

**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. 20-03

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FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 12, 2019, appealing a denial of a permanent promotion to a Grade 21 Lead Animal Services Officer position with the County Department of Police (Department or DOP) (IRC 37949).

Because the appeal did not include a copy of a formal notification of non-promotion, as required by Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), by letter dated August 12, 2019, the Board stayed the processing of the appeal and requested submission of a copy of the notification of nonselection.

On August 19, 2019, Appellant submitted an August 5, 2019, email from the Animal Services Director advising Appellant of the end date of her temporary promotion. Appellant’s email stated that it was “the closest thing I received as the Director have [sic] me verbal notification.”

On August 21, 2019, the Board issued a show cause order requiring the County to provide a statement of whether: (1) there has been a final selection for the Lead Animal Services Officer position; (2) a determination has been made that Appellant does not meet the minimum qualifications; and (3) a final determination has been made that Appellant will not be appointed.

On August 26, the Board received the County’s statement acknowledging that Appellant was denied the promotion. Appellant was thereby relieved of her obligation to respond to the show cause order.

The County submitted a response to the Appeal on October 7. Appellant's due date for a reply was October 28. To date, Appellant has not submitted a reply contesting the County's submission.

The Appeal was reviewed and considered by the Board.¹

FINDINGS OF FACT

The Appellant in this appeal is an Animal Services Officer III, Grade 20. County Submission, p. 1. Appellant has served at various times as a Temporary Lead Animal Services Officer. County Exhibit (CX) 2; Appeal and Notice of Non-promotion. Appellant has been a Montgomery County employee since July 22, 2002. Appeal Form, p. 2.

On May 31, 2019, the Department posted a recruitment for the position of Lead Animal Services Officer, Grade 21, with a closing date for applications of June 14, 2019. CX 1 (IRC 37949). Appellant filed a timely application for the promotion, as did seven other individuals. CX 1 and 2.

After an evaluation of the applications, five applicants were deemed "not qualified." Appellant and one other applicant were found to be qualified and were placed on the eligible list. CX 1. Appellant and the other applicant were then interviewed by a three-person panel on July 8, 2019. CX 2 and 3. After the competitive recruitment process, the other qualified applicant was selected for promotion to a permanent position of Lead Animal Services Officer.

The Appeal Form states that on July 29, 2019, Appellant "received verbal notification from the Animal Services Director that my application for the permanent position of Lead Animal Services Officer was denied." According to Appellant, the selected candidate had less experience with the Animal Services Division. Appeal Form, p. 2. The Appeal further alleges that the decision not to promote Appellant to the Lead Animal Services Officer

was incorrect based on my years of experience, training, and leadership in the Department. I have received both formal and on the job training in Leadership, Management, Animal Science, Adult Education, Criminal Justice, and Emergency Management. I am a life long Montgomery County, Maryland resident who has served the county, my home and community, loyally since I was hired. I have worked with co-workers as a team member and a team leader and always go out of my way to assist my fellow officers on my shift.

Appeal Form, p. 2.

The County notes that Appellant has only intermittently served as the Temporary Lead Animal Services Officer and that the selected candidate has also periodically served in that capacity over the past few years. County Response, p. 2; County Exhibit 3.

Pursuant to the County's selection guidelines,² each member of the interview panel completed an individual evaluation form rating the two candidates. The ratings were based on the applicants' responses to the same five questions. County Exhibits 2 and 3. Then, as a group, the

¹ The Board's former Chair, Michael J. Kator, did not participate in the hearing or consideration of this Appeal. Member Sonya Chiles, who took office on January 1, 2020, also did not participate in the hearing or consideration of this Appeal.

² *Selection Guidelines for Montgomery County: A Users Guide for Hiring Managers* (Revised June 3, 2016), p. 8.

panel members completed a consensus evaluation form for each applicant interviewed. The interview panel's consensus evaluation was consistent with the individual ratings completed by each panel member.

The selected candidate was chosen based on the interview panel's conclusion that her responses during the interview were superior to Appellant's. County Exhibits 2 and 3. The interview panel's consensus rating of the selected candidate's responses was "Above Average" (the highest rating category) on four out of the five questions. County Exhibit 3. The selected candidate received a rating of "Average" for the question concerning "sound judgement/result orientation." *Id.*

The interview panel's consensus rating of Appellant's interview responses was well below the scores of the selected candidate. County Exhibits 2 and 3. Although Appellant was rated as "Above Average" in "sound judgement/result orientation" while the selected candidate was rated as "Average," Appellant was rated as "Average" in her response to three other questions and "Below Average" (the lowest rating category) for "job qualifications." County Exhibit 2. The selected candidate was rated as "Above Average" in those four categories. County Exhibit 3.

As a result, the rating panel recommended the selected candidate for the promotion and Appellant to be considered at a later time.

APPLICABLE CODE PROVISIONS AND REGULATIONS

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. . .

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.

ISSUE

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?

ANALYSIS AND CONCLUSIONS

To prevail in a nonselection/nonpromotion case, Appellant must demonstrate that the decision not to select her 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 presented un rebutted documentary evidence supporting the legitimate reasons for selecting the other qualified applicant. Ratings for each applicant were assigned by the three person interview panel based on the job related questions asked of both applicants. The consensus rating of the interview panel was that the other applicant was significantly more qualified for the promotion.

Appellant only presented the Board with an argument that she deserved the promotion because she was qualified and experienced, had temporarily held the position on an acting basis, and had a longer tenure with the agency. The County pointed out that both applicants had appropriate job related experience and qualifications, and both had temporarily held the position on an acting basis. Appellant did not contest the County's evidence concerning the interview and applicant evaluations.

In sum, while Appellant was one of only two applicants deemed qualified and eligible to be interviewed for the promotion, the interview panel was unanimous and provided detailed reasons for its conclusion that the other applicant was the superior candidate.

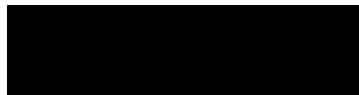
Selection of a higher rated candidate is consistent with the County personnel regulations. MCPR § 7-1. The Board will not substitute its judgment for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). The Board has reviewed the documentation and does not see any basis for overturning the agency decision.

ORDER

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 Lead Animal Services Officer, is hereby **DENIED**.

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
March 16, 2020



Harriet E. Davidson
Chair