Operator was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

Based on the foregoing, the Board hereby denies Appellant's appeal from OHR's determination to rescind Appellant's conditional offer of employment as a Transit Bus Operator.⁴

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

⁴ The Board strongly urges the County to adopt clearer, written job-related policies concerning background checks and criminal convictions. Further, the almost careless administrative process evident in this case, and the poor wording of the conditional offer letters, deserves the close attention of OHR management. Even though the County properly withdrew the conditional job offer after discovering Appellant's criminal history, no job applicant should be subjected to mixed messages and apparently unauthorized correspondence that cruelly raises false hopes.