

**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. 25-02

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FINAL DECISION

Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) on September 3, 2024, claiming she was denied employment when she applied for a permanent M3 position with the Montgomery County Department of Health and Human Services¹. On September 25, 2024, the Board acknowledged the appeal and advised Appellant that it was necessary to provide a copy of the Notice of Nonselection per Montgomery County Personnel Regulations (MCPR), 2001 § 35-4(d)(3). On December 2, 2024, Montgomery County Government (County) filed its Response to the Appeal. Appellant filed her response on December 9, 2024.

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.²

¹ The appeal was filed by electronic mail on Sunday, September 1, 2024, a day that the MSPB offices are not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

² 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 #284, filed on September 3, 2023.
2. A. Ex. 2 – March 13, 2024, email exchange with M.H.
3. A. Ex. 3 – March 14, 2024, email exchange with M.H.
4. A. Ex. 4 – March 14, 2024, Microsoft Teams message exchange with M.H.
5. A. Ex. 5 – Appellant Notice of Nonselection.
6. AR. – Appellant Response, filed on December 9, 2024.

FINDINGS OF FACT

Appellant was originally hired by the County on June 21, 2022, into a Program Manager II (term N25) term position with the Department of Health and Human Services (HHS). CR., p. 2. Appellant was assigned to the COVID Rent Relief Program (CRRP) in HHS's Service to End and Prevent Homelessness (SEPH). A. Ex. 2³. As a term employee, Appellant's employment terminated at the expiration of a specific time or term. MCPR §§ 1-80 & 1-81. On March 26, 2023, Appellant was temporarily promoted to Housing Stabilization Services Administrator (term M3), which was also a term position. CR., p. 2. On July 1, 2023, Appellant was promoted to the Housing Stabilization Services Administrator (term M3) term position. *Id.* Appellant's term was scheduled to expire on June 30, 2024. *Id.*

The County Executive released his proposed Fiscal Year 2025 (FY 25) budget on March 14, 2024. A. Ex. 3. The proposed FY 25 budget called for the abolishment of the term Housing Stabilization Services Administrator (term M3) positions, beginning July 1, 2024. CR., p. 2. Additionally, the proposed FY 25 budget abolished all other CRRP term positions, beginning July 1, 2024. A. Ex. 3. This was due to the lack of Federal COVID related funds. *Id.* The proposed FY 25 budget included requests to fund the creation of one (1) new permanent Housing Stabilization Services Administrator (M3) position, one (1) new permanent Office Services Coordinator (OSC) position, and six (6) Client Assistant Specialist (CAS) positions, all beginning July 1, 2024. *Id.*

On March 8, 2024, Appellant sent an email to Mr. H■■■■, HHS Chief Operating Officer, regarding impacts to CRRP term staff affected by the County Executive's proposed FY 25 budget, requesting guidance on how to communicate with the affected staff. A. Ex. 2. Mr. H■■■■ responded to Appellant on March 13, 2024, instructing Appellant not to communicate with staff, that he was drafting a letter to distribute to affected staff. *Id.* Mr. H■■■■ indicated that the letter would inform staff that not all CRRP term staff positions would be funded in FY 25, that funding for one (1) Housing Stabilization Administrator position (M3), one (1) OSC position, and six (6) CAS positions were included in the proposed FY 25 budget, and that seniority and performance would be the basis for determining which current staff would fill the positions. *Id.* Mr. H■■■■ also directed Appellant not to promise positions to anyone until Council's final approval of the FY 25 budget. *Id.*

The County provided the following documents:

1. CR. – County Response, filed on December 12, 2024.
2. C. Ex. 1 – Appellant Termination Notice.
3. C. Ex. 2 – Email from C.H. to Appellant.
4. C. Ex. 3 – Affidavit of C.H.
5. C. Ex. 4 – Advertisement 2024-00029.
6. C. Ex. 5 – Appellant Recruitment File.
7. C. Ex. 6 – A.Y. Recruitment File.

³ While neither Appellant nor the County specifically stated that Appellant was assigned to the CRRP in SEPH, the documents provided to the Board infer that was Appellant's assignment.

On March 14, 2024, Mr. H[REDACTED] provided Appellant the communication he drafted for distribution to CRRP term staff. A. Ex. 3. Per Mr. H[REDACTED] direction, Appellant forwarded the following communication to CRRP staff as an “FYI”:

Good morning all,

The County Executive will be releasing his proposed FY25 budget this afternoon. As you look through it you will see that without any Federal COVID funds, SEPH CRRP will be county funded for only 1 manager, 1 OSC, and 6 Client Assistant Specialist (CAS) positions. That means that there are Term Positions that will end on June 30, 2024.

