

**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. 20-11

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FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 13, 2020, appealing a denial of a promotion to Manager, Fire Code Compliance Section (FCC), Division of Fire Prevention and Code Compliance, Department of Permitting Services (DPS or Department).

In his appeal Appellant alleges that the “person selected does not have managerial experience except with a personal company that she is involved with.” Appeal Form, p. 2. Appellant further alleges that:

The same individual prior to all candidates being interviewed went to another candidate and told him directly that they offered her the position. Additionally there is a serious conflict of interest because the questions were produced by Mr. [RM] that vacated the position. Mr. [RM] and the selected candidate are in business together.

Id.

Appellant also complains that he only found out about the promotion when an officewide announcement was issued.

Because the appeal did not include a copy of a formal notification of nonpromotion, as required by Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), by letter dated February 13, 2020, the Board stayed the processing of the appeal and requested submission of a copy of the notification of nonselection/nonpromotion. On February 18, 2020, Appellant provided a copy of a February 11, 2020, officewide email announcing the promotion of another employee to

the position of Manager, Fire Code Compliance Section. The Board treated that document as a notification of nonselection/nonpromotion and on February 19 sent a letter to the County and Appellant setting the schedule for the County to respond to the Appeal and for Appellant to reply to the County's submission.

The County filed a response to the appeal on March 17, 2020. Appellant's due date for a reply was April 13. To date, Appellant has not submitted a reply to the County's submission.

The Appeal was reviewed and considered by the Board.

FINDINGS OF FACT

Appellant is a Permitting and Code Inspector III (Grade 23) in the County Fire Code Compliance Section, Division of Fire Prevention and Code Compliance, Department of Permitting Services. On December 19, 2019, the County posted a vacancy announcement (IRC41489) for the position of Manager of the Fire Prevention and Code Compliance division, at the Management Leadership Service (MLS) III level, (Grade M3). County Exhibit (CX) 1.

The minimum qualifications for the Manager position were stated in the vacancy announcement for IRC41489:

Experience: Five (5) years full-time work experience in progressively responsible professional experience in managing building/fire code compliance, inspections, and enforcement operations.

Education: Graduation from an accredited college or university with a Bachelor's Degree.

Equivalency: An equivalent combination of education and experience may be substituted.

CX 1. In addition, candidates were advised of the "preferred criteria" that would be used to determine preference for interviews. The preferred criteria included, in relevant part:

- Experience as a building/fire code official managing programs responsible for the interpretation, plan review, inspection and enforcement of the following construction codes: commercial buildings, life/fire safety, fire alarm, sprinkler, and mechanical;
- Experience in building/fire code enforcement, documenting violations, providing testimony to judicial, quasi-judicial and administrative bodies;
- Experience in managing programs that feature a commitment to customer services as a central working principle and staff supervision;
- Maryland Fire and Rescue Institute Fire Inspector, I or Equivalent Certificate;
- Experience in working with clients of diverse backgrounds and skills, individually and in groups, to provide service and communicate decisions/policies.

Id.

Appellant's resume indicates that since 2015 he has been employed by DPS as a Fire Code Inspector III (Grade 23). CX 3.¹ Prior to joining DPS Appellant served with Prince George's County Fire and Emergency Medical Services from 1992 to 2014 in progressively more responsible positions, rising from the rank of Firefighter to Lieutenant, Captain, and finally Battalion Chief. *Id.* Appellant earned an Associate of Applied Science in Fire Science at the College of Southern Maryland, but it does not appear that he has a bachelor's degree. Appellant's considerable amount of relevant work experience was undoubtedly deemed to be an appropriate substitute for the education requirement. Appellant also attended numerous continuing education courses and received several certifications. Appellant timely applied for the promotion, was found to be "Qualified," placed on the eligible list, and selected for an interview. Appellant's interview was conducted by a three-person interview panel on January 27, 2020. CX 3.

