

Merit System Protection Board Annual Report FY2025

Members:

Sonya E. Chiles, *Chair*
Treava Hopkins-Laboy, *Vice Chair*
Era Pandya, *Associate Member*

Edward E. Haenftling, Jr.
Executive Director

Prepared by:

Janice Curtis
Office Services Coordinator

Montgomery County, Maryland
Merit System Protection Board
100 Maryland Avenue, Room 113
Rockville, Maryland 20850
240-777-6620



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FY 2025 ANNUAL REPORT OF THE MONTGOMERY COUNTY MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (Board or MSPB) is composed of three members who are appointed by the County Council pursuant to Article 4, § 403, of the Charter of Montgomery County, Maryland. Board members must be County residents and may not be employed by the County in any other capacity. No member may hold political office or participate in any campaign for any political or public office during the member's term of office. One member is appointed each calendar year to serve a term of three years. Members of the Board conduct work sessions and hearings during the workday and in the evenings, as required, and are compensated as prescribed by law. In Fiscal Year 2025, the Board was supported by a part-time Executive Director and a part-time Office Services Coordinator. The Executive Director position was enhanced to full-time beginning in Fiscal Year 2026.

The Board members in Fiscal Year 2025 were:

Sonya E. Chiles	Chair
Treava Hopkins-Laboy	Vice Chair
Era Pandya	Associate Member (Appointed March 11, 2025)
Barbara S. Fredericks	Chair (until December 2024)

DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in the Charter of Montgomery County, Maryland, Article 4, "Merit System and Conflicts of Interest," § 404, *Duties of the Merit System Protection Board*; the Montgomery County Code, Article II, Merit System, Chapter 33; and the Montgomery County Personnel Regulations, § 35, Merit System Protection Board Appeals, Hearings, and Investigations. Below are excerpts from some of those provisions.

1. Section 404 of the Charter establishes the following duties for the Board:

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The

decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

2. Section 33-7 of the Montgomery County Code sets out the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein must be exercised by the Board as needed to rectify personnel actions found to be improper. The Board must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, must establish its staffing requirements and define the duties of its staff.

* * *

(c) *Classification standards.* With respect to classification matters, the County Executive must provide by personnel regulation, adopted under Method (1), standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

- (1) The necessary components of class specifications;
- (2) Criteria for the establishment of new classes, modification or elimination of existing classes;
- (3) Criteria for the assignment of positions to classes;
- (4) Kinds of data required to substantiate allocation of positions;
- (5) Guidelines for comparing levels of job difficulty and complexity; and
- (6) Criteria for the establishment or abolishment of positions.

The Board must conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and must submit audit findings and recommendations to the County Executive and County Council.

* * *

(f) *Personnel regulation review.* The Merit System Protection Board must meet and confer with the Chief Administrative Officer and employees and their organizations from time to time to review the need to amend these regulations.

(g) *Adjudication.* The Board must hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(h) *Retirement.* The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

(i) *Personnel management oversight.* The Board must review and study the administration of the county classification and retirement plans and other aspects of the merit system and transmit to the Chief Administrative Officer, County Executive and County Council its findings and recommendations. The Board must conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations must cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this section.

(j) *Publication.* Consistent with the requirements of State law, confidentiality and other provisions of law, the Board must publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

3. Section 35-20(a) of the Montgomery County Personnel Regulations states:

The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

DISCIPLINARY ACTION OR TERMINATION

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. To initiate the appeal process, the employee must file in writing or by completing the [Appeal Form](#)¹ on the Board's website. Montgomery County Personnel Regulations (MCPR), § 35-4. Under MCPR § 35-3, the employee must file the appeal within ten (10) working days after the employee receives a Notice of Disciplinary Action involving a demotion, suspension or removal, resigns involuntarily, or receives a Notice of Termination. The appeal must include a copy of the Notice of Disciplinary Action. MCPR § 35-4(d)(1). Employees are encouraged to complete the on-line Appeal Form, which permits the uploading of documents.

In accordance with § 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final disciplinary action of the Fire Chief or a local fire and rescue department, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within thirty (30) days after receiving a final notice of disciplinary action, unless another law or regulation requires that an appeal be filed sooner.

After receiving the Appeal Form, the Board's staff notifies the Office of the County Attorney, Office of Labor Relations, Office of Human Resources, and, if applicable, the Fire Chief or local fire and rescue department, of the appeal. MCPR § 35-8. The notice to the parties requires each side to file a prehearing submission, including a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which potential witnesses and exhibits are discussed. Typically, a merits hearing date is set by the Board in consultation with the parties at the Prehearing Conference. The Board requires all parties to comply with its [Hearing Procedures](#)² and [Remote Hearing Procedures](#)³, both of which are available on the Board's website. After the hearing, the Board prepares and issues a written decision.

