

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

IN THE MATTER OF

[REDACTED]

APELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 24-15

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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 [REDACTED] (Appellant) from the determination of the Montgomery County Office of Human Resources (OHR) Occupational Medical Services (OMS) division that Appellant was rated Not Fit for Duty as a Customer Service Representative in the Office of Animal Services. The appeal was filed April 25, 2024. On May 28, 2024, Montgomery County Government (County) filed its Response to the Appeal. Appellant did not file final written comments.

The Board has determined that the record is complete based upon a review of the documents and exhibits provided by the parties and issues the following Decision.¹

¹ Appellant did not label Appellant's attachments. For ease of reference, the Board has done so. Appellant provided the following documents:

1. A. Ex. 1 – Appeal Form #272, filed on April 25, 2024.
2. A. Ex. 2 – Denial of Employment Letter, dated April 12, 2024.
3. A. Ex. 3 – Employee Medical Examiner (EME) letter dated April 12, 2024.
4. A. Ex. 4 – Maryland Medical Cannabis Commission Patient Identification Card.
5. A. Ex. 5 – Maryland Cannabis Administration Medical Marijuana Certificate.

The County provided the following documents:

1. CR. – County Response, filed on May 28, 2024.
2. CRAI – County Response to Request for Additional Information, filed on January 22, 2025.

FINDINGS OF FACT

Appellant holds a Maryland Cannabis Administration certification, which indicates that Appellant has been prescribed cannabis by her provider, N■■■■ C■■■■. A. Ex. 5. Appellant also holds a Maryland Medical Cannabis Commission Patient Identification Card. A. Ex. 4.

Appellant applied for a Grade 13 position as a Customer Service Representative I (“CSR”) with the Montgomery County Office of Animal Services (“OAS”). C. Ex. 1. The position advertisement included a notification that the selected applicant is subject to the Limited CORE medical exam, with a drug screen. C. Ex. 1. Per the position’s classification specification, Customer Service Representative I, OAS is subject to the Limited CORE medical exam. C. Ex. 5. On or about March 21, 2024, Appellant was issued a conditional offer of employment for the position. C. Ex. 2.

Per the requirements of the conditional offer, Appellant submitted to a drug test on March 26, 2024. C. Ex. 3. The laboratory that analyzed the specimen provided by Appellant reported a positive result. According to Appellant, the drug test result indicated a positive test for cannabis. A. Ex. 1. The Medical Review Officer (MRO) reviewed the results with Appellant on April 3, 2024, and determined the results to be a verified positive test. C. Ex. 3. The Employee Medical Examiner (EME) subsequently determined that Appellant was “Not Fit for Duty” due to the verified positive test result. C. Ex. 3.

Appellant was notified via memorandum dated April 12, 2024, that the County’s Employee Medical Examiner (“EME”) determined that Appellant did not meet the medical standards for the position based on a positive drug screen result. C. Ex. 3. The Office of Human Resources (“OHR”) then notified Appellant via letter dated May 6, 2024, that the conditional offer for the position was withdrawn. C. Ex. 4. Appellant subsequently appealed the nonselection to the Board.

POSITIONS OF THE PARTIES

1. Appellant

- a. The position that Appellant applied for is not properly classified as public safety or as a High Potential Risk (“HPR”) position, because, according to Appellant, a CSR with OAS “does not provide support to employees classified as Public Safety employees.”
- b. The CSR classification does not fall within the types of positions that are subject to mandatory drug screens per MCPR §§ 32-3(h)(3)(a)-(c).

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3. C. Ex. 1 – IRC61745, Customer Service Representative I, Office of Animal Services.
 4. C. Ex. 2 – Conditional Offer, dated March 21, 2024.
 5. C. Ex. 3 – Notification of Positive Drug Screen, dated April 12, 2024.
 6. C. Ex. 4 – Withdrawal of Conditional Offer, dated May 6, 2024.
 7. C. Ex. 5 – Class Specification No. 000879.