The resume of the selected candidate, [REDACTED] (PW), indicates that since 2016 she had been employed by DPS as a Senior Permitting Services Specialist (Grade 26). CX 2. Prior to her employment by DPS Ms. PW held various progressively responsible positions: Lead Fire Test Engineer with the Bureau of Alcohol, Tobacco, Firearms and Explosives; Fire Protection Engineer, Deputy Fire Marshal, NASA Goddard Space Flight Center; Engineer III and then a Senior Fire Protection Engineer with Montgomery County Fire and Rescue, Office of the Fire Marshal. From 2011 to at least the date of her application Ms. PW was also a partner in Q-DOT Engineering, LLC, an engineering company in York, Pennsylvania, "with approximately 30 employees including engineers, inspectors, and administrative staff." CX 2. Ms. PW earned a Bachelor of Science in Fire Protection Engineering from the University of Maryland, College Park and obtained postgraduate education, as well as numerous licenses and certifications. Ms. PW is a Registered Professional Engineer (PE) in Maryland and five other states, and a Certified Safety Professional (CSP). Ms. PW is a member of various boards and committees, including being a director of the Maryland Building Officials Association. Ms. PW was also found to be "Qualified," placed on the eligible list, and selected for an interview. Ms. PW's interview was conducted by the same three-person interview panel on January 29, 2020. CX 2.

The interview panel asked both Appellant and Ms. PW the same nine job related questions.² County Response, CX 2 & 3. The rating of candidates was by consensus. The consensus ratings by the interview panel were that Appellant's responses were "Average" on questions 2 A & B, 3, and 4, those that measured Job Qualifications. On the questions concerning Sound Judgment/Problem Solving Appellant was rated as "Average" on question 1 but "Below Average" on questions 6 and 7. Similarly, in the category of Results Orientation Appellant was rated as "Average" on question 1 but "Below Average" on questions 2 C and 5. CX 3. Appellant was rated as "Not Recommended" by the interview panel based on his responses to the interview questions, with an overall numerical score of 23.

Ms. PW's answers to all three Job Qualifications questions were rated as "Well Above Average." CX 2. For the Sound Judgment/Problem Solving questions she was rated as "Above

¹ While Appellant's formal classification is Permitting and Code Inspector III his working title appears to be Fire Code Inspector III.

² We say that there are nine questions because the interview sheets list seven questions with question two consisting of three subparts. County Response, CX 2 & 3.

Average” on question 7 and “Average” on questions 1 and 6. Ms. PW’s answers to questions 2 C and 5 in the Results Orientation category were rated as “Well Above Average,” while her answers to question 1 was rated as “Average.” Ms. PW was rated as “Recommended” by the interview panel based on her responses to the interview questions, with an overall numerical score of 38. CX 2.

On February 11, 2020, [REDACTED], the FCC Division Chief, sent a broadcast email to all DPS staff announcing the selection of PW as the Manager of the FCC. *See* Notice of Nonselection. Appellant responded to the email, saying that “[a]s one of the personnel who was in the interview process, I find this unpleasant to be notified in such a manner.” A short time later [REDACTED], a DPS Permitting Services Manager and a member of the interview panel, responded to Appellant: “I’m very sorry that you were notified this way. I wasn’t aware that other candidates had not been notified directly.” *Id.*

APPLICABLE CODE PROVISIONS AND REGULATIONS

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

§ 33-9. Equal employment opportunity and affirmative action.

(c) *Appeals by applicants.* Any applicant for . . . 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:

§ 6-14. 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. . .

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

Appellant Has Failed to Show That His Nonselection Was Improper

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.

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 his substantial burden of proof.

The selection of a candidate for the Manager, Fire Code Compliance Section position was based on applicant ratings assigned by the three-person interview panel based on the answers to job related questions asked of all applicants selected for interviews.

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 her rating as “Recommended.” Documents submitted by the County indicate that Appellant and the selected candidate were interviewed on the same questions and that the selected candidate performed significantly better than Appellant. The un rebutted evidence of record indicates that the selected candidate was the best qualified. 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. As Appellant was rated “Not Recommended,” the Department would have had to justify bypassing the selected candidate. The County Personnel Regulations and selection guidelines certainly do not require an agency to take those extraordinary steps.