We do not know what the County Council will do at this point. They may decide to add positions or they may take out the positions proposed before voting to finalize the FY25 budget. But using the County Executive’s proposed funding, we will be working on making the 8 positions noted above permanent.

The OSC position and the CAS positions currently have more staff than are proposed next year. As a result we will be looking at current staff seniority (first) and performance ratings (second) as the basis for determining which staff are able to fill the proposed positions above, but at this time we cannot promise positions to anyone since nothing is final until the Council approves the budget at the end of May. In order to offset this loss of staffing in the CRRP program, we will be reposting vacant positions you may be eligible for on the DHHS transfer line and we encourage you to apply to those or to positions on the County website.

If you have any questions or concerns, please do not hesitate to reach out to your supervisor, your Chief of SEPH, or to M[REDACTED] H[REDACTED], Chief Operating Officer.

A. Ex. 3.

At 1:16 p.m. on March 14, 2024, Appellant sent a Microsoft TEAMS message to Mr. H[REDACTED], requesting that Mr. H[REDACTED] verify that the permanent Housing Stabilization Services Administrator (M3) position mentioned in the communication to CRRP term employees was Appellant’s position. A. Ex. 4. Mr. H[REDACTED] responded “yes” to Appellant at 1:43 p.m. *Id.* Appellant reacted to Mr. H[REDACTED]’s response with a “heart” emoji. *Id.*

According to the County, the County Council ultimately approved the abolition of the term positions and approved the creation of the new positions.⁴ CR., p. 2.

After the March 14, 2024, Microsoft TEAMS exchange between Appellant and Mr. H■■■■, HHS decided to competitively fill the new positions rather than use seniority and performance ratings to fill the new permanent positions. On May 23, 2024, Appellant sent an email to C■■■■ H■■■■, HHS Chief for SEPH, requesting an urgent meeting to discuss the decision to competitively advertise the new permanent Housing Stabilization Services Administrator (M3) position to the general public. C. Ex. 2. Appellant raised concerns about the change from the “original plan” wherein Appellant would be transferred into the newly created position via seniority. *Id.* Appellant also questioned the decision to treat the new permanent Housing Stabilization Services Administrator (M3) position differently than the union represented positions. *Id.* Appellant argued that there was a lack of equity between union employees who were able to apply for union positions via a “transfer line” while Appellant was required to compete with members of the general public for the new permanent Housing Stabilization Services Administrator (M3) position. *Id.*

On the morning of May 24, 2024, Ms. H■■■■ met with Appellant to complete Appellant’s appraisal. C. Ex. 3. During the meeting, Ms. H■■■■ informed Appellant that Appellant would not be non-competitively transferred into the new permanent Housing Stabilization Services Administrator (M3) position. *Id.* At 12:11 p.m. on May 24, 2024, Ms. H■■■■ sent an email to Appellant reiterating HHS’s decision to competitively advertise the new permanent Housing Stabilization Services Administrator (M3) position. C. Ex. 2. Ms. H■■■■ explained that the decision to competitively advertise the position was not a reflection on Appellant’s performance but was based upon a desire for fairness for all on the CRRP team who were required to reapply for the limited number of newly created positions. *Id.* At 12:35 p.m. on May 24, 2024, Appellant responded to Ms. H■■■■’s email, claiming that Appellant learned earlier in the month that MLS positions could not be advertised on the “transfer line,” but that Mr. H■■■■ “told [Appellant] that HR was making an exception and this [position] would be on the transfer line.” C. Ex. 2. Appellant suggested that she should have been informed that HHS had only requested the exception and was awaiting OHR approval. *Id.*

Mr. H■■■■ responded to Appellant’s email on May 28, 2024, explaining the reasons for the decision to competitively advertise the new permanent Housing Stabilization Services Administrator (M3) position. *Id.* Mr. H■■■■ indicated that the original plan to transfer the most senior staff into the newly created positions was changed after the Municipal and County Government Employees Organization, Local 1994 (MCGEO), which represented some of the CRRP term employees, alleged that the termination of the term positions was equivalent to a Reduction in Force (RIF) under the MCGEO Collective Bargaining Agreement with the County.⁵

⁴ Per Resolution No. 20-526, the County Council approved the FY 25 budget on May 23, 2024.