During fiscal year 2025 the Board issued the following decision on an appeal concerning a disciplinary action.

¹ See <https://www.montgomerycountymd.gov/MSPB/AppealForm.html>.

² See <https://www.montgomerycountymd.gov/mspb/hearing-procedures.html>.

³ See <https://www.montgomerycountymd.gov/mspb/remote-hearing-procedures.html>.

CASE NO. 25-03

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant. On September 11, 2024¹, Appellant filed this appeal challenging his dismissal from a Firefighter/Rescuer III position with the Montgomery County Fire and Rescue Service (MCFRS, DFRS, or Department).²

BACKGROUND

The discipline in this matter relates to a November 12-13, 2023, incident involving Appellant's verbal abuse and physical assault upon his fiancée at their home in Baltimore, Maryland. CX 1. On July 29, 2024, MCFRS issued a Notice of Disciplinary Action (NODA) dismissing Appellant, effective August 15, 2024. CX 1.

Per the NODA, the Department determined that Appellant violated various provisions of the Montgomery County Personnel Regulations (MCPR) and MCFRS policies and procedures arising out of Appellant's conduct towards his fiancée. Specifically, the Department found that Appellant had exhibited conduct unbecoming, thus violating MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Policy and Procedure No. 502 (Code of Conduct) §§ 3.1, 5.0, 5.3, & 5.14.

A hearing on the merits was conducted on May 20, 2025. After hearing the testimony and reviewing the exhibits, the appeal was considered and decided by the Board.³

¹ The appeal was filed online on September 10, 2024, at 9:49 p.m., after MSPB business hours. Accordingly, the appeal was considered to have been officially received on the Board's next business day. See MSPB Case Nos. 17-14 and 17-16 (2017).

² The Department was previously known as the "Department of Fire and Rescue Services."

³ County Exhibits 1 through 35 were admitted into the record. Appellant did not file any exhibits. The County Exhibits are as follows:

- CX 1 - Notice of Disciplinary Action
- CX 2 – Appellant Internal Affairs Interview Audio
- CX 3 – KH Internal Affairs Interview Audio
- CX 4 – SV Internal Affairs Interview Audio
- CX 5 – ML Internal Affairs Interview Audio
- CX 6 – DB Internal Affairs Interview Audio
- CX 7 – JK Internal Affairs Interview Audio
- CX 8 – CM Internal Affairs Interview Audio
- CX 9 – SP Internal Affairs Interview Audio
- CX 10 – FF JC Internal Affairs Interview Audio
- CX 11 – Appellant Internal Affairs Interview Transcript
- CX 12 - Internal Affairs Acknowledgement form signed by Appellant
- CX 13 - KH Internal Affairs Interview Transcript
- CX 14 - SV Internal Affairs Interview Transcript
- CX 15 – ML Internal Affairs Interview Transcript
- CX 16 – DB Internal Affairs Interview Transcript
- CX 17 – JK Internal Affairs Interview Transcript

FINDINGS OF FACT

The Board heard testimony from four witnesses, including Appellant. The following witnesses testified and are identified by their initials, or as “Appellant,” elsewhere in this decision:

1. JC, Assistant Fire Chief, MCFRS (JC)
2. SV, Battalion Chief, DFRS (SV)
3. MB, Manager III, DFRS Office of Professional Standards (MB)
4. Appellant

The disciplinary action against Appellant arose out of a series of violent incidents between Appellant and his fiancée, KH, that occurred on November 12 and 13, 2023, at Appellant’s home in Baltimore, Maryland.

At the time of his dismissal, Appellant was employed as a Firefighter/Rescuer III with MCFRS and had been a firefighter for over seven (7) years. CX 1. SV was the recruit training coordinator at the time Appellant entered recruit school in December of 2015. Tr. 22:19 – 23:6. The two met during recruit training and developed a relationship to the point that SV kept in contact with Appellant after Appellant completed recruit school. Tr. 22:9. According to SV, “[i]t was my first career recruit class and [Appellant and SV] hit it off.” Tr. 22:10. They eventually worked together at the fire station in Silver Spring. Tr. 22:16. SV also testified that firefighter/rescuers are called to treat people who were assaulted by their partners, and that he had responded “[t]oo many times to note in [his] career.” Tr. 30:1.