Appellant alleges that the “person selected does not have managerial experience except with a personal company that she is involved with.” Appeal Form, p. 2. While it is true that the minimum experience requirements for the position includes five years full-time work experience in “managing building/fire code compliance, inspections, and enforcement operations” and that Ms. PW’s experience in the private sector may not have been full-time, the rest of her resume reflects significant professional and managerial experience. Indeed, the interview panel rated her as “Well Above Average” in job qualifications.

In a nonselection 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. 20-04 (2020); MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). Given Ms. PW’s impressive resume it would be difficult for Appellant to show that he was clearly more qualified. Other than his allegation that she lacked management experience, which we discussed and disposed of above, Appellant has made no attempt to argue that he is more qualified or in what way.

Nor has Appellant provided any evidence to support his belief that he was denied the promotion for reasons other than those related to his relative qualifications. We do not find any evidence in the record to establish arbitrary and capricious or illegal conduct on the part of the Department. The County correctly notes that Appellant provided no evidence to substantiate his claim that the selected candidate is in business with former incumbent, RM. Just as importantly, he has suggested no reason why her business relationship with the prior Manager, even if true, would have had any bearing on the interview panel’s recommendation. Appellant does not suggest that Appellant’s business partner attempted to or was in a position to directly influence the interview panel’s assessment of the candidates. He does not allege that the three members of the interview panel were improperly subjected to any attempted influence or that they would have

allowed such an attempt. Nor did Appellant provide evidence to support his allegations that RM provided questions to the interview panel or why that would have been improper. We assume Appellant is implying that RM must have shared the interview questions with Ms. PW. But speculation is not proof, and even Appellant stops short of alleging that such an ethical breach actually occurred.

Nor did Appellant provide evidence to support his allegations that prior to all candidates being interviewed Ms. PW told another unnamed candidate that she had been offered the position. While hearsay is admissible in administrative proceedings, it must be credible and of sufficient probative force. In this instance we have doubt concerning the reliability of such second level hearsay, also referred to as “hearsay within hearsay.” *See Travers v. Baltimore Police Department*, 115 Md. App. 395, 413 (1997). Appellant’s failure to even provide an explanation for why he did not identify the unnamed candidate, let alone produce an affidavit from the person, raises significant concerns over the reliability of the hearsay. *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725-26 (1989). Appellant cannot rely on this slimmest of reeds to make his case.

There is simply no reliable evidence to support Appellant’s bald allegations of favoritism or unequal treatment. Indeed, even when the selected candidate and the Appellant are both known to those involved in the selection process it is not enough for us to conclude that there had been improper favoritism to one of them. *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.”). Appellant has not provided any evidence that the hiring process was procedurally flawed in any way or based on favoritism. Allegations without proof may not form a basis for us to uphold the appeal. *MSPB Case No. 20-04 (2020)*. *Cf.*, *MSPB Case No. 15-31 (2015)*, n. 2.³

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Manager, Fire Code Compliance Section position, and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations. MCPR § 7-1. As we stated in a prior failure to promote case, “[s]election of a higher rated candidate is consistent with the County personnel regulations.” *MSPB Case No. 17-05 (2017)*. *See MSPB Case No. 20-04 (2020)*.

Finally, while Appellant was understandably disturbed that he found out about Ms. PW’s promotion when a Department wide announcement was made, that minor discourtesy does not reflect on the propriety of the selection process. We see no violation and believe that the immediate apology to Appellant was appropriate and sufficient.

Accordingly, we find no merit in Appellant’s claim that he was improperly denied promotion to a position for which he was the best qualified and that Appellant has not met his heavy burden of proving that the County’s decision was arbitrary, capricious or based on other

³ It is significant that despite being provided with the opportunity, Appellant did not contest the County’s Response. *See MSPB Case No. 16-01 (2015)*.


non-merit factors. MCC, § 33-9(c); MCPR, §34-9(d)(2).

ORDER

Because Appellant has failed to demonstrate that the County's decision on his application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, the appeal of his nonselection for the position of Manager, Fire Code Compliance Section, Division of Fire Prevention and Code Compliance, 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
June 5, 2020


Harriet E. Davidson
Chair