

**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. 20-13

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ORDER OF DISMISSAL

Appellant officially filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on March 2, 2020, alleging a denial of a promotion by the Department of Health and Human Services (DHHS).¹ On the appeal form Appellant stated that the date he received the Department’s notice of denial was February 20, 2020. Appellant did not include the notice of denial when filing his appeal.

In a nonselection/nonpromotion appeal, Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), requires that “a copy of the notification of nonselection/nonpromotion must be provided.” Accordingly, by letter dated March 2, 2020, the Board stayed the processing of the appeal and requested submission of a copy of the notification of denial. Appellant responded by email stating that it would be “impossible to provide” the notice. Appellant’s email further explained:

The position was filled via promotion but the issue is that the job was never posted. Though a competitive promotion, management gift wrapped this position to an employee without going through the proper process.

¹ The appeal was submitted online Friday, February 28, 2020. Because the MSPB offices are not open on Fridays, the appeal was officially considered received the next business day, Monday, March 2, 2020. *See* MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

There was no selection or interview process thus no “copy of the notification of nonselection/nonpromotion” by myself or any other employee is going to exist.

Nevertheless, because Appellant had not submitted a copy of a notice of denial of employment pursuant to MCPR § 35-4(d)(3), the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why his appeal should not be dismissed for failure to comply with Board procedures regarding notice or for failure to exhaust administrative remedies. In response, on March 10, 2020, Appellant provided a copy of a February 20, 2020, email announcing the appointment of a Ms. RM as an Income Assistance Program Specialist III in the DHHS Germantown office.

The County filed a Response to Show Cause Order Requesting Dismissal on March 16, 2020, arguing that the February 20 email submitted by Appellant was not a notice of nonselection/nonpromotion, as required by MCPR § 35-4(d)(3). The County points out that “Appellant’s allegations are not that he was not selected for the position, but rather, he was not able to apply in the first place because the County used an expired qualified/well-qualified list, allegedly in violation of established procedures, that he was not on.”

MCPR § 34-4 provides, in part: “An eligible employee . . . may file a grievance if the employee was adversely affected by an alleged:

(c) improper, inequitable, or unfair act in the administration of the merit system, which may include . . . promotional action that was arbitrary and capricious or in violation of established procedures . . .

The County grievance procedure is designed to promote dispute resolution “at the lowest level” under “specific and reasonable time limits for each level or step.” MCPR § 34-3(a). The time within which to file a grievance is 30 calendar days after the date on which an employee knew or should have known of the occurrence or action on which the grievance is based, or the date on which he received a notice specifically required by the County regulations. MCPR § 34-9(a)(1). Step one of the grievance procedure provides that an employee shall initially file a grievance with the employee’s immediate supervisor. Step two requires that “within 10 calendar days after receiving the department’s response” an employee may file the grievance with the CAO. MCPR §34-3(e). A grievance appeal to the MSPB may be filed within 10 working days after the CAO’s step two decision is received by the employee. MCPR §34-3(e); §35-3(a)(3).

While Appellant has alleged that a promotion occurred as a result of the County failing to follow proper procedures, Appellant does not contend that he applied for the prior promotional opportunity that resulted in an eligible list being created and, according to him, improperly extended. We fail to see how Appellant can maintain a nonselection/nonpromotion direct appeal to the MSPB when he was never an applicant for the position. Instead, Appellant’s proper recourse is to file a grievance concerning the promotional process at issue. *See* MCPR § 27-4(a).


Appellant’s failure to file a grievance and to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust his administrative remedies that must result in the dismissal of this appeal. *See* MSPB Case No. 15-28 (2015). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies and is dissatisfied with the CAO’s decision.

Appellant has filed a second appeal concerning his allegations of an improper promotional process, which we docketed as MSPB Case No. 20-14. In that appeal he is asking the Board to review the failure of the CAO to respond to his generalized request for an interpretation of a regulation. In our letter acknowledging that appeal we suggested to Appellant that the regulation concerning Interpretations of Personnel Regulations specifically provides that while an “employee may not grieve or appeal a written CAO interpretation,” an employee may file a grievance under MCPR § 34 or file an appeal with the MSPB under § 35 “over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action.” MCPR § 2-3(c)(2).

For the reasons set out above, it is hereby **ORDERED** that the appeal in Case No. 20-13 be and hereby is **DISMISSED**.

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 18, 2020


Harriet E. Davidson
Chair