SV recalled one incident where Appellant prevented “a very sick individual from taking an ambulance at Washington Adventist Hospital.” Tr. 29:9. During his interview with the MCFRS Office of Investigative Programs, SV indicated that Appellant actually disarmed and restrained the individual. Tr. 86:19. Appellant testified that he was defending a doctor inside the hospital from a patient who attempted to assault the doctor. Tr. 100:15. Appellant escorted the patient back to the patient’s bed. *Id.* When Appellant was walking back to the ambulance, the patient attempted

CX 18 – CM Internal Affairs Interview Transcript
CX 19 - SP Internal Affairs Interview Transcript
CX 20 – FF JC Internal Affairs Interview Transcript
CX 21 – Photograph of KH
CX 22 – Text Messages
CX 23 – Video Recordings
CX 24 – Internal Affairs Investigative Report
CX 25 – MCPR Section 33-5
CX 26 – MCFRS Code of Conduct
CX 27 – MCFRS Executive Regulation 22-00
CX 28 – MCFRS Policies and Procedures No. 529, Internal Affairs
CX 29 – 2006 MOU Re: Levels of Discipline
CX 30 – Collective Bargaining Agreement, Article 30 - Discipline
CX 31 – Notice of Disciplinary Action dated September 12, 2024
CX 32 – Notice of Disciplinary Action dated March 12, 2023
CX 33 – Notice of Disciplinary Action dated December
CX 34 – Statement of Charges dated January 16, 2019
CX 35 – Notice of Disciplinary Action dated April 23, 2019

to get in the ambulance. *Id.* The patient then attempted to get into another vehicle, resulting in a physical altercation with the driver and passenger of the vehicle. *Id.* Appellant intervened, and the patient brandished a knife. *Id.* The patient almost drove off with the ambulance but Appellant stopped him. *Id.* Appellant broke his foot during the altercation. *Id.*

At some point prior to November 2023, Appellant, SV, and approximately six (6) other firefighters formed a “sober group,” where firefighters that knew one another could support each other in sobriety. Tr. 23:11. The firefighters used a “text group” to communicate with each other and to provide support to group members who were struggling with issues that were negatively affecting them to the point they were considering breaking sobriety. Tr. 24:8.

Between November 12 and 13, 2023, Appellant sent several texts and shared photographs and videos that depict various verbal and physical exchanges between Appellant and his fiancée with the text group. Tr. 24:18 – 25:7. The County provided a video of the relevant comments in the text group exchange wherein Appellant stated, “I wanna kill her so angry I am,” “I can’t control myself,” “I’ve already put my hands on her,” and “But this is urgent! I think I should turn myself in . . . I’ve been beating up this woman for 2 days.” CX 22. The County entered the videos into evidence, which depict Appellant’s verbal and physical abuse towards KH, including one video in which Appellant appeared to be holding down KH with Appellant’s hand clenching KH’s neck. CX 23. KH can be heard in the videos telling Appellant to “stop” and that Appellant was hurting her. *Id.*

SV testified that, based upon his experience with Appellant, it was clear that Appellant was “suffering” and that “something pretty bad had happened that caused him to . . . get that upset.” Tr. 25:2. According to SV, the text messages were beyond upsetting and that it was “the worst thing [SV] had ever seen in a text message.”⁴ Tr. 26:8. SV stated that Appellant’s conduct in the videos did not reflect Appellant’s conduct while working. Tr. 26:9. SV testified that the group did not call the police; rather, one of the members of the group, Lieutenant DB, intervened and convinced Appellant to seek help at a fire station. Tr. 30:11 – 31:13. The text group facilitated Appellant seeking help at a rehabilitation center. Tr. 30:14. The text group also reached out to KH to assess her wellbeing. Tr. 31:18.

After privately texting another member of the text chat, SV reported the text messages to MCFRS Assistant Chief JC, in the Department’s human resources division, administrative services section. Tr. 28:7. JC is responsible for overseeing the Department’s recruitment of civilian and uniformed personnel, promotional processes for uniformed personnel, and addressing discipline, grievances, and other labor and employee relations matters. Tr. 44:6. Upon receiving the information from SV, JC made a request to the Fire Chief for an internal investigation by the MCFRS Office of Investigative Programs. Tr. 48:2.

MCFRS Internal Affairs manager MB conducted the investigation into Appellant’s conduct. Tr. 74:11. MB was employed as a state trooper with the Maryland State Police from 1990 until he retired in 2015. Tr. 73:10. MB subsequently began his employment with MCFRS in 2015. Tr. 73:12. During his employment as a state trooper, MB responded to a variety of calls, including

⁴ SV also testified that he was seeing therapists when discussing what he saw on the videos. Tr. 26:2. However, it’s not clear from his testimony whether the videos were the reason for why SV was seeking treatment.

allegations of domestic violence. Tr. 74:1. MB was also assigned to a domestic violence unit for approximately two (2) years. Tr. 83:9.