⁵ Because Appellant is not represented by MCGEO, the RIF provisions in the Personnel Regulations apply to any argument regarding whether Appellant was subject to a RIF. Moreover, Appellant has not claimed that Appellant was subject to a RIF, nor would such an argument succeed, as Appellant’s position had a specific term (expiring on June 30, 2024) and the position was abolished at the end of the term. See MCPR § 30-2(a) (“... The abolishment of a term position create for a specified period of time or term is not a RIF if the position is abolished at the end of the term. . .”).

Id. Subsequently, a determination was made that the “cleanest way to move forward was to end all term positions as expected on June 30 and start fresh on July 1 with the 8 approved permanent positions competitively hired.” *Id.* Mr. H█████ acknowledged that he “did not handle all of this perfectly or communicate[d] things the right way at every step.” *Id.* On May 29, 2024, Appellant was notified that her employment with the County would end when the term position expired on June 30, 2024. C. Ex. 1.

The County advertised the new permanent Housing Stabilization Services Administrator (M3) position on August 1, 2024. C. Ex. 4. Appellant applied for the position, and Appellant and A█████ Y█████, the candidate that was ultimately selected for the position, were both placed on the eligible list. CR., p. 2.

Appellant and Mr. Y█████ were interviewed by the same interview panel on September 6, 2024. *Id.* Both Appellant and Mr. Y█████ were presented with the same questions, and their responses were rated by the interview panel with a final consensus rating issued for both applicants. C. Ex. 5; C. Ex. 6. Appellant’s consensus rating consisted of one (1) average rating and six (6) above-average ratings, with the panel ultimately recommending Appellant be “Considered at a Later Date.” C. Ex. 5. Mr. Y█████’s consensus rating consisted of three (3) above-average ratings and four (4) well-above-average ratings, with the panel ultimately recommending that Mr. Y█████ be selected for the position. C. Ex. 6. Mr. Y█████ accepted the offer and began employment as the new permanent Housing Stabilization Services Administrator (M3) on November 18, 2024. CR., p. 2.

POSITIONS OF THE PARTIES

a. Appellant

Appellant argues the County’s selection process violated County law, claiming that:

- she was told by management that she would transition into a permanent employee status when her term position ended.
- the County has failed to provide justification for changing the new position from a noncompetitive transfer to a competitive selection process.

Appellant originally requested that the Board reinstate her in the position; however, in her Reply to the County’s Response, Appellant noted that doing so may be unfair to the individual who was selected for the position and asked that the Board issue an appropriate remedy.

b. County

The County denies Appellant’s claims, arguing that:

- the County's decisions to terminate the Appellant at the end of the term of her position, to competitively search for a candidate to fill the newly created permanent position, and to hire the selected ideal candidate, were all done in accordance with the MCPR and in an impartial and non-arbitrary manner.
- while the MCPR enables the County to consider the transfer of employees and limiting a competitive search to County employees, it does not require the County to take such actions.
- Appellant has not alleged, and there is no evidence to support, that the County's decision was arbitrary and capricious, illegal, or based on other non-merit factors.
- Appellant has failed to meet her burden of proof.

APPLICABLE CODE PROVISIONS AND REGULATIONS

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 1. DEFINITIONS

1-80. Term employee: An incumbent of a term position.

1-81. Term position: A type of full-time or part-time career merit system position that is created for a special term, project, or program, or a position in which the incumbent's employment terminates at the expiration of a specified period of time or term.

SECTION 6. RECRUITMENT AND APPLICATION RATING PROCEDURES

6-2. Announcement of open jobs.

- (a) The OHR Director:

* * *

- (3) may announce a vacancy to the general public or may restrict the vacancy to some or all County employees;

* * *

6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.

* * *

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 7. APPOINTMENTS, PROBATIONARY PERIOD, AND PROMOTIONAL PROBATIONARY PERIOD

7-1. Use of eligible list. If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

- (a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.
- (b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.
- (c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an

individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.

SECTION 26. TRANSFER

26-1. Policy on transfer of employees.

- (a) Transfer of employees is a prerogative of management.

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SECTION 29. TERMINATION

29-1. Definition.

Termination: A nondisciplinary act by a department director to end an employee's County employment for a valid reason. Examples of valid reasons for termination include those stated in 29-2.

29-2. Reasons for termination.

- (a) A department director may terminate the employment of an employee:

* * *

- (4) who is a term employee whose term of employment has ended;

* * *

SECTION 34. GRIEVANCES

34-6. Matters that are not grievable:

- (a) The following matters are not grievable:

* * *

- (4) the termination of a term employee at the end of the term of employment or the completion of the work the employee was hired to perform;

* * *

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.

