

**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. 20-06

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ORDER OF DISMISSAL

[REDACTED] (Appellant) filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on September 19, 2019, appealing a denial of a promotion to a Supervisory Therapist position with the County Department of Health and Human Services.¹ The County filed a response moving to dismiss the appeal as untimely and opposing it on the merits. Appellant’s due date for a reply to the County submission was November 18, but to date she has not submitted a response or otherwise communicated with the Board.

Appellant received notification of non-selection on September 3, 2019. The appeal was thus due on September 17 but was electronically filed through the Board’s website on September 18 at 5:02 p.m. Montgomery County Personnel Regulations (MCPR) §35-3(b). Appellant has provided no explanation, justification, or excuse for the late filing.

This Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *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

¹ Member Sonya Chiles, who took office on January 1, 2020, did not participate in the consideration of this Appeal.

are 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. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See* MCPR, § 35-7(c) (“The MSPB must dismiss an appeal if it determines it lacks jurisdiction.”). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Appeal is Untimely

Under the Montgomery County personnel regulations Appellant had ten (10) working days to file an appeal challenging the denial of employment. MCPR, § 35-3(b) (“An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position”).

It is undisputed that Appellant received notification of non-selection on September 3, 2019. The appeal was thus due on September 17 but was not filed electronically until after 5:00 p.m. on September 18. The Board’s official office hours are 9:30 a.m. to 3:00 p.m. The Board’s website provides notice of the office hours and specifically advises that appeals filed outside of those hours will be considered as filed the next official work day.²

The Board has held on many occasions that appeals or pleadings filed after Merit System Protection Board office hours are considered to have been officially received the next Board business day. *See* MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015). Accordingly, we find that the appeal in this matter was officially received by the Board on September 19. Appellant has provided no explanation, justification, or excuse for her late filing.

In the past the Board has not waived the 10-day period for filing an appeal in non-selection cases, and we have not been provided with any reason for us to do so here. MSPB Case No. 14-43 (2014). *See* MSPB Case No. 09-07 (2009) (“Appellant is reminded that the Board’s hours of operation are 9:30 a.m. to 3:00 p.m. Thus, any filing must be received by the Board before 3:00 p.m. . . . or it will be deemed untimely.”).

Moreover, while we need not reach the merits of the County’s promotional decision due to the late filing of the appeal, the Board has reviewed the evidence of record and, as an alternative basis for its decision, finds that Appellant did not meet her burden of proving that the promotional action was arbitrary and capricious or in violation of an established procedure.

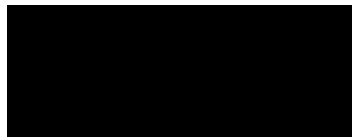
The Board will not substitute its judgment for that of the selecting official unless the appellant demonstrates that her qualifications were plainly superior to those of the selectee. Here the County’s documentation indicates that the selected candidate is well qualified, and that the interview panel reasonably concluded that the selected applicant performed better in the job interviews and was the superior candidate. Thus, the Board sees no basis for overturning the agency decision.

² The homepage of the Board’s website, found at <https://www.montgomerycountymd.gov/mspb/>, states: “The MSPB’s office hours are Monday - Thursday, 9:30 a.m. - 3:00 p.m. Appeals filed outside of those hours will be considered officially filed the next MSPB business day.”

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-06 be and hereby is dismissed for lack of jurisdiction because it was untimely filed. Furthermore, Appellant has failed to meet her burden of proof on the merits of her claim.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
February 5, 2020



Harriet Davidson
Chair