MB reviewed the information provided by SV. Tr. 74:25. MB described the video wherein Appellant placed his hands upon KH's neck. Tr. 76:21 – 77:4. Based upon his professional experience, MB testified that at the very least, conduct wherein a person puts their hands on somebody else's neck rises to the level second degree assault, and that Maryland state law now includes enhanced penalties for "choking behaviors" in a domestic violence incident. Tr. 77:8. MB noted that throughout the videos, KH indicated that Appellant was "off his meds." Tr. 91:8. MB also interviewed all members of the text group. Tr. 75:16.

MB interviewed Appellant on April 4, 2024. Tr. 80:7. During the interview, MB reviewed each text message and every video that was shared with the text group. Tr. 80:11. Appellant admitted that he was the male in the videos, identified his voice, and admitted to taking the videos that were shared with the text group. Tr. 81:4. Appellant admitted to assaulting KH on various occasions over the November 12 and 13, 2023. Tr. 81:9. Appellant also stated that he was not taking his medications as prescribed. Tr. 83:17; Tr. 90:12. According to MB, Appellant was professional, polite, and accepted responsibility for his actions. Tr. 90:2.

MB also interviewed KH on November 20, 2023. Tr. 82:14. During the interview, KH confirmed Appellant's conduct, but that, based upon MB's experience investigating domestic violence related crimes, KH was clearly in the "domestic violence cycle," as she attempted to excuse Appellant's behavior, blaming herself for his conduct as well as stating that Appellant was not taking his medications as prescribed. Tr. 83:9. At some point during the interview, KH realized she was the victim of domestic violence and was appreciative that the Department was conducting its investigation. Tr. 83:23 – 84:5.⁵

Per JC, Appellant was dismissed from County service "for his actions on November 12 and 13 in relation to the assault of his fiancée in violation of Code of Conduct policy [502] which captures employee conduct on and off duty." Tr. 46: 24 – 47:9. JC also testified that the Department reviews each case on its own and applies what is commonly known as the *Douglas* factors to evaluate the level of discipline. Many of these factors are discussed in NODAs, and include consideration of the employees record, how the Department has handled like discipline in the past for consistency, the potential for rehabilitation and other mitigating circumstances. Tr. 68:10.

In this case the discipline that Appellant received was consistent with discipline received by other employees who were found to have engaged in domestic violence while off-duty. Tr. 58:11. According to JC, going back to approximately 2018, every case that involved domestic violence wherein discipline was sustained resulted in disciplinary dismissal. Tr. 48:14. During his testimony, JC reviewed five (5) NODAs from disciplinary actions involving domestic violence where the employee was dismissed. Tr. 50:1 – 56:3. *See* CXs 31 – 35.

⁵ According to MB, KH eventually obtained a protective order against Appellant based upon conduct that occurred after the conclusion of MB's investigation.

JC stated the following as the rationale for the decision to dismiss employees who engage in domestic violence:

Part of the reason is because we are a public safety organization and as firefighters the organization has to hold our employees to a higher level of standard both on and off-duty. That is spelled out in our Code of Conduct policies, not only because we are public servants, but because we are also representatives of safety and trust to the public, right?

And with occasions of domestic violence like this or allegations of domestic violence or sustained cases of domestic violence, it undermines that trust that the public has in us and it also presents a potential safety concern for the organization in terms of liability, what if the act of domestic violence were to spill over into the workplace, for concerns of other employees' safety and/or what if that spills out into conduct against one of our residents that call 911 for assistance. And that conflicts with our overall values of the Department. That's why we take that stance on domestic violence and similar occasions. Tr. 56:8 – 57:4.

JC further testified that there is a nexus between domestic violence and employment as a firefighter:

[D]omestic violence is a problem in our county to the point where the Maryland protocols have specific hospitals that we transport victims of domestic and/or sexual assault to the facilities because they require specialty-type level care and these facilities throughout the State of Maryland are specialized for that.

So I would say yes, the other nexus would be that employees that engage in domestic-violence-type behavior shouldn't be in a position to be able to take care of the vulnerable population of transporting these domestic-violence victims to they are called safe facilities, the safe hospitals. Tr. 57:22 – 58:10.

