

**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. 18-28

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FINAL DECISION AND ORDER

On May 7, 2018, ██████████ (Appellant) filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a May 4, 2018 denial of employment in a mail clerk position by the Department of General Services (DGS).¹ On May 21, 2018, Appellant submitted the notification of nonselection he was appealing. Appellant Exhibit 1 (AX 1). The County submitted a response to the appeal on June 25, 2018 (County Response) with five exhibits.² Appellant did not exercise his right to reply to the County Response.

FINDINGS OF FACT

In October 2013, Appellant submitted an application for a Grade 11, Mail Clerk position (017102) with DGS in response to job posting IRC 12580. CX 1, ¶s 3 & 4; CX 3. The County received 392 applications for position 017102, which had been vacant since July 13, 2013. CX 1, ¶ 3; CX 2, ¶s 4 & 6.

¹ Appellant submitted his online appeal on Sunday, May 6, 2018, at 6:30 a.m., a day and time when the Board’s office is not open. Accordingly, the appeal is considered to have been officially received by Board the next business day.

² The County Exhibits (CX) were as follows:
CX 1 - Affidavit of ██████████, Human Resources Specialist III, Office of Human Resources, June 22, 2018;
CX 2 - Affidavit of ██████████, Chief, Division of Central Services, DGS, June 22, 2018;
CX 3 - Vacancy Details, iRecruitment Position Vacancy IRC 12580, Mail Clerk 017102, October 10, 2013;
CX 4 - DGS Request to Abolish/Create Mail Clerk, Grade 11 (017102), April 18, 2018;
CX 5 - Appellant’s letter of resignation, October 19, 2008.

Rather than being supported by the County General Fund, the Mail Clerk position was funded by an “Internal Service Fund.” CX 2, ¶ 5. Through the Internal Service Fund, other County departments reimburse DGS Central Duplicating for various services, such as copying, printing, mail delivery and pick up, etc. County Response, p. 2; CX 2, ¶ 5. Because DGS was unable to generate sufficient revenue to fund Mail Clerk position 017102 it could not be filled. CX 2, ¶s 6 & 7. As a result, interviews were not conducted, and the position was never filled. CX 1, ¶ 5; CX 2, ¶s 6 & 7. On April 18, 2018, DGS requested permission to abolish the Mail Clerk position and recreate position 017102 with a lower graded Printer Apprentice classification. CX 4. On April 27, 2018, the Office of Human Resources (OHR) granted a DGS request to abolish the vacant Mail Clerk position and create a lower graded Printer Apprentice position in its place. *Id.*

Unfortunately, when OHR processed the abolish and create transaction in its Oracle system, it was done in a way that triggered an automatic email that erroneously notified all the candidates from the 2013 recruitment (IRC12580) that the position had been filled. CX 1, ¶ 7; CX 2, ¶ 9. That is why, on May 4, 2018, Appellant received an email from the County’s electronic Human Resources recruitment application. AX 1. The entire text of the email was: “The status of your job application for **IRC12580** is changed to **Position has been Filled.**” (emphasis in original). However, the position had not, in fact, been filled. CX 1, ¶ 5; CX 2, ¶ 7; CX 3.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, 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 non-merit 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, and June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which provides, in pertinent 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 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.

ISSUE

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

ANALYSIS

Appellant has the burden of proving that the County's action with regard to his application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). Despite being given the opportunity, Appellant did not dispute the County's assertions or, indeed, provide any reply to the County's submission.

The County presented evidence demonstrating that the Mail Clerk position in question became vacant July 13, 2013, was advertised in October 2013 (IRC12580), but that the recruitment was abandoned due to insufficient funding. Although Appellant received an erroneous notice stating that the position had been filled, that was not the case. The Mail Clerk position was never filled and was abolished prior to the erroneous notice. This is fatal to the appeal as the Board lacks jurisdiction to consider claims of nonselection where, in fact, no selection has been made. MSPB Case No. 14-14 (2014); MSPB Case No. 14-41 (2014).

Based on the record evidence, the Board concludes that Appellant has failed to meet his burden of showing that the County's decision to not fill the vacant Mail Clerk position and thereby deny him employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors. Moreover, the Board simply lacks jurisdiction because there was no selection for the Mail Clerk position

Appellant applied for in 2013.³

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 Mail Clerk.

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

For the Board
August 20, 2018



Angela Franco
Chair

³ Appellant also alleges that in 2008 he was constructively discharged in retaliation for the filing of discrimination complaints. The Board has previously found on multiple occasions that it lacks jurisdiction over Appellant's discrimination claims. MSPB Case No. 16-01 (2015); MSPB Case No. 16-02 (2015); MSPB Case No. 15-31 (2015); MSPB Case No. 15-15 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). *See* Montgomery County Code, § 33-9(c); MCPR § 35-2(d).