- c. While cannabis is listed as a prohibited drug in MCPR Section 32-4(F)(2), Appellant has a legitimate medical need which should exempt Appellant from the prohibition.
- d. Because there is a legitimate explanation for the presence of cannabis in Appellant's system, i.e., her medical marijuana prescription, per MCPR § 32-3(h)(15)(E) the test result should be considered as negative.
- e. Because cannabis is now legal in Maryland for recreational use, it should not be used as a disqualifier for employment.
- f. OMS informed Appellant at some unknown time in the past that Appellant's prescription for cannabis would be treated by the County as any other prescription would be treated.

2. County

- a. Appellant cannot meet the burden of proof or show that the County's decision was arbitrary, capricious, or illegal.
- b. The MCPR states that an applicant for a County position must meet the medical requirements for the position.
- c. The MCPR also states that the OHR director must designate positions as High Potential Risk (HPR) if the position is not a Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position and involves, among other things "working with dangerous materials or under hazardous conditions."
- d. The class specification at issue contains language suggesting that the position has a potential exposure to hazardous conditions; thus, the position is properly designated as an HPR for the purposes of drug screening.
- e. The job posting, the class specification, and the conditional offer also indicate that the applicant must submit to a Limited Core Exam, which includes a drug screening.
- f. Because Appellant tested positive for the presence of cannabis, the Appellant did not meet the conditions of employment, and the conditional offer was properly rescinded.
- g. Applicants are not permitted to work for the County if they test positive for marijuana, as Montgomery County is a drug free workplace pursuant to the Drug Free Workplace Act of 1988. See 41 U.S.C. 81, *et seq.*
- h. Hiring individuals who test positive or maintaining employees who test positive for marijuana places the County's federal funding in jeopardy.

APPLICABLE CODE PROVISIONS AND REGULATIONS

UNITED STATES CODE

21 U.S.C. § 812. Schedules of controlled substances

* * *

Schedule I

* * *

- (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific designation:

* * *

- (10) Marihuana

* * *

21 U.S.C. § 844. Penalties for simple possession

- (a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more

than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

MONTGOMERY COUNTY CODE

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

* * *

- (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 discrimination prohibited by chapter 27, "Human Relations and Civil Liberties," of this Code, may be filed in the manner prescribed therein. 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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

MONTGOMERY COUNTY PERSONNEL REGULATIONS, 2001

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.

SECTION 8. MEDICAL EXAMINATIONS AND REASONABLE ACCOMODATION

- 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.

* * *

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.

- (2) An applicant who receives a conditional offer of employment in a County position must:

- (A) submit a completed medical history form to OMS; and

- (B) undergo other medical examinations or tests as required by the medical exam protocol that the EME has determined is appropriate for the County position.

* * *

- (7) The County may use the results of a pre-placement medical evaluation to:

- (A) Determine the individual's current ability to perform essential functions of the offered position without significant threat to the health and safety of the individual or others;

* * *

- (b) Medical exam protocols.

* * *

(2) Types of medical exam protocols.

* * *

(B) Limited Core Exam. This protocol includes a medical history review, vision and hearing tests if the employee's position requires driving, and a drug test, if required for the position. Depending on the risks associated with the applicant's job, other tests and a hepatitis B vaccination may be required. This protocol is for applicants for positions in occupational classes that are subject to pre-employment drug screening which:

(i) are sedentary, but driving is a recurring and significant duty;
or

(ii) involve significant exposure to communicable diseases.

* * *

8-11. Appeals by applicants and grievance rights of employees.

(a) A non-employee applicant or employee applicant who is disqualified from consideration for a position or rated as medically unfit for appointment to a position may file an appeal directly with the MSPB under Section 35 of these Regulations.

* * *

SECTION 32. EMPLOYEE DRUG AND ALCOHOL USE AND DRUG AND ALCOHOL TESTING

32-1. Purpose. This section of the Personnel Regulations is intended to:

(a) establish policies and procedures to deal with employee use of alcohol and drugs;

* * *

32-2. Definitions.

* * *

(k) *Applicant*: An individual who has received a conditional job offer for a County merit system position. "Applicant" includes an employee who has applied for appointment to a position that is subject to pre-employment drug and alcohol testing.

