

**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. 20-07

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ORDER OF DISMISSAL

[REDACTED] (Appellant) filed this appeal concerning denial of employment as a temporary/seasonal Recreation Assistant VI, Development, Grade S6, with the Montgomery County Department of Recreation (Department or County). The appeal letter was received by the Merit System Protection Board (MSPB or Board) on October 14, 2019. The Board docketed the appeal as MSPB Case No. 20-07, but advised Appellant by letter dated October 15, 2019, that it would stay processing of the appeal until she provided a copy of a notification of non-selection. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3).

After receipt of Appellant’s notification of non-selection, an acknowledgement letter was sent to Appellant and the County on November 4, 2019, establishing a schedule for the parties to submit information and complete documentation concerning the appeal.

The County submitted a response on December 9, 2019, asserting that the appeal was untimely and should be dismissed for lack of jurisdiction. The County response also argued that the denial of employment was appropriate on the merits. To date, Appellant has not submitted a reply or other pleading, or otherwise communicated with the Board.

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 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). It is undisputed that by letter dated September 20, 2019, apparently emailed to her on September 23, Appellant was notified by the County that her provisional job offer was rescinded. Appellant submitted a copy of the letter to the Board and did not dispute that she received the email containing the letter on September 23rd.

This Appeal was filed with the Board on October 14, 2019, fifteen (15) working days after Appellant received the notice of non-selection. In the past the Board has not waived the 10-day period for filing an appeal in non-selection cases, and there is no basis for it to do so here. MSPB Case No. 14-43 (2014). Accordingly, Appellant's appeal must be dismissed as untimely.

Non-Merit System Position

The Montgomery County Code (MCC) grants the MSPB jurisdiction over appeals from applicants for employment in merit system positions with the County. MCC § 33-9(c) ("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."); MCPR § 6-14 ("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"). Thus, the MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. MSPB Case No. 19-02 (2018); MSPB Case No. 16-02 (2015); MSPB Case No. 09-08 (2009).

However, Appellant applied for a temporary, seasonal position. This is reflected by the placement of Recreational Assistant positions on the Seasonal Salary Schedule and the fact that Appellant was asked to complete the Report of Pre-Placement Medical History for Temporary Employees form. CX 2.

While the County submission notes that the Recreational Assistant position is temporary/seasonal, it fails to raise the issue of the Board's lack of jurisdiction over decisions concerning employment or promotion to non-merit system positions. Nevertheless, the Board is always obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). We are thus compelled to address our jurisdiction *sua sponte*.

The County Council has not delegated to the MSPB authority to hear matters involving temporary, seasonal non-merit system employees. MSPB Case No. 18-17 (2018); MSPB Case No. 13-08 (2013). As there is no dispute that Appellant is appealing her non-selection for a temporary,

seasonal position that is not in the merit system we conclude that Board lacks jurisdiction over this appeal.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant's appeal because it is untimely and because it concerns the selection process for a non-merit system position. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-07 is dismissed for lack of jurisdiction.

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 10, 2020



Harriet Davidson
Chair