

**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. 20-12

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FINAL DECISION

████████████████████ (Appellant) filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 27, 2020. Appellant is appealing a conditional offer of employment for an Administrative Specialist II position (Grade 21) (Call Center Supervisor) in the Department of Finance that was rescinded when the background credit check revealed that she had a significant amount of overdue and unpaid credit card debt. That same day the MSPB sent a letter to Appellant acknowledging the appeal and requesting that she submit a copy of the notification of nonselection, as required by the Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3). The Office of Human Resources (OHR) and the Office of the County Attorney (OCA) were copied on the letter from the Board and provided with the filing.

In response to the MSPB’s request, on March 3, 2020, Appellant submitted a letter from OHR dated February 19, 2020. Because the February 19 letter was not a notification of nonselection a second letter from the MSPB was sent advising Appellant: “The February 19 letter states only that the County will be deciding on your application at some point. The MSPB cannot proceed with your appeal until you have submitted a Notice of Nonselection.” OHR and OCA were again copied and provided with the document Appellant submitted.

Appellant received a letter dated March 9, 2020, rescinding the conditional offer of employment and submitted it to the Board on March 11. The MSPB then sent a scheduling letter on March 12, 2020. The County submitted its response on May 4, 2020. Appellant’s reply was due May 25, 2020. To date, Appellant has not filed a reply or otherwise communicated with the MSPB.

FINDINGS OF FACT

Appellant applied for an Administrative Specialist II position (Grade 21), Call Center Supervisor, in response to County job posting IRC40968. County Exhibit (CX) 1. The position is in the Department of Finance and has access to Countywide systems concerning public assets and citizen tax information. CX 3. Appellant was informed in the job posting that she would be subject to a background investigation, including a check of her credit history. The job posting further advised that the background check “will be a significant factor in the hiring decision.” CX 1.

Appellant was interviewed and selected for the position, receiving a conditional offer of employment on January 22, 2020. CX 2. The offer explained that it was contingent upon a background investigation “and on the absence of any additional information that materially bears upon your . . . suitability for employment.” *Id.* The offer concluded by stating that if the County received “information evidencing a job-related factor that would hinder or prohibit . . . satisfactory performance of the duties and responsibilities of the position . . . the County reserves the right to withdraw this conditional job offer.” *Id.*

The Department of Finance determined that a credit check was necessary because an employee in the position would have access to countywide systems that “secure public assets.” CX 3, Affidavit of JC, Contracts and Special Programs Manager, Department of Finance, April 23, 2020, ¶10. According to the Affidavit of JC, he drafted the Department of Finance policy in 2017. CX 3, ¶8.¹ The guidelines include a requirement that individuals with three or more instances of bad debt in the past seven years, and a total bad debt exceeding \$10,000 not be hired. CX 3, ¶12; CX 5. The Department’s policy also considers whether the trend in bad debt is getting better or worse. CX 5.

The background credit check revealed that Appellant had a significant amount of overdue and unpaid credit card debt. CX 6. The credit report showed that Appellant had four instances of “bad debt” and that the debt was well in excess of \$10,000. Specifically, Appellant had overdue credit card debts with █████ (\$14,622), █████ (\$2,605), and █████ (\$4,974). CX 6. In addition, the credit report disclosed that on October 16, 2019, Appellant was sued by █████ for unpaid credit card debt. *Id.*

By certified letter dated February 19, 2020, OHR provided Appellant with a copy of the credit report and an opportunity to contest it or to provide an explanation. CX 6. Appellant did not respond to the February 19 letter but instead filed an Appeal with the MSPB on February 27. The Appeal form stated that Appellant had been denied employment because of the credit check. Because the Appeal did not include the February 19 letter, the MSPB wrote Appellant a letter requesting that she submit a notification of nonselection, as described above.

The Appeal said that Appellant had been employed with the State Department of Assessments and Taxation for 13 years with a spotless record. Appellant acknowledged the unpaid

¹ The Department of Finance guidelines on background checks drafted by JC, the Contracts and Special Programs Manager, and used since he drafted them in 2017 were submitted as CX 5. The County provided no explanation as to why a document reflecting a policy in place since 2017 was labeled “DRAFT Nov. 2017.” It should go without saying that the County must provide the final adopted versions of a policy or guideline it wishes to introduce, or provide an explanation of why one cannot be provided.

debts, explaining that her husband has medical issues resulting in a substantial drop in income. Appellant also stated that “we have even considered bankruptcy.”