Appellant testified that he began his career feeling strong and proud, but that over time, due to what he witnessed on the job, things started to change. Tr. 97:16. Appellant indicated that a major change occurred in July 2019. Tr. 97:21. Appellant was assaulted by a person with a knife just after Appellant lost a friend, he lost his wife, he began to drink alcohol more, and didn't sleep. *Id.* His coworkers, including SV noticed the changes and encouraged him to transfer to a different fire station. Tr. 98:1. Appellant testified that by the end of 2020 he "start[ed] asking for help loudly, vulnerably," and that he went to "rehab." *Id.* He further testified that he sent messages to County contacts and waited for callbacks. *Id.* However, COVID hit and, according to Appellant he was "sent home and told to wait." *Id.*

Appellant returned to rehab in 2020 and was prescribed Lexapro to help him with PTSD, mood swings, anxiety, depression, and insomnia. Tr. 98:10; Tr. 103:2. At first the medication helped; however, after a while he didn't like the way it made him feel. *Id.* He continued to use the medication as it was the only way he could return to work. *Id.* In December 2022, Appellant informed FROMS⁶ that he stopped taking the medication because he didn't like how it made him feel. Tr. 98:19. Appellant claimed that he was placed on light duty without any follow-up, no psychologist, and no plan to assist him. *Id.* Appellant reluctantly continued with the medication because he "needed the job." *Id.*

Appellant stopped taking the medications approximately ten (10) days prior to the conduct that formed the basis for his disciplinary dismissal. Tr. 99:4. After a forty-eight (48) hour shift, Appellant was exhausted, paranoid, and impulsive. *Id.* Then the events of November 12 and 13, 2023 occurred. *Id.* Appellant testified that he "hurt her," that he "hurt [himself]," and that at that moment he knew he needed help. *Id.*

Appellant reentered rehab but claimed that the rehab facility took his medication away without properly monitoring him. Tr. 99:11. Appellant began having suicidal thoughts and was moved to another rehab facility. *Id.* He claimed he had no support, and that the County never followed up with him. *Id.* During his testimony, Appellant asked the Board for help. Tr. 100:2. Appellant also testified that he no longer wishes to take the medication. Tr. 101:15.

Under cross examination, Appellant admitted that he is currently treating with a doctor from Brazil. Tr. 103:20. However, the doctor is unable to prescribe medication to Appellant. Tr. 104:4. Appellant also admitted that JC referred Appellant to the County's fire rescue therapist "a couple of times." Tr. 104:11. Appellant also admitted that when he stopped taking his medication in 2022, he did not tell his treating physician. Tr. 106:21. Appellant testified that he didn't know it was a "big deal." *Id.* He eventually told the FROMS doctor he was no longer taking the medication, who in turn informed Appellant that he could not return to work unless he resumed the medication. Tr. 107:2. Appellant was then placed on a light duty assignment until he resumed the medications. Tr. 108:5. Appellant then admitted that he failed to fill his Lexapro prescription "because just life happened." Tr. 108:21.

Appellant also testified under cross examination that the Center for Excellence would not take him in due to the videos of his conduct. Tr. 110:18. Rather, Appellant entered a rehab facility in Florida that focused on first responders. Tr. 111:3. Appellant did not successfully complete the treatment at this facility, as he was asked to leave after he had an argument with other patients and had "an emotional connection with one of the girls there." Tr. 113:7. Appellant entered another rehab at FRG⁷. Tr. 113:17.

Appellant also received an email from JC on May 1, 2025, providing Appellant with information regarding who Appellant may call to obtain mental health assistance from the Department. Tr. 119:18. At first, Appellant denied that he received such an email, but he later admitted he received it. *Id.*

⁶ FROMS is the Fire Rescue Occupational Medical Services. Tr. 107:13.

⁷ The parties did not provide any testimony or information as to what "FRG" is other than it's a rehabilitation facility not geared towards first responders. Tr. 113:19.

**APPLICABLE CODE PROVISIONS, REGULATIONS, POLICIES, AND COLLECTIVE
BARGAINING AGREEMENT PROVISIONS**

CHARTER OF MONTGOMERY COUNTY, MARYLAND

Sec. 404. Duties of the Merit System Protection Board.

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit system and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

MONTGOMERY COUNTY CODE

Sec. 2-39A. Structure.

* * *

- (b) Department of County government. The Montgomery County Fire and Rescue Service is a department of County government under the County Charter. The Fire Chief is Director of the Department. The Department consists of a Division of Volunteer Services, a Division of Fire and Rescue Operations, and any other divisions necessary for effective management and administration of the Department.

* * *

Sec. 33-12. Appeals of disciplinary actions; grievance procedures.

- (a) Appeals of certain disciplinary actions. Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary

action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.

* * *

MONTGOMERY COUNTY PERSONNEL REGULATIONS, 2001

SECTION 2. GENERAL PROVISIONS

- 2-9. Conflict between a collective bargaining agreement and the Personnel Regulations. If a provision of these Regulations is inconsistent with a collective bargaining agreement, the agreement applies to any employee in the bargaining unit.

