

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

████████████████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

*
*
*
*
*
*
*
*
*
*
*
*

CASE NO. 23-02

=====

FINAL DECISION

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of ██████████ (Appellant) from the determination of the Montgomery County Office of Human Resources (OHR) Occupational Medical Services (OMS) division that Appellant was not medically acceptable to perform the duties of a Security Officer I. The Appeal was officially filed August 29, 2022.¹ The County filed its response to the appeal (County Response) on September 28, 2022. Additional information was supplied by the County on December 14, 2022, in response to the Board’s request for clarification of the recruitment timeline. Appellant did not file a reply to either County submission.

The appeal was considered and decided by the Board.

FINDINGS OF FACT

On April 27, 2021, the County posted a recruitment notice (IRC47985) for five vacant Security Officer I positions with the Montgomery County Police Department (MCPD). County Exhibit (CX) 1. The recruitment was open and accepted applications through May 11, 2021. Appellant applied on May 11, 2021. CX 6. Appellant was placed on the Eligible List rated as “Well Qualified” on June 25, 2021, and was interviewed on November 1, 2021. CX 6.

¹The envelope containing Appellant’s appeal was apparently hand-delivered through the MSPB office door mail slot at a time or date that the MSPB office was not open. Accordingly, the appeal is considered to have been officially received the next Board business day. See MSPB Case No. 18-13 (2018).

On November 21, 2021, Appellant was provided with a background check booklet to complete, and he returned the completed form on March 17, 2022. CX 6. After a successful background check was completed, the County sent Appellant an email with a conditional offer of employment on May 20, 2022. CX 4. The conditional offer of employment was subject to a medical evaluation finding that Appellant met the medical standards for employment. CX 4.

The job specifications require that candidates undergo a Medical Exam Protocol involving a Core Exam with a Drug/Alcohol Screen. CX3. *See* Montgomery County Personnel Regulations (MCPR) §8-6(b)(2)(C).

The job specifications for a Security Officer I position (CX3) state that:

Employees may encounter threatening situations and unknown risks when responding to security incidents, and confront abusive and combative individuals in unlawful acts. Work requires continuous periods of patrolling County buildings and other facilities and typically involves . . . walking, climbing stairs, pushing, pulling, etc. Employee is subject to adverse weather conditions while patrolling and to occasional confrontations with unruly, aggressive people and other situations involving some risk to self, requiring attention to safety precautions to avoid injury.

Appellant was examined by Dr. [REDACTED] of OHR's Occupational Medical Services. The medical examination found that Appellant had uncontrolled diabetes mellitus, non-insulin-dependent diabetes (NIDDM). CX 2 (unredacted). After the medical examination Dr. [REDACTED] concluded:

I cannot clear him based on end organ disease and continued out of controlled diabetes long standing. He has had a cva² 2019 with complete occlusion of the rt vertebral artery, Cardiac stented RCA³ 2021 and appears despite aggressive diabetic therapeutic interventions has had uncontrolled diabetes at least since 6/2019 to and including to 6/2022.

His risk of sudden incapacitation based on the potential physical demands of a security officer which could include carrying a gun, having to run- restrain another in role of a body guard assigned to protect a county VIP in MCO makes it to [*sic*] risky to clear him for this position. He is not fit for duty at this time. CX 2 (unredacted)

Regarding the Not Fit for Duty determination, Dr. [REDACTED] also said "If at a latter [*sic*] time he has his diabetes in good control then he may reapply and have his medical evaluation reconsidered." CX2 (unredacted).

Neither the jobs specifications nor the job posting mention that an employee in a Security Officer position would be required to carry a firearm. CX 1; CX 3.

As a result of the medical evaluation, Occupational Medical Services notified MCPD on August 9, 2022, that, after completing his medical examination, Appellant was not fit for duty. CX

² CVA is an abbreviation for a cerebrovascular accident.

³ RCA is an abbreviation for the right coronary artery.

6. That same day MCPD sent Appellant a notice rescinding the conditional offer of employment. CX 5, CX 6.

In response to the Board's request for clarification of the timeline of Appellant's application and eventual nonselection, on December 14, 2022, the County submitted an Affidavit from [REDACTED], a Program Manager II with MCPD. CX 6.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Personnel Regulations, Section 8. Medical Examinations and Reasonable Accommodation (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015), provide in pertinent part:

§8-1. Definitions.

