

**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. 18-05**

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**FINAL DECISION AND ORDER**

On September 18, 2017, ██████████ (Appellant) filed this appeal with the Merit System Protection Board (MSPB or Board), challenging a determination by the Montgomery County Department of Health and Human Services (Department or DHHS) not to promote her from a Grade 23 Program Manager I position to a Grade 25 Program Manager II position on the DHHS Contract Management Team (CMT).<sup>1</sup> On October 23, 2017, the County filed a response (County Response) opposing the appeal on the merits and moving to dismiss it as untimely.<sup>2</sup> Appellant filed a reply to the County’s response on November 6, 2017 (Appellant’s Response).<sup>3</sup>

<sup>1</sup> Appellant retired from County service effective September 1, 2017.

<sup>2</sup> The County Response included two attachments. We will identify the attachments as County Exhibits (CX):

CX 1 - Appellant’s Appeal Form, September 14, 2017.

CX 2 - CAO Step 2 decision, July 28, 2017.

The Board requests that when the County provides attachments to its submissions and responses those attachments be properly identified and labeled as exhibits.

<sup>3</sup> Appellant’s Response included the following attachments, which we will identify as Appellant Exhibits (AX):

AX 1 - Email exchange between Appellant and GB of OHR, June 15, 2017

AX 2 - Email from Appellant to ██████████, June 16, 2017

AX 3 - Email from Appellant to SH, March 30, 2017

AX 4 - Emails from SH, April 21 & 28, 2017

AX 5 - Memorandum from SH re Oral Admonishment, April 12, 2017

AX 6 - Appellant’s Notes, June 16, 2017

AX 7 - Email exchange with Director UA, June 26, 2017

AX 8 - Email exchange, Director UA, July 5, 2017

AX 9 - Email exchange, Director UA apology, July 5, 2017

On November 22, 2017, the Board requested additional information from the County.<sup>4</sup> On December 20, 2017, the County filed a supplemental response (County Supplemental Response), providing additional documents and withdrawing the motion to dismiss.<sup>5</sup>

### FINDINGS OF FACT

Appellant applied for a promotion to the position of Program Manager II (vacancy announcement IRC24374) with the DHHS Contract Management Team. County Response p. 1; County Supplemental Response, CX 3, ¶s 3-4. The DHHS CMT manages over 700 contracts. County's Supplemental Response, CX 5, ¶ 1.

Vacancy announcement IRC24374 listed the following preferred criteria:

1. Experience in developing and writing solicitations, contracts and amendments with moderate to complex scope requirements and performing budget and price analysis;
2. Experience with coordinating development of contract agreements with multiple departments/interests, leading negotiations and evaluating proposals;
3. Experience managing and prioritizing multiple projects simultaneously;
4. Experience using public sector procurement regulations, policies and procedures;
5. Experience providing customer service to multiple clients;
6. Experience working independently to problem solve for clients;
7. Experience in contracting for a variety of health and human service programs.

Based on the preferred criteria and the specific job duties of the position, eight interview questions were developed:

1. Considering what you understand to be the mission and vision of [DHHS], what do you perceive to be the role and responsibilities of the Contract Management Team? Please describe your experience in developing contract scopes and managing/monitoring contracts in a public or private organization.

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<sup>4</sup> The Board's request, in part, was as follows:

[T]he Board has held on numerous occasions that unsworn statements in pleadings are not evidence. *See, e.g.,* MSPB Case Nos. 16-06 (2015); 13-12 (2013); 13-10 (2013); 12-11 (2012); and 08-13 (2008). The Board thus requests that the various assertions in the County's response to the appeal be properly supported . . . with appropriate documentation and sworn statements to support the County's position that the selected applicant was better qualified than Appellant. . . [T]he Board would also appreciate knowing if the County's position on the timeliness of the Appeal has changed, including your view on whether Appellant's time to appeal was tolled while she was on leave, and whether the term "working days" in the Montgomery County Personnel Regulations, Section 35, applies to the schedule of the County agency or to that of the employee. *See Mihailovich v. Dep't of Health & Mental Hygiene*, 234 Md. App. 217 (2017).