* * *

(aa) *High Potential Risk or HPR position:* A drug/alcohol designation that the County assigns to a position if:

- (1) the position is not a Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position; and
- (2) the duties associated with the position, when performed by an employee impaired by or under the influence of drugs or alcohol, would pose a risk of substantial harm to the employee, coworkers, the public, or to public or private property.

(bb) *Illegal drug:* A controlled substance that is illegal to possess under local, state, or Federal Law.

32-3. Prevention of Prohibited Drug Use and Alcohol Misuse by County Employees under County Regulations.

(a) *Drug and alcohol prohibitions that apply to job applicants and County employees.*

- (1) An applicant for an HPR, Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position must not:
 - (A) have, at the time a urine specimen is given for a drug test, an illegal drug in the applicant's body above the established cutoff levels for the drug; or

* * *

- (2) A County employee (regardless of the drug/alcohol designation of the employee's position) must not:

* * *

- (B) perform the employee's job duties after using a prescription drug or other substance that impairs the employee's ability to perform the employee's job duties safely;

* * *

(f) *Drug/alcohol designations of County positions.*

- (1) The OHR Director must give each County position one of the following drug/alcohol designations:

* * *

(B) High Potential Risk (HPR);

* * *

(3) The OHR Director must designate a position as HPR if the position is not a Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position and involves:

* * *

(D) working with dangerous materials or under hazardous conditions;

* * *

(h) Drug and alcohol testing of job applicants and employees.

(1) Goals of drug and alcohol testing program. The County government conducts drug and alcohol testing of job applicants and employees to:

* * *

(D) protect the health and safety of employees and the public;

(E) prevent accidents and reduce liability for employee accidents and misconduct;

* * *

(3) *Pre-employment drug testing.*

(C) The County conducts pre-employment drug tests on all applicants for:

(i) HPR positions; and

* * *

(14) *Substances tested.*

* * *

(B) For drug testing under County authority, the laboratory must test specimens for the following drugs or their metabolites:

* * *

- (iv) cannabinoids (marijuana);

* * *

- (15) *Drug test results.*

* * *

- (E) If the MRO determines that there is a legitimate medical explanation for a test result, the test result will be reported to the department as negative.

* * *

- (19) Consequences of a verified positive drug test result or an alcohol test result of 0.02 or higher.

- (A) A department director must not select a job applicant who has a verified positive drug test result.

* * *

- (21) *Appeal rights of job applicants and employees subject to drug or alcohol testing.*

- (A) A job applicant may appeal to the MSPB under Section 35 of these Regulations if the applicant was denied employment or assignment to the position sought because of a verified drug test result, alcohol test result, or refusal to take a drug test.

SECTION 34. GRIEVANCES

34-9. Grievance procedure.

* * *

- (d) Burden of Proof.

* * *

- (2) The grievant has the burden of proof in a grievance on any other issue.

**SECTION 35. MERIT SYSTEM PROTECTION BOARD APPEALS, HEARINGS
AND INVESTIGATIONS**

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 the burden of proving that the County's decision to rescind its conditional offer of employment was arbitrary, capricious, or based on other non-merit factors. *See* MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). In this case, Appellant does not challenge the validity of the drug test result; rather, Appellant is challenging the County's application of the procedure to rescind a conditional offer that was made to an applicant who has a lawful prescription for cannabis. The County asserts that the rescission was proper, as the position in question is an HPR and that a positive drug screen result requires the County to rescind a conditional offer of employment.

According to MCPR § 32-2(aa), positions are designated as HPR if:

- (1) the position is not a Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position; and
- (2) the duties associated with the position, when performed by an employee impaired by or under the influence of drugs or alcohol, would pose a risk of substantial harm to the employee, coworkers, the public, or to public or private property.

