

**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. 20-04

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FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 21, 2019, appealing a denial of a promotion from a Grade 21 Administrative Financial Specialist I to a Grade 25 Program Manager II position in the Alcoholic Beverage Service (ABS or Department).¹

In her appeal Appellant alleges that “although I met the highest qualifications interviewed . . . and after the position was closed DLC reopened and with no explanation to the current candidates another round of interviews were held. Low and behold once again, another Caucasian male with no experience was hired.” Appeal Form, p. 2.

The County filed a response to the appeal on September 24, 2019, arguing that Appellant had provided no evidence concerning her claims and that any employment discrimination claims were outside the Board’s jurisdiction. County Response, p. 2.

On October 24, 2019, the Board requested that the County provide a supplemental response to specifically address “why and under what authority the recruitment process for the Program Manager II position . . . was extended.” The Board also asked the County to provide a full response to Appellant’s allegation that the extension and reposting of the position was due to favoritism.

The County submitted a supplemental response on November 18, 2019. Appellant’s due date for a reply to the County’s initial response was October 15, and the due date for her to respond

¹ Effective July 1, 2019, the Montgomery County Department of Liquor Control (DLC) was renamed as the Alcohol Beverage Services. Chapter 673, Laws of Maryland 2019.

to the County's supplemental submission was December 2, 2019. To date, Appellant has not submitted a response contesting either the County's September 24 submission or its November 18 supplemental response.

The Appeal was reviewed and considered by the Board.²

FINDINGS OF FACT

In late 2018 the Department of Liquor Control (renamed Alcohol Beverage Services in July 2019) requested that the Office of Human Resources (OHR) reclassify a Grade 23 Program Manager I position to a Grade 25 Program Manager II position. The justification for the reclassification request was the need for a retail pricing analyst who could supervise two other employees. County Response, County Exhibit (CX) 1.³ The position was reclassified effective December 20, 2018, and the vacancy was posted on March 19, 2019, as IRC35483. County Response, CX 2. The closing date for the recruitment was April 5, 2019. County Supplemental Response, CX 1.

Appellant, a Grade 21 Administrative Financial Specialist I, timely applied for a promotion to the Grade 25 Program Manager II Retail Pricing Analyst position (IRC35483) on April 5, 2019. County Response, CX 3. Appellant and eight other applicants were rated as "Qualified" for the position and six, including Appellant, were interviewed on April 18, 2019. County Supplemental Response, CX 1 & CX 2.

The interview panel consisted of three high level Department employees who asked interviewees the same eleven job related questions.⁴ County Supplemental Response, CX 2 & 3. The rating of candidates was by consensus. Appellant and three other applicants were rated as "Not Recommended" by the interview panel. The other two interviewed applicants were rated as "Consider at a Later Date." No applicant was rated as "Recommended." County Supplemental Response, CX 1.

Appellant's overall "Not Recommended" rating was based on her responses to the interview questions. The consensus ratings by the interview panel were that Appellant's responses were "Average" on questions 1, 3a, 4, and 6, "Below Average" on questions 2, 3b, 3c, 5, 7, and 8, and "Well Below Average" on question 3d. County Supplemental Response, CX 2.

Because none of the applicants responding to the original announcement were rated in the highest rating category ("Recommended"), the Department requested that OHR extend the recruitment under IRC35483. *Id.* On May 3, 2019, the recruitment was re-announced. The reposting stated that "This is a re-announcement. The status of applicants who previously applied will remain the same." County Response, CX 2; County Supplemental Response, CX 1. The recruitment closed on May 10, 2019. *Id.*

² The Board's former Chair, Michael J. Kator, did not participate in the consideration of this Appeal. Member Sonya Chiles, who took office on January 1, 2020, also did not participate in the consideration of this Appeal.

³ The County exhibits are numbered according to the written response to which they were appended. The September 24 County Response had four exhibits, numbered CX 1 through CX 4. The November 18 County Supplemental Response had three exhibits, numbered CX 1 through CX 3.

⁴ We say that there are eleven questions because the interview sheets list eight questions with question three consisting of four subparts. County Supplemental Response, CX 2 & 3.

Three additional qualified candidates were interviewed by the same panel and asked the same questions on June 13, 2019. County Supplemental Response, CX 1. Two of those candidates were rated as “Consider at a Later Date” by the interview panel.

The third candidate was the only applicant rated as “Recommended” by the interview panel and was thus selected for the position. County Supplemental Response, CX 1 & CX 3. The selected candidate’s overall “Recommended” rating was based on his responses to the interview questions. The consensus ratings by the interview panel were that the selected candidate’s responses were “Well Above Average” on questions 1 and 3a-d, “Above Average” on questions 2, 4, 5, 7, and 8, and “Average” on question 6. County Supplemental Response, CX 1 & CX 3.

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?

APPLICABLE LAW AND POLICY

Montgomery County Code, Chapter 33, Personnel and Human Resources, which provides, in pertinent part:

§ 33-5. Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article.

(b) Merit system principles. The merit system established by this chapter encompasses the following principles: . . .

(2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills . . .

(6) All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other nonmerit factors in all aspects of personnel administration. . . .

§ 33-9. Equal Employment Opportunity and Affirmative Action

(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.

(b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.

(c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.

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 (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.