<sup>5</sup> The County Supplemental Response included the following unidentified and unlabeled exhibits, which we identify and number as follows:

CX 3 – Affidavit of VB, December 19, 2017  
CX 4 – Affidavit of JM, December 15, 2017  
CX 5 – Affidavit of SH, December 15, 2017  
CX 6 – Affidavit of RB, December 14, 2017

2. Please describe your knowledge and/or experience in supporting and working with IT contracts and procurements.
3. Describe what you see as your strengths related to this position. What do you think you bring to this organization that someone else would not?
4. Many of the functions and challenges of this position, require assistance and collaboration from internal DHHS staff, other Departments in the County, as well as community stakeholders/advocates in the County. What strategies will you use to establish and maintain open lines of communication and support among highly engaged and independent thinkers? Please provide specific examples of where you may have done this successfully.
5. This position requires the oversight of daily program operations that involve a multitude of staff collaboration with various programs across multiple service areas. Please describe your specific experiences with daily program oversight including budgetary and personnel considerations.
6. Discuss your experience in utilizing data and specifically outcome measures to report program efficiency and to enhance programmatic efficiency and effectiveness. Please describe your experience in preparing Excel reports for management review.
7. Give an example of how you have reinvented or redefined a job to meet your organization's changing needs. What proactive steps did you take to increase the output of your position?
8. What is your experience/knowledge of the County Procurement Process, rules and regulations in regard to Council Grants, Community Grants and State/Federal Grants?

County Response; CX 2.

Applicants who met the criteria listed in the vacancy announcement were deemed qualified to be interviewed by a three person interview panel. After the interviews, the interview panel prepared a consensus sheet which rated the candidates on three competencies based on responses to the interview questions. For each question, candidates were rated as well below average, below average, average, above average, or well above average. Grievant received the following scores:

**Competency #1 - Job Qualifications:**

- Question #1 - Average
- Question #2 - Below Average
- Question #3 - Average
- Question #6 - Average
- Question #8 - Average

**Competency #2 - Sound Judgment/Problem Solving:**

- Question #4 - Average
- Question #7 - Average

**Competency #3 - Results Orientation:**

- Question #3 - Average
- Question #4 - Average
- Question #5 - Average

County Response; CX 2. The selected candidate was rated as follows:

**Competency #1 - Job Qualifications:**

- Question #1 - Above Average
- Question #2 - Above Average
- Question #3 - Above Average
- Question #6 - Average
- Question #8 - Average

**Competency #2 - Sound Judgment/Problem Solving:**

- Question #4 - Above Average
- Question #7 - Average

**Competency #3 - Results Orientation:**

- Question #3 - Above Average
- Question #4 - Above Average
- Question #5 - Average

It is undisputed that Appellant lacked experience in Information Technology (IT) procurement. Appeal, p. 2 (“I admitted to the question #2 that I had not worked with IT Contracts.”); Appellant Response, p. 2 (“when it came to Question 2 – ‘to describe your knowledge and/or experience in supporting and working with IT contracts and procurements,’ I was honest and said that even though I have not directly worked with IT contracts, I would have no difficulty in learning to work on such contracts.”). The selected candidate was rated as “Above Average” on her Question 2 interview response concerning IT contract support knowledge and capability, while Appellant was rated “Below Average.” County Response, p. 2; County’s Supplemental Response, p. 2; CX 2. The selected candidate also received higher ratings than Appellant on Questions 1, 3, and 4, equal ratings on Questions 5 - 8, and was determined to be the best qualified candidate overall. CX 2; CX 4; CX 5; CX 6.