Appellant alleged in her Appeal that she “was denied the position and did not receive the results of my background check via e-mail or through the U.S. mail.” On March 3, 2020, Appellant sent the MSPB an email apologizing for submitting the wrong document with her appeal and attaching a copy of the February 19, 2020 letter from OHR. Appellant did not explain how or when she had received the February 19 letter or why she believed she had been denied the position when the letter explicitly stated that she was being offered an opportunity to contest the credit report or explain why she should be hired notwithstanding the credit report.

On March 9, 2020, based on the credit report and having received no reply to its February 19 letter, the County rescinded the conditional offer of employment. CX 7.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action, which provides, in pertinent part:

(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 relevant part:

§ 6-4. Reference and background investigation requirements; Review of applications.

- (a)
 - (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job related personal characteristics of applicants and employees.
 - (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
 - (3) All applicants and employees must comply with established reference and investigation requirements.
- (b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if: . . .

(5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

§ 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, 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

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 County may establish the qualifications for a position and conduct a background investigation before selecting an applicant for a position. MCPR § 6-4(a)(1). If job related, the background investigation may include a credit history check. MSPB Case No. 15-23 (2015). *See* MCPR § 6-4(b)(5).

The Department of Finance reasonably determined that the Call Center Supervisor position should be subject to a credit check because an employee in the position would have access to countywide systems that "secure public assets." CX 3. The Department's guidelines include a requirement that individuals with three or more instances of bad debt in the past seven years, and a total bad debt exceeding \$10,000 not be hired. CX 3, ¶12; CX 5. The Department's policy also considers whether an applicant's credit problems are recent and whether there is a trend reflecting improvement. CX 5.

According to the Affidavit of JC, the Contracts and Special Programs Manager, the guidelines have been in use by the Department since he drafted them in 2017. CX 3, ¶8. As noted above, the County provided no explanation as to why the copy of the guidelines submitted as CX 5 was labeled "DRAFT Nov. 2017."

However, even if the 2017 Guidelines were not formalized, Appellant's credit history was disqualifying under Department of Finance policy and Board precedent predating 2017. In MSPB Case No. 15-23 (2015), a case involving an applicant for a position in the Department of Finance, the Board ruled that the County may decide that "any blemish on [a] credit record, even if it had eventually been resolved, could call into question [an applicant's] fitness" because "trust is of paramount importance in a position in an office that handles financial transactions."

Appellant acknowledges the large amount of unpaid debt and does not deny that her credit history and financial situation are troubling. Appellant instead argues that she has been a reliable and trusted employee of the State for 13 years and is of good character. Nevertheless, Appellant's financial difficulties are the result of her husband's declining health and are relatively recent. Appellant's admission that she has considered bankruptcy suggests doubt that the situation is likely to improve anytime soon.

Under these circumstances it is entirely sensible for the County to be concerned about Appellant's fitness for a Call Center Supervisor position and to be leery of trusting her with access to sensitive County financial systems. Appellant has not therefore carried her burden of proof to show that the County's action was arbitrary, capricious or illegal.

Moreover, the Board has also held that since the Board must decide "based on the written record in the application process, and absent extraordinary circumstances, . . . it will not consider evidence that was not submitted during the application process." MSPB Case No. 15-14 (2015), p. 5, n. 4. Because Appellant failed during the hiring process to provide to the Department an explanation of why she is suitable for the position despite her credit history, she may not do so for the first time on appeal to the Board. *See* MSPB Case No. 15-23, p. 7, n. 9.

For these reasons the Board finds that Appellant has failed to prove that the County's decision on her application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

Based on the above analysis, Appellant's appeal of the County's rescission of her conditional offer of employment for the position of Administrative Specialist II (Call Center Supervisor, 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
August 24, 2020


Harriet E. Davidson
Chair