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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).

Selection of a higher rated candidate is consistent with the County Personnel regulations. MCPR § 7.1; MSPB Case No. 18-05 (2018); 17-10 (2017). "In a nonselection case, the Board will not substitute its judgement for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee. . ." MSPB Case No. 18-05 (2018); 17-10 (2017); 06-02 (2006). In this case, Appellant has failed to allege any facts suggesting that her qualifications are plainly superior to those of Mr. Y████. Furthermore, the County is correct that the MCPR permits but does not require non-competitive transfers into positions. See MCPR §§ 6-2(a)(3); 6-7; 7-1; 26-1. Thus, the change from non-competitive transfer to competitively advertising the position was well within the County's discretion. It was the prerogative of management to engage in a competitive recruitment and, while the Board may or may not have taken action in the same manner, the Board cannot substitute its judgment when management is taking a discretionary action. MSPB Case No. 16-07 (2016); 84-70 (1984). Thus, appellant has failed to show arbitrary or capricious conduct on the part of the County. MSPB Case No. 18-05.

Based upon the information provided and Appellant's statements, it appears she is making an equitable estoppel argument, claiming that while management originally informed her that she was transitioning into the position when her term ended, the County changed course and competitively filled the position. However, Appellant has not sufficiently alleged the elements of equitable estoppel. To prove equitable estoppel, Appellant must show 1) affirmative misconduct, and 2) reasonable reliance on that misconduct. *Perez Peraza*, 114 M.S.P.R. 457 (2010).

Affirmative misconduct is a prerequisite for invoking equitable estoppel against the government; negligent provision of misinformation does not constitute affirmative misconduct. *See id.* In this case, Appellant has provided evidence that Mr. H█████ affirmed in writing that the newly created Housing Stabilization Services Administrator (M3) position was Appellant's role. However, while the communication provided to CRRP term staff indicated that certain positions would be filled via seniority and performance ratings, the communication clearly stated that "... at this time we cannot promise positions to anyone since nothing is final until the Council approves the budget at the end of May . . .", suggesting that the mechanism for filling the new permanent positions was subject to change rather than a promise to provide positions to certain individuals. At the time Mr. H█████ made the statement the Department fully intended to non-competitively transfer employees into the newly created positions upon Council approval. However, the Department decided to go a different route after the labor union raised concerns. At most, Mr. H█████'s statement regarding how the positions would be filled was a negligent provision of misinformation.⁶ Even Mr. H█████ admitted in his May 28, 2024, email communication to Appellant that he could have handled the situation better, but his actions do not rise to the level of affirmative misconduct. Therefore, Appellant has failed to prove the first element for equitable estoppel.

Even if the statement by Mr. H█████ was affirmative misconduct, there is nothing in the record to suggest that Appellant somehow relied on the alleged promise to her detriment. MSPB Case No. 16-07 (2016); 17-05 (2017). *See King v. Office of Personnel Management*, 114 M.S.R.P. 181, 189 (2010) (equitable estoppel against the government requires detrimental reliance such as relinquishing a valuable right). *See Gontrum v. Mayor and City of Baltimore*, 182 Md. 370, 378 (1943) (estoppel cannot be applied against a governmental defendant in a contract action)." There are no allegations that Appellant passed up other opportunities based upon the alleged promise. Additionally, Appellant was not precluded from applying for the new position. Indeed, Appellant was informed by the Department before the job was posted that she would not be non-competitively transferred into the position well before the position was advertised. She applied for the position, was placed on the eligible list, and interviewed by the Department.

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Housing Stabilization Services Administrator (M3) position, and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations. *See* MCPR § 7-1.

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary,

⁶ The Board would be remiss if it did not comment on Mr. H█████'s conduct in this matter. His comments to Appellant were neither clear nor concise and created the appearance that Appellant's continued employment with the County was inevitable. The Microsoft Teams exchange is the most dubious of his interactions with Appellant. A. Ex. 4. Clearly, Appellant was asking if the job was hers. Mr. H█████'s single word response created a false sense of security that frankly anyone could have misconstrued. We are encouraged by Mr. H█████'s admission that he could have better handled the situation; however, we urge Mr. H█████ to further reflect on his actions and be more careful and considerate when addressing matters such as these with his subordinates.

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
March 26, 2025


Sonya E. Chiles
Chair