Appellant alleges that the selected candidate had less procurement experience than Appellant but was selected because she was more friendly with SH, the CMT Team Lead. Appeal, p. 2; Appellant Response, p. 2. Appellant also suggests that one of the members of the interview panel was biased because she used to work in the same office as the selected candidate. Appellant Response, p. 2. Appellant also alleges that the selected candidate’s seeming lack of interest when the position was posted (she “did not show interest . . . but was at the file cabinet, filing her files”) was evidence that she had been preselected. *Id.*

Appellant further alleged that she was not allowed adequate time to review the interview questions prior to her interview. Appeal, p. 2; Appellant Response, p. 2. Appellant does not, however, provide any factual basis for concluding that other interviewees had more time than Appellant to review questions prior to their interviews.

Appellant also alleges that her responses to the interview questions were not properly recorded by the members of the interview panel. Appeal, p. 2. Appellant’s allegation appears to be

based on the fact that the notes of the interview panel members did not contain everything Appellant said in her interview. Appellant Response, p. 2.

Appellant filed a written grievance on April 25, 2017. Appellant had a Step 2 meeting with Assistant County Attorney [REDACTED], the CAO's designee, on June 14, 2017. In a decision dated July 28, 2017, the CAO denied the grievance. Appellant further alleges that while employed with the DHHS CMT she was subjected to harassment, stress and retaliation for filing a grievance. Appeal, p. 2.

As evidence of retaliation Appellant says that the CMT Team Lead ceased saying "good morning" to her when he arrived at work and otherwise ignored her. Appellant Response, p. 2. Appellant received a memorandum dated April 12, 2017, with the subject line "Oral Admonishment, April 12, 2017." Appellant Response, p. 3; AX 5. Appellant claims that this oral admonishment was issued in retaliation for her filing a grievance.

The Oral Admonishment purported to discipline Appellant for involving herself in attendance and dress code issues for other employees; challenging the Team Lead's proposed time management plan; raising her voice at the Team Lead while complaining about another employee she believed was being "vindictive" towards her; advising the Team Lead in writing that she was disappointed in the way he handled the unit and that the standard of the unit had "come down" under his supervision; and, for creating a hostile work environment for the other staff. AX 5. The April 12 memorandum (AX 5) stated:

1. On a number of occasions, I have directed you to let go of your concerns regarding CMT staff time and the way some staff dress since there is no dress code policy for CMT and since you are not a supervisor, staff schedules are not your concern. You have failed to take my direction which results in your insubordination.
2. You have told me both verbally and in your email dated March 30, 2017, that CMT standards have "come down" and that you are disappointed in the way things are handled by me in CMT. While all staff are free to hold their own opinions, the Team Manager is empowered to make decisions about how work is organized and accomplished, and CMT staff are expected to follow those instructions. Not following direction and undermining the functioning of CMT is counterproductive and will reflect on your performance.
3. Numerous CMT staff have brought to my attention and the attention of the Department management and HR that you have created a "hostile" work environment based on your actions and behaviors. This is not acceptable and will not be tolerated.

Related to management's apparent concerns over interpersonal conflicts between Appellant and other staff, Appellant's office was temporarily moved "to alleviate tensions." AX 7. Appellant, however, disputes the existence of interpersonal issues with other staff and suggests that "there was [*sic*] no tensions, and I in no way showed disrupted behavior but I was penalized for no reason, other than for filing the grievance." Appellant Response, p. 4.

Appellant admits that she was concerned about the way other employees dressed, and that she took those concerns to SH. Appellant Response, p. 1. According to Appellant, in response to her complaints about the unprofessional attire of other employees SH said “how do you know that I and the ladies do not like you wearing Indian clothes?” *Id.* Appellant viewed the remark as discriminatory and an indication that SH “felt my Indian clothes would not suitable [*sic*] for the position.” *Id.* Appellant appears to infer discriminatory intent from SH’s remark to Appellant that “you seem to go high and low.” Appellant Response, p. 3; AX 3. Appellant viewed the remark as suggesting that she has Bipolar disorder, which she denies. AX 3 (“I connect those words with someone who has BIPOLAR disease, which I know surely has not been diagnosed by my medical doctor.”). The CAO stated in the grievance decision that the Director of DHHS had referred issues between Appellant and other individuals in the office to EEO.