Per MCPR § 32-3(h)(3), positions designated as HPR are subject to drug screening. The MCPR also states that drug screening will include testing for cannabis. *See* MCPR § 32-3(h)(14). A conditional offer of employment for a job subject to drug screening must be rescinded if an applicant tests positive for an illegal drug. *See* MCPR § 32-3(h)(19). "Illegal drug" is defined in the MCPR as any controlled substance that is illegal to possess under state, local, or federal law. *See* MCPR 32-2(bb). While Maryland law now permits the use of cannabis for medical and recreational purposes, federal law still considers cannabis a Schedule I illegal controlled substance and does not include an exception for medical marijuana. *See* 21 U.S.C. § 812 (1)(c) (2024); 21 U.S.C. § 829 (2024) (there are no prescription exceptions in federal law for Schedule I controlled substances); 21 U.S.C. § 844(a) (2024). Additionally, Montgomery County laws and regulations

are devoid of any provisions that provide for an exclusion for a positive cannabis test for applicants who have a Maryland medical marijuana certificate.²

The OHR Director is responsible for designating positions as HPR. *See* MCPR § 32-3(f)(1). The OHR Director must designate a position as HPR if the position “is not a Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position and involves . . . working with dangerous materials or under hazardous conditions.” MCPR § 32-3(f)(3)(D).

Neither the class specification, the job posting, nor the conditional offer of employment specifically indicate that the position in question is an HPR.³ Nevertheless, the class specification, the job posting, and the conditional offer of employment, in some fashion, each indicate that an applicant is subject to a drug test. First, the class specification addresses the job hazards specific to the Customer Service Representative I – Animal Services position. C. Ex. 5. Under the Hazards section, Animal Services “Employees in this class are exposed to hazardous conditions, such as working with animals that could be ill, aggressive, injured, or rabid requiring the use of special equipment and/or adherence to special precautions.” This supports the County’s contention that the position is properly designated as an HPR. The class specification also states in the Medical Exam Protocol section that the job is subject to the Limited Core Exam, which includes drug screening. Similarly, the job posting lists the applicant is subject to the “Limited Core Exam with Drug Screen” in the Medical Exam section. C. Ex. 1.

Finally, the conditional offer of employment letter specifically states:

[t]his offer of employment is conditioned on your satisfying the County’s medical standards for employment, which includes a drug/alcohol screening test. If the result of the drug test is confirmed positive, the County’s Occupational Medical Services will notify both the Office of Animal Services and the Department where you are currently employed of the positive test result. (C. Ex. 2.)

The Board is satisfied that there is sufficient information to conclude that the position fits the definition of an HPR and that applicants must submit to drug screening. Because HPR designated positions require a drug screening, and because a positive drug screening for cannabis – regardless of whether an applicant or employee has a medical marijuana certification – is

² We are concerned about the lack of information provided to applicants and employees regarding the County’s cannabis policies now that Maryland law permits recreational and medicinal use of marijuana. Currently, the County’s only resource regarding Cannabis in the State of Maryland is a link provided by MC311 to information provided by the State, which seems to be a general resource for County residents. The Board was unable to find any other information or FAQs for applicants or employees. Stating that the County is subject to the Drug Free Workforce Act is insufficient considering the confusion that has manifested since the law changed. The Board strongly suggests that OHR, in consultation with the Office of the County Attorney, consider including at least some information on its recruitment or OMS web page to provide guidance associated with the County’s current policies.

³ The Board recommends that OHR consider including HPR and other required designations per MCPR Section 32 in all class specifications as well as job announcements so that applicants and employees alike are sufficiently informed about the medical requirements of positions and to avoid confusion and future disputes.

automatic grounds for rescission, the County properly rescinded the conditional offer of employment.⁴

Appellant suggests that sometime in the past, she received information from OMS that individuals with medical marijuana certificates would be treated no differently than other employees with prescriptions. A. Ex. 1. Appellant admittedly is unable to provide the name of the individual who provided the alleged information. Nor does the record provide support for the allegation, as the Personnel Regulations do not afford such a benefit. Moreover, as previously stated, such an application would violate the provisions found in MCPR Section 32.


Appellant has provided no evidence to prove that the County violated any law, regulation, or policy, or that its actions were arbitrary, capricious or discriminatory. Therefore, we conclude that Appellant has failed to meet the burden of proof. Accordingly, Appellant's appeal is denied.

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.

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
June 9, 2025


Sonya E. Chiles
Chair

⁴ The Board encourages the County to periodically re-evaluate its requirements and policies due to the fluid nature of the discussions around legalization efforts at the national level.