SECTION 33. DISCIPLINARY ACTIONS

- 33-2. Policy on disciplinary actions.

- (a) Purpose of disciplinary actions. A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

* * *

- (c) Progressive discipline.

- (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:

(A) the severity of the employee's misconduct and its actual or possible consequences; or

(B) the employee's continuing misconduct or attendance violations over time.

- (2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

- (d) Consideration of other factors. A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

33-3. Types of disciplinary actions.

* * *

- (h) Dismissal. Dismissal is the removal of an employee from County employment for cause.

33-4. Authority to take disciplinary action.

- (a) An immediate supervisor may give an employee an oral admonishment.
- (b) A department director may take any disciplinary action under these Regulations.
- (c) A department director may delegate the authority to take any type of disciplinary action to a lower level supervisor. The delegations must be in writing.

33-5. Causes for disciplinary action. The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

* * *

- (c) violates any established policy or procedure;
- (d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment;

* * *

33-9. Right of an employee to appeal a disciplinary action.

* * *

- (b) Right to appeal a disciplinary action to the MSPB.
 - (1) Right to file a direct appeal to the MSPB. An employee with merit system status may appeal a demotion, suspension, or dismissal by filing an appeal directly with the MSPB under Section 35 of these Regulations. An employee who files a direct appeal must not also file a grievance on the same disciplinary action.

* * *

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

35-2. Right of appeal to MSPB.

- (a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the MSPB.

* * *

MONTGOMERY COUNTY FIRE AND RESCUE SERVICES POLICIES AND PROCEDURES

Montgomery County Department of Fire and Rescue Services, Policies and Procedures, *Code of Conduct, Code of Personal Conduct*, No. 502, May 6, 1996.

* * *

- 3.1 All employees are to adhere to Departmental policies and procedures, County Administrative Procedures, Executive Orders, Montgomery County Personnel Regulations and Charter and to conform to all laws applicable to the Fire-Rescue-EMS Services and the general public.

* * *

- 5.0 Employees will, at all times, conduct themselves in such a manner as to reflect favorably on the DFRS and Fire-Rescue-EMS Service in general. While this policy applies at all times, it is especially important when employees are wearing any portion of a fire department uniform that identifies the Department, have in their possession anything that identifies them with the DFRS or are on County or Corporation property.

* * *

- 5.3 Employees will be courteous and discreet toward each other, volunteer personnel and the public, and maintain proper decorum and command of temper. Employees will not use violent, insolent or obscene language in public, or as otherwise restricted, while on duty.

* * *

- 5.14 No employee will commit any act which constitutes conduct unbecoming a merit system employee. "Unbecoming" conduct includes, but is not limited to, any criminal, dishonest or improper conduct.

***COLLECTIVE BARGAINING AGREEMENT BETWEEN THE MONTGOMERY COUNTY
CAREER FIRE FIGHTERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 1664, AFL-CIO AND MONTGOMERY COUNTY
GOVERNMENT***

ARTICLE 30. DISCIPLINE.

Section 30.1. Policy.

- A. The Employer shall not suspend, discharge or otherwise discipline any employee of the bargaining unit except for cause.
- B. Once the Employer has determined there is cause to discipline an employee, the Employer agrees to give due consideration to the relevance of any mitigating and/or aggravating factors, in deciding the nature and level of disciplinary action appropriate, including, but not limited to:
 - 1. the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical and inadvertent, or was committed maliciously or for gain, or was frequently repeated;
 - 2. the employee's job level and type of employment, including his or her supervisory or fiduciary role, the frequency and level of his or her contact with the public, and the prominence of his or her position;
 - 3. the employee's past disciplinary record;
 - 4. the employee's past work record, including his or her length of service to the Department, his or her job performance, his or her demonstrated ability to get along with fellow Department employees, and his or her dependability;
 - 5. the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the Employer's confidence in the employee's ability to perform assigned duties;

6. the consistency of the penalty with those imposed upon other employees with similar personnel history for the same or similar offense(s);
7. the notoriety of the offense or its impact upon the reputation of the Employer;
8. the clarity with which the employee was actually on notice of any rules, regulations, directives, policies, orders, instructions or the like that were violated in committing the offense, or had been warned about the conduct in question;
9. the potential for rehabilitation;
10. mitigating circumstances surrounding the offense, such as unusual job tensions, personality conflicts, mental impairment, harassment, bad faith, or malice or provocation on the part of others involved in the matter; and,
11. the potential adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

ISSUE

Was Appellant's dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

Burden of Proof

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) ("the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability").