Appellant asserts that the stress of her employment situation caused her to retire: “Due to the harassment, stress and retaliation that I was subjected to, I was forced to retire on September 1, 2017.” Appeal, p. 2. The alleged harassment and retaliation included the temporary office move in late June 2017, just prior to her two-month vacation. Appellant Response, p. 4. Appellant acknowledges that she was told that there would be further discussion of the matter when she returned in mid-September. *Id.*

Appellant also asserts that she did not receive support from DHHS when she “was attempting to get a waiver from the Ethics Commission.” Appellant states that her “husband has assisted living homes. . . [and] I was attempting to assist my husband in the running of the homes.” Appellant Response, pp. 4-5. The waiver request was dropped when Appellant retired. *Id.*

Finally, Appellant submits that she was offended by the DHHS Director’s response to a complimentary email concerning Appellant. Although the Director responded to the sender by saying “Glad [REDACTED] provided good service,” she also inadvertently replied all on an email with the comment “Feels like she asked to do this. Sigh.” Appellant Response, p. 5; AX 8. Appellant acknowledges that the Director apologized for her response, but nevertheless felt slighted. Appellant Response, p. 5; AX 9.

### **ISSUES**

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

### **APPLICABLE LAW**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action**, which provides, in pertinent 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. . . .

**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 provides, in pertinent part:**

**§ 6-5. Competitive rating process.**

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

. . .

**§ 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 February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, *Appointments, Probationary Period, and Promotional Probationary Period*, which provides, in pertinent part:**

**§ 7-1. Use of eligible list.**

If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

(a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended June 30, 2015), Section 27, *Promotion*, which provides in applicable part:**

**§ 27-4. Appeal of promotional action.**

- (a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.
- (b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.
- (c) An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 28, *Resignation*,** which provides, in applicable part:

**§ 28-4. Appeal of resignation.** An employee may appeal, under Section 34 or 35 of these Regulations, a resignation that the employee believes was involuntary or coerced. If the MSPB finds that an employee submitted a resignation under circumstances that caused the resignation to be involuntary, the MSPB will treat the resignation as a removal.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, *Grievances*,** which states in pertinent part:

**§ 34-7. Investigation of complaints of harassment or retaliation for filing a grievance.**

- (a) An employee may file a complaint with the OHR Director if the employee was harassed or retaliated against by a supervisor or coworker for filing a grievance. The employee must include a written description of the harassment or retaliation.
- (b) The OHR Director must investigate the complaint and give the employee a written report of findings within 30 calendar days after the OHR Director receives the complaint.
- (c) The employee may file an appeal with the MSPB if the OHR Director denies the complaint. The employee must file the appeal within 10 working days after the employee receives the OHR Director's decision.

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

**§ 35-2. Right of appeal to MSPB.**



- (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.

### ANALYSIS AND CONCLUSIONS

This is an appeal of a determination by the County DHHS not to promote Appellant to a Grade 25 Program Manager II position. In addition to discussing the reasons she believes the County erred by not selecting her for the promotion, Appellant suggests that she has been the victim of retaliation, harassment, discrimination, and that she was forced into retirement by the stress of the alleged retaliation and harassment. Although the Appeal is expressly limited to the nonselection, we will also address the other issues.

#### ***The Board's Jurisdiction is Limited to the Authority Granted by Statute***

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

#### ***The Board Lacks Jurisdiction Over Appeals That Allege Discrimination***

The County Code provides that an applicant may challenge the Chief Administrative Officer's decision regarding an application for employment or promotion. However, the Code explicitly requires that appeals alleging discrimination prohibited by Chapter 27 of the Montgomery County Code (MCC) must be filed with the Human Rights Commission. MCC § 33-9(c). Appellant alleges that she may have been denied the promotion and suffered workplace harassment based on her ancestry, national origin, and/or perceived disability. Appellant's claims are outside of the Board's jurisdiction as the Board lacks the authority to adjudicate such claims of discrimination. *See* MCC § 27-19(a), (c) and (g); MCPR § 35-2(d).<sup>6</sup> MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014).