(b) *Conditional offer*: An offer of County employment that the OHR Director may withdraw if the applicant fails to meet the medical requirements for the position. .

(f) *Fitness-for-duty evaluation*: A medical evaluation of an employee to determine if the employee has a physical or psychological condition that affects the employee's ability to perform the essential functions of the employee's job.

§8-3. Medical requirements for employment.

(a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position. . .

§8-6. Required medical examinations of applicants; actions based on results of required medical examinations.

(a) *Medical and physical requirements for job applicants.*

(1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class. . .

(b) *Medical exam protocols*

(2) *Types of medical exam protocols.*

(C) Core Exam. This protocol includes the same requirements as the limited core exam, but also includes a physical examination by a physician, urinalysis, EKG, additional blood tests, and additional tests for communicable diseases. . . This protocol is for applicants for positions in occupational classes that involve:

- (i) moderate or heavy physical demands;
- (ii) significant exposure to potentially aggressive or combative people;
- (iii) emergency communications; or
- (iv) frequent shift rotation.

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 the burden of proving that the County's decision on his application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 21-12 (2021); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). *See* MCPR § 34-9(d)(2).

The Board has held in numerous cases that a County determination on whether a medical or psychological condition impacts an applicant's ability to perform a job should be given "significant deference" or "substantial latitude" absent a showing that it is arbitrary, capricious, or clearly unsupported by facts. *See, e.g.*, MSPB Case No. 15-30 (2015); MSPB Case No. 13-01 (2012); MSPB Case No. 03-01 (2003).

The criteria used to screen out an applicant with disabilities as part of a medical examination "must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation. . .". 29 C.F.R. § 1630.14(b)(3). A determination that there is a significant risk of substantial harm to the health or safety of the applicant or others that cannot be eliminated or reduced by reasonable accommodation must "be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." 29 C.F.R. § 1630.2(r). That determination "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Id.*

There are two prior MSPB decisions concerning diabetic applicants for Police Officer positions where the applicants were determined to not be fit for duty. *See* MSPB Case No. 07-09 (2007) (Where applicant had "extremely erratic fluctuations in blood glucose levels" it was "reasonable for Dr. [REDACTED] to conclude that because of the symptoms associated with erratic fluctuations in blood glucose levels caused by Type I Diabetes Mellitus, Appellant was not fit for duty as a Police Officer Candidate as Appellant would be unable to perform the essential duties of the position."). *See also* MSPB Case No. 02-08 (2002). Similarly, in this appeal Dr. [REDACTED] found that Appellant had uncontrolled diabetes mellitus.

Despite Dr. [REDACTED]'s mention that the job "could include carrying a gun" when that may not be the case, he identified the physical demands of a Security Officer position, such as "having to run- restrain another." The physical demands of the Security Officer job are thus comparable in key respects to those of a police officer. We find that the medical examination and evaluation

identified significant and undisputed medical conditions that would impair Appellant's ability to perform the essential functions of a Security Officer position and posed a significant risk of substantial harm to himself and others. CX 2 and 3.

Appellant did not file a reply to the County's submission. In nonselection cases where the appellant has the burden of proof it is significant when an appellant does not file a response. MSPB Case No. 20-16 (2020) ("Finally, we note that it is significant that despite being provided with the opportunity, Appellant did not contest the County's Response to his appeal. *See* MSPB Case No. 20-11 (2020); MSPB Case No. 16-01 (2015)"). Indeed, Appellant has provided no basis to support his appeal. Appellant's appeal simply says that he is appealing the County's decision to rescind the offer of employment and wants a reevaluation of his application. Appellant offers no explanation of why he believes the County's decision was in error. In sum, the Board has no choice but to conclude that Appellant has failed to carry his burden of proof.⁴


Accordingly, the Board must deny the appeal and uphold the County's decision to rescind the contingent offer of employment.


ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Security Officer (IRC47985). It is further **ORDERED** that should Appellant apply for a future Security Officer position the County will reconsider Appellant's medical acceptability based on his then existing medical condition.

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 of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
February 14, 2023


Harriet E. Davidson
Chair

⁴ There is no suggestion in the record that Appellant requested a reasonable accommodation or that a reasonable accommodation is possible. In this regard we note that Appellant did not respond to Dr. 's effort to contact him. CX 2 ("I did attempt to call him and left a message on listed telephone last week and have not heard back from him to discuss this.").