Appellant's position – Firefighter III – with MCFRS is a position that falls within the Fire and Rescue collective bargaining unit. *See* MCC §§ 33-147, *et seq.* Positions within this bargaining unit are currently represented by the Montgomery County Career Fire Fighters Association, International Association of Firefighters, AFL-CIO, Local #1664 (IAFF) and are subject to the collective bargaining agreement (CBA) between Montgomery County, Maryland, and IAFF. *See* IAFF CBA Art. 1. The County and IAFF have negotiated provisions associated

with disciplinary actions, which is found in CBA Article 30. Pursuant to MCPR § 2-9, when CBA provisions are inconsistent with the Personnel Regulations, the provisions in the CBA apply to bargaining unit members. Accordingly, the Board must apply the CBA provisions associated with discipline to this case.

Cause

Section 30.1.A of the CBA requires that the County may only discipline an employee for cause. The CBA does not define “cause.” However, MCPR § 33-5 provides numerous scenarios wherein cause may be proved, including subsections (c) (violates any established procedure) and (d) (violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment).

Conduct Unbecoming and Violation of the Law

The County charged Appellant with conduct unbecoming for verbally abusing and physically assaulting KH, which the County argues is a violation of MCFRS policies and procedures and MCPR § 33-5(c). Under the DFRS Code of Conduct §§ 5.0, 5.3 & 5.14, Appellant was required to conduct himself “in a manner as to reflect favorably on the DFRS” and not to “commit any act which constitutes conduct unbecoming a merit system employee.” Section 5.14 specifically provides that conduct unbecoming “includes, but is not limited to, any criminal, dishonest or improper conduct.” The County also charged Appellant with violating MCPR § 33-5(d), alleging that Appellant’s conduct violated Maryland criminal laws, wherein the crime of assault is either a misdemeanor or a felony offense, punishable by imprisonment up to ten (10) years for a misdemeanor or up to twenty-five (25) years for a felony, depending on the degree of the assault. *See* Crim. Law, Md. Code Ann. §§ 3-202 and 3-203.

Appellant did not dispute the allegations against him. We find that the County proved by preponderant evidence that Appellant verbally abused and physically assaulted KH on November 12 and 13, 2023. Appellant’s texts and videos, Appellant’s statements to the Internal Affairs Investigator, and KH’s statements to the Internal Affairs Investigator provide ample support for a finding that Appellant verbally abused and physically assaulted his fiancée. Appellant’s violent conduct unequivocally falls within the definition of “unbecoming conduct,” which violates MCFRS policies and procedures, and, in turn, violates MCPR §§ 33-5(c) & (d).⁸

Nexus to Employment

When, as here, the County seeks to discipline an employee on charges that involve off-duty misconduct, the County bears the burden of proving that there is a nexus between the alleged misconduct and the employee’s position with the County. *See* MSPB Case No. 19-16 (2019). In MSPB Case No. 16-08 (2016), we held that:

⁸ Although Appellant was not criminally charged for his conduct, the Personnel Regulations do not require a judgment or conviction prior to disciplining employees for conduct that would otherwise be considered a violation of the law.

Nexus may be demonstrated simply by showing that an employee engaged in off-duty misconduct that is inconsistent with the agency's mission and undermines confidence in the employee.

Thus, for example, the Board has sustained disciplinary action against a firefighter who engaged in domestic violence (MSPB Case No. 19-16); a firefighter who assaulted a prostitute (MSPB Case No. 16-08 (2016)); a correctional officer involved with illegal narcotics (MSPB Case No. 14-17 (2014)); as well as a security officer engaged in domestic violence (MSPB Case No. 14-19 (2014)).