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<sup>6</sup> MCC Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance “employment matters for which another forum is available to provide relief.” MCC § 33-12(b). Appellant unquestionably had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 93-25 (1993) (interpreting § 33-12(b)’s “another forum available” limitation as applying to discrimination claims). *See also* MCPR § 27-4(c) (“An employee who alleges discrimination prohibited by the County’s EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.”).<sup>7</sup> Appellant has not put forth any evidence that she filed a complaint with the Office of Human Rights.

The Board thus lacks jurisdiction over Appellant’s discrimination claims.

***The Board Lacks Jurisdiction Over Appeals Where There Is A Failure to Exhaust Administrative Remedies***

Appellant claims that she was subjected to harassment and retaliation for filing a grievance with the CAO.<sup>8</sup> Under MCPR § 34-7, complaints of harassment or retaliation for filing a grievance must first be filed with and investigated by the Office of Human Resources (OHR) Director. There is no suggestion in the Appeal or elsewhere in the record that Appellant made any attempt to raise her complaints of harassment or retaliation with the OHR Director or to otherwise follow the dictates of § 34-7 prior to raising these claims in her appeal to the Board. Thus, the Board lacks jurisdiction over this claim because Appellant failed to exhaust her administrative remedies.

***Appellant Has Not Demonstrated a Constructive Discharge***

An employee who leaves County government employment as a direct result of harassment or other improper actions may file a grievance for involuntary or constructive discharge. MCC § 33-12(b) (“A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the event of such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal.”). The Board’s regulations also provide that an employee may file a direct appeal with the Board over discipline, including an involuntary resignation. MCPR § 35-2(a).

Appellant describes a working environment in which she felt her opinions on workplace decorum and efficiency were not appreciated, and her job skills and abilities insufficiently recognized. She was also unhappy that her office was temporarily relocated “to alleviate tensions”

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<sup>7</sup> The County avers that “Out of an abundance of caution, and despite the Department’s belief there is no merit to Appellant’s claims, [Appellant’s] allegations have been referred to the EEO Office by the HHS Director for investigation under MCPR Section 5.” County Response, p. 2, n. 2. This was also mentioned in the CAO’s Step 2 decision.

<sup>8</sup> Other than making bald allegations that the admonishment and the office move were taken in retaliation for filing a grievance, Appellant has not offered any proof of a causal connection between her grievance and the adverse treatment.

with her coworkers. However, Appellant's allegations, even taken as true, do not support a claim of involuntary resignation or constructive discharge. The circumstances described by Appellant are not so egregious as to suggest that her retirement was involuntary, *i.e.*, that the agency deliberately made her working conditions intolerable with the intent of forcing her to resign. *See Baker v. U.S. Postal Service*, 71 MSPR 680, 695 (1996); *Zygmunt v. Department of Health & Human Services*, 61 MSPR 379, 383 (1994); *Swift v. U.S. Postal Service*, 61 MSPR 29, 32 (1994) ("the ultimate question . . . is whether working conditions were so difficult that a reasonable person in the employee's position would have felt compelled to resign."). While Appellant may have disliked a workplace where her opinions were sometimes disregarded, and her job performance insufficiently recognized, "[m]ere allegations of an unpleasant work environment do not rise to the level of forcing an employee to resign." *Colodney v. MSPB*, 244 Fed. App'x. 366, 369, 2007 WL 2045704 (Fed. Cir. 2007). *See Garcia v. Dep't of Homeland Security*, 437 F.3d 1322, 1329 (Fed. Cir. 2006) (Forced resignation is "a demanding legal standard," and resignations are presumed voluntary).