Selection Guidelines for Montgomery County: A Users Guide for Hiring Managers, (Revised June 3, 2016), pp. 30-31:

Based on the consensus evaluation of which candidates should be hired, the interview panel will make a determination of ‘recommended’ or ‘not recommended’. Those you do not recommend at this time due to a particular number to be sent forward or other factors should be recommended for ‘consideration at a later date’.

ANALYSIS AND CONCLUSIONS

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

Appellant asserts that “there are a limited number of female managers and [ABS] just recently hired an African American manager. . . not because of what she knows but because of who she knows. Which is typical of DLC as almost all the upper management folks worked with

each other outside of DLC.” Appeal Form, p. 2. To the extent Appellant is attempting to allege race or sex discrimination, her claims are outside the Board’s jurisdiction.

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 based on her race and sex. 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).⁵ MSPB Case No. 18-05 (2018); MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014).

In addition, 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 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. 18-05 (2018); 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.”).

The Board thus lacks jurisdiction over Appellant’s discrimination claims.⁶

Appellant Has Failed to Show That Her Nonselection Was Improper

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 selection of a candidate for the Program Manager II position was based on applicant ratings assigned by the interview panel based on the job related questions asked of all applicants selected for interviews. In response to the Board’s question as to why the County reposted the position, the County submitted an affidavit from an OHR recruitment specialist attesting that the position was re-announced because there were no applicants in the highest rating category (“Recommended”) responding to the original announcement. County Supplemental Response, CX 1. The Department’s desire to broaden the pool of applicants to obtain more qualified candidates is certainly not arbitrary, capricious or illegal.

⁵ 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.

⁶ Appellant also alleged that when the position was open three years ago she had performed the duties of the job she sought “single handily . . . for 5+ years by myself” and that “when the position was . . . posted in 2016 DLC hired a new incumbent who did not have the skills but because he was a friend/former colleague of one of the hiring managers.” Of course, any claim regarding a 2016 nonselection would be untimely.

Once the recruitment was extended, under MCPR § 7-1(a), it was entirely appropriate for the Department to select a candidate from the highest rating category. If the Department had for some reason wished to select a candidate from a lower rating category, under § 7-1(c) the Department would have had to justify that unusual selection in writing. Moreover, bypassing the higher rated candidate to select Appellant would have required CAO approval. Indeed, as Appellant was rated “Not Recommended,” the Department would have had to justify bypassing not only the selected candidate, but also the two candidates rated “Consider at a Later Date.” The County Personnel Regulations and selection guidelines certainly do not require an agency to take those extraordinary steps.

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). Appellant has not shown that she was more qualified than the selected candidate, nor has she provided any evidence to support her belief that she was denied the promotion for reasons other than those related to her relative qualifications. Indeed, we do not discern any evidence in the record to establish arbitrary and capricious or illegal conduct on the part of the County. On the contrary, the interview records submitted by the County indicate that Appellant was appropriately rated as “Not Recommended,” and that the significantly higher scores of the selected candidate justified his rating as “Recommended.” The unrebutted evidence of record indicates that the selected candidate was the best qualified.

The Merit System law provides that the “advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills,” and that employees of the County “shall be assured fair treatment without regard to . . . nonmerit factors.” Montgomery County Code, § 33-5(b)(2) & (6). Here, the County’s recruitment effort adhered to its own policies and procedures and was designed to identify the most qualified candidate. There is no evidence to support Appellant’s bald allegation of favoritism or any other kind of unequal treatment. Allegations without proof may not form a basis for us to uphold the appeal. *Cf.*, MSPB Case No. 15-31 (2015), n. 2.⁷ Indeed, even if the selected candidate was known to those involved in the selection process it would not be enough for us to conclude that there had been improper favoritism. *See* MSPB Case No. 00-12 (2000), *aff’d*, *Montgomery County v. Clarke*, No. 2580, Sept. Term, 2000 (Md. Ct. Spec. App. Dec. 5, 2001) (“The fact that the selecting official picks someone who is previously known and viewed favorably, or doesn’t select someone who is previously known and viewed unfavorably, does not, in the Board’s view, render the procedure defective.”).

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Program Manager II position and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations. MCPR § 7-1. MSPB Case No. 17-05 (2017) (In DLC failure to promote appeal “Selection of a higher rated candidate is consistent with the County personnel regulations.”).

⁷ It is significant that despite being provided with the opportunity, Appellant did not contest the County’s Response or its Supplemental Response. *See* MSPB Case No. 16-01 (2015).

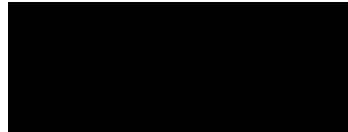
Accordingly, we find no merit in Appellant's claim that she was improperly denied promotion to a position for which she was the best qualified and that Appellant has not met her heavy burden of proving that the County's decision was arbitrary, capricious or based on other non-merit factors. MCC, § 33-9(c); MCPR, §34-9(d)(2).

ORDER

To the extent Appellant's Appeal is based on alleged discrimination or human rights violations, it is **DISMISSED** based on a lack of jurisdiction. Moreover, Appellant has failed to demonstrate that the County's decision on her application for a promotion was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors. Accordingly, the appeal of her nonselection for the position of Program Manager II, 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 5, 2020



Harriet E. Davidson
Chair