Consistent with our prior decisions, we find that the County has met its burden. The Board has previously held that strangulation of one's significant other is violent and potentially life-threatening, and that such a serious assault may provide sufficient nexus and warrant removal, especially where Appellant's job involves responding to the homes of County citizens. *See* MSPB Case No. 19-16; *Hayes v. Department of Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984) (for purposes of nexus agency properly concerned about off duty domestic abuser's access to residential housing in connection with work as a mechanical planner-estimator). As was the case with the appellant firefighter in Case No. 19-16, Appellant's position as a firefighter with MCFRS is dedicated to the protection and preservation of life, health, and safety. Appellant's violent domestic assault was inconsistent with the MCFRS mission and a job in which Appellant would be entrusted with the health and safety of the citizens of Montgomery County. *Cf.*, MSPB Case No. 14-19 (2014) (Domestic violence is incompatible with the responsibilities of a security officer to protect the safety of County employees). *See Social Security Administration v. Long*, 2010 M.S.P.B. 19, 113 M.S.P.R. 190 (2010), *aff'd*, 635 F.3d 526 (Fed. Cir. 2011) (ALJ dismissed for domestic violence; victim recanted, criminal charges dropped); *Kinslow v. Department of the Treasury*, 315 F. App'x 286, 289 (Fed. Cir. 2009) (removal of an IRS agent who assaulted his wife); *); Carlton v. Department of Justice*, 95 M.S.P.R. 633 (Deputy U.S. Marshal dismissed for choking, throwing vase, and pointing gun at wife; "misconduct was serious and raises serious concerns about his lack of judgment and impulse control and his ability to perform the duties of his position."), *review dismissed*, 115 F. App'x 430 (Fed. Cir. 2004). *Banks v. Dep't of Veterans Affairs*, 25 F. App'x 897, 900 (Fed. Cir. 2001) (VA hospital food service worker's domestic violence assault provides nexus). The nexus in this case is strengthened by the fact that Appellant shared the videos of the violence with his co-workers, which clearly had a negative impact on the members of the texting group, as evidenced by Chief V's testimony during the hearing.

We therefore find that Appellant's egregious behavior violated MCPR § 33-5(c) & (d), and DFRS Code of Conduct §§ 5.0, 5.3 & 5.14 (conduct unbecoming). Accordingly, it was proper for the County to issue discipline against Appellant for his conduct.

Level of Discipline

The Board, having determined that discipline is proper in this case, now turns to the level of discipline issued to Appellant. Montgomery County Code § 33-14(c) grants the Board substantial latitude to decide the appropriate level of penalty. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986). The Board will normally uphold an agency determined penalty

unless we find some aspect of the personnel action to have been improper. MSPB Case No. 19-16 (2019).

Section 30.1(B) of the IAFF CBA requires the County to consider several factors, known as *Douglas* factors, when determining level of discipline. This Board has not formally adopted the factors in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). See MSPB Case No. 19-20 (2019); MSPB Case No. 17-20 (2018); MSPB Case No. 00-22 (2000). Nor does it need to do so at this time. However, per the IAFF CBA, the County is required to consider said factors when determining level of discipline. Accordingly, from a procedural standpoint, the County has the burden of proving that the County considered each of these factors when it levied the discipline in this case.

Per MCPR § 33-4(b), department directors have the authority to take disciplinary action against employees. That authority may be delegated to a lower-level supervisor, but the delegation must be in writing per MCPR § 33-4(c). The Fire Chief is the department director for MCFRS. See MCC § 2-39A(b). In this case, the Fire Chief did not testify. Thus, the Board did not receive testimony from the individual with the authority to issue discipline and to explain how he considered each factor listed in IAFF CBA § 30.1.B. We have warned the County before that “while the Board is not bound by the County’s choice of penalty, and does not defer to that choice in any significant way, it is much more likely to sustain a County-imposed penalty if it is clear on the record that these factors have been considered and the individuals who in fact made those considerations are called to testify.” MSPB Case No. 19-20 (2019); MSPB Case NO. 20-17 (2020).

While Chief C testified that the Fire Chief considered the *Douglas* factors, the County did not elicit testimony explaining how each factor was weighed. Tr. 43:13 – 69:17. Similarly, the NODA lacks sufficient information for how each of the *Douglas* factors were weighed when deciding the level of discipline. CX 1. Chief C acknowledged as much when he testified that the NODA contained a list of the *Douglas* factors that the Department considered, “for the most part.” Tr. 68:14-16. Such testimony and evidence would have shown that the County considered each of the listed factors. Nevertheless, Appellant has not argued that his discipline was the result of procedural deficiencies in the disciplinary process, or that the Department did not properly consider each of the *Douglas* factors. Without testimony to the contrary, we determine that the County did, in fact follow the procedure as outlined in IAFF CBA § 30.1.B.

Turning to the specific discipline in this case, to his credit, Appellant admitted to verbally abusing and physically assaulting KH to Internal Affairs investigators. Furthermore, at no point during his testimony did Appellant suggest that he should not receive discipline; rather, Appellant testified that he did not deserve to have his job back. Tr. 38:17. At the same time, Appellant seemingly suggests that the level of discipline is too severe and that the Department should have provided him with help.

However, throughout his testimony during cross-examination, Appellant revealed that the County has provided him with opportunities for help. Indeed, as recent as twenty (20) days prior to the hearing, and well after Appellant’s dismissal, JC emailed Appellant with information for how Appellant could obtain help through MCFRS. In fact, it was Appellant who decided not to

use the County's psychologist back in 2020. Tr. 115:18. We are also concerned that, after all that transpