

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

IN THE MATTER OF

████████████████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

APPELLEE

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CASE NO. 24-09

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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 Police Officer Candidate. The Appeal was officially filed February 5, 2024.¹ The County filed its response to the appeal (County Response) on March 5, 2024. Appellant did not file a reply to the County submission.

The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a Grade P1 position as a Police Officer Candidate with the Montgomery County Police Department (MCPD). The class specification, job posting, and conditional offer indicated that candidates were required to successfully complete a medical

¹The appeal was submitted online to the MSPB on February 2, 2024, at 12:19 a.m., a date and time when the MSPB office is not open. The appeal was officially received by the MSPB the next Board business day. *See* MSPB Case No. 18-13 (2018).

examination protocol. *See* CE Ex. 1; CE Ex. 3; CE Ex. 4. The medical examination protocol specified for the position was a Core I exam.² *See* CE Ex. 3.

On October 18, 2023, appellant was issued a conditional offer of employment for the position, subject to her satisfying the County's medical standards for employment. *See* CE Ex. 4. Appellant presented for the physical examination on three separate occasions: October 30, 2023, November 27, 2023, and January 8, 2024. *See* CE Ex.2. As noted by the County's Employee Medical Examiner (EME), Dr. [REDACTED], appellant failed to meet the fitness requirements as established by the County on all three occasions.³ *Id.*

On January 24, 2024, appellant's conditional offer was withdrawn based on the EME's assessment that she did not meet the required medical standards for the position. *See* CE Ex. No. 2.; CE Ex. No. 5.

On February 2, 2024, appellant filled out an MSPB appeal form in which she alleged that the Department's decision was wrong because, after the conditional offer was withdrawn, she sought out her "primary physician who conducted an electrocardiogram (ECG) with favorable results." *See* 24-09 Appeal Form. Appellant further indicated that the action she wanted the Board to take was to "reconsider [her] situation, giving [her] more time to demonstrate that [her] body is healthy and fit to continue being part of this process." *Id.*

APPLICABLE CODE PROVISIONS AND REGULATIONS

MCPR Section 6. Recruitment and Application Rating Procedures

§ 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.

MCPR Section 8. Medical Examinations and Reasonable Accommodation

² The Core I Exam is defined as: "[Protocol that] may include the elements of the Core Exam and an exercise treadmill test, a test to determine blood type, and a respiratory function test. Physical ability testing is required for Police Officer, Deputy Sheriff, and Correctional Officer applicants. A Core I Exam is required for public safety classes that require formal medical monitoring under OSHA regulations or periodic health assessments to insure [sic] continued fitness for duty in occupations that involve high risks or occupations that require confined space entry and use of self-contained breathing apparatuses." *See* Montgomery County Personnel Regulations § 8-6(b)(2)(D).

³ "Per Montgomery County requirement, Police Officer Candidates must have a maximum heart rate of 90% or less of predicted maximum and reach stage 4 (12 METS) in order to meet standards of fitness. On initial evaluation, [appellant] was able to complete the test of 12 METS but her maximum heart rate was 99% of predicted maximum, above the limit of 90% of predicted maximum. Candidates are given 3 attempts to achieve this goal. [Appellant] returned for a second attempt on 11/27/23 and reached a maximum heart rate of 98% of predicted maximum. Her third attempt was made on 1/8/24, at which time she again completed the test but her maximum heart rate was 93% of predicted maximum, again above the 90% limit required for applicants for the Montgomery County Police Department. Because [appellant] did not meet the fitness requirements as established by the County, she was rated as Not Fit For Duty." CE Ex. 2.

§ 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[.]

§ 8-4. Medical standards and guidelines for medical examinations and pre-employment inquiries.

(a) Policy on medical standards and guidelines.

(1) The CAO must establish, consistent with the ADA:

(A) medical standards for positions and occupations; and

(B) guidelines for medical examinations and pre-employment inquiries.

(2) Medical standards and guidelines for medical examinations and pre-employment inquiries must be:

(A) job-related and used to determine if the applicant or employee can perform essential functions of the job with or without accommodation; and

(B) applied uniformly and consistently to all applicants and employees who are offered employment or employed in the same job class or occupational class.

(3) When performing medical examinations or inquiries, the EME must conduct an individualized assessment of an individual's current health status and functional capabilities:

(A) in relation to the essential functions, physical and psychological demands, working conditions, and workplace hazards of a particular occupation or position; and

(B) under appropriate occupational health guidelines and practices that are consistent with applicable Federal, State, and local statutes and regulations.

(4) The EME may refer an applicant or employee to another health care provider for an independent medical evaluation as necessary.

(5) The EME must not conduct medical examinations and pre-employment inquiries to determine if an applicant or employee has a disability or the nature or severity of the disability unless the examination or inquiry is job-related and consistent with business necessity.

(6) The EME must:

(A) maintain records of medical equipment maintenance and calibration;

(B) comply with regulatory medical testing requirements;

(C) educate Occupational Medical Services (OMS) staff in proper examination and testing procedures; and

(D) use certified laboratories for applicant and employee testing.

§ 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.

(D) Core I Exam. The elements of the Core I Exam may include the elements of the Core Exam and an exercise treadmill test, a test to determine blood type, and a respiratory function test. Physical ability testing is required for Police Officer, Deputy Sheriff, and Correctional Officer applicants. A Core I Exam is required for public safety classes that require formal medical monitoring under OSHA regulations or periodic health assessments to insure continued fitness for duty in occupations that involve high risks or occupations that require confined space entry and use of self-contained breathing apparatuses.

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

In a nonselection appeal, the appellant has the burden of proving that the County's decision was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. *See* Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); Montgomery County Personnel Regulations (MCPR) § 34-9(d)(2). The County argues that appellant has failed to prove that the County's decision was arbitrary, capricious, or illegal. The Board agrees and concludes that appellant's appeal is denied.

The County is authorized to establish medical standards for each County position. *See* MCPR § 8-4(a)(1)(A). An applicant must meet the required medical standards to be considered for the position. *See* MCPR § 8-3(a). The County may withdraw an offer of employment if the applicant fails to meet the medical standards for the position. *See* MCPR § 8-1(b).

In the instant case, appellant applied for a position as a Police Officer Candidate and the job specifications stated that her employment was conditioned on her successful clearance of the medical examination protocol for the position. Because of public safety concerns, it is reasonable for the County to not select a Police Officer Candidate who would be unable to perform the essential duties of the position. *See* MSPB Case No. 07-09 (2007) (where applicant had "extremely erratic fluctuations in blood glucose levels" it was reasonable for the medical examiner to conclude that the applicant was not fit for duty as a Police Officer Candidate).

There is no dispute that appellant failed to meet the fitness requirements specified for the Police Officer Candidate position. *See* CE Ex. 2. Appellant has provided no evidence that the County's decision to withdraw her conditional offer, based on her failure to meet those fitness requirements, 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. *See* Montgomery County Code, § 33-9(c); MCPR, § 6-14. As such, we conclude that appellant has not met her burden of proof and her appeal is denied.

We note that, going forward, appellant is free to apply for any open County position and undergo a new medical evaluation if required.⁴

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from her nonselection for the position of Police Officer (IRC57963). It is further **ORDERED** that, should appellant apply for a future position, the County will reconsider appellant's medical acceptability based on her 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

⁴ Should appellant experience nonselection after applying for a new position, such nonselection would be treated separate and apart from the instant case. Appellant would maintain appeal rights to the MSPB pursuant to Montgomery County Code § 33-9 and MCPR § 6-14.

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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
April 29, 2024


Barbara S. Fredericks
Chair