As the court in *Goldsmith v. Mayor & City Council of Baltimore*, 987 F.2d 1064, 1072 (4th Cir. 1993) recognized:

[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge. Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress. (citations and internal quotation marks omitted)

MCPR § 28-4 states that "If the MSPB finds that an employee submitted a resignation under circumstances that caused the resignation to be involuntary, the MSPB will treat the resignation as a removal." The alleged personal slights and criticism, the denial of a promotion, and the temporary office relocation, however unpleasant or stressful they may have been, did not compel Appellant's retirement. Thus, we do not find that Appellant retired under circumstances suggesting that her retirement was forced and involuntary.

### ***Appellant Has Failed to Show That Her Nonselection Was Improper***

We now address the crux of this Appeal, the nonselection of Appellant for a promotion. To prevail in a nonselection case, an appellant must demonstrate that the decision was arbitrary, capricious or illegal. MCC § 33-9(c); MCPR §34-9(d)(2). The County argues that Appellant failed to meet her substantial burden of proof.

The County has offered legitimate reasons for selecting an applicant other than Appellant for the CMT Program Manager II position. Selection of a higher rated candidate is consistent with the County personnel regulations. MCPR § 7-1. In a non-selection case, the Board will not substitute its judgment for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 17-10 (2017); MSPB

Case No. 06-02 (2006).

The selection of a candidate for the CMT Program Manager II position was based on applicant ratings assigned by the interview panel based on the job related questions asked of all applicants. Affidavits were submitted by all the members of the interview panel declaring that the selected candidate was the best qualified. It is undisputed that Appellant was forced to concede during her interview that she lacked *any* experience in the important IT contract area. She was therefore appropriately rated as “Below Average” in IT contract support, knowledge, and capability, while the selected candidate was rated “Above Average.” Appellant was also rated below the selected candidate in several other categories. We thus find no merit in Appellant’s claim that she was improperly denied promotion to a position for which she was the best qualified.

Beyond mere speculation, Appellant has not provided any evidence to support her belief that she was denied the promotion for reasons other than those related to her relative qualifications. For example, there is no evidence in the record that other interviewees had more time than Appellant to review interview questions. Indeed, we do not discern any evidence in the record to establish arbitrary and capricious conduct on the part of the County.

Accordingly, we find that Appellant has not met her heavy burden of proving that the County’s decision was arbitrary, capricious or based on other non-merit factors. MCC, § 33-9(c); MCPR, §34-9(d)(2).

***Oral Admonishment***

Although not raised by either party, the Board is concerned over the April 12, 2017 memorandum purporting to be an oral admonishment. Specifically, the Board is troubled by the manner in which the “oral admonishment” was confirmed in writing to the Appellant and placed in her supervisor’s file. By definition, an “oral admonishment” is not to be provided in writing to an employee. It is “a spoken warning or indication of disapproval.” MCPR § 33-3(a)(2). One reason this lowest level of discipline is not grievable is because there is to be no formal documentation of the action. *See* MSPB Case No. 83-3 (1983); MCPR § 33-9(a)(1). We therefore conclude that the memorandum of April 12, 2017, should be rescinded and removed from Appellant’s personnel files.

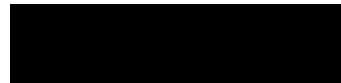
**ORDER**

To the extent Appellant’s Appeal is based on alleged human rights violations, it is **DISMISSED** based on a lack of jurisdiction. To the extent that Appellant is raising issues of retaliation or harassment, her Appeal must be **DISMISSED** for failure to exhaust her administrative remedies. Furthermore, to the extent that Appellant is claiming that her retirement was a constructive discharge, her Appeal must be **DENIED**. Finally, because Appellant has failed to demonstrate that the County’s decision on her application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, the appeal of her nonselection for the position of Program Manager II with the DHHS CMT (IRC24374), is hereby **DENIED**. Finally,

the memorandum of April 12, 2017, shall be **RESCINDED** and removed from Appellant's personnel files.

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  
October 25, 2018



Angela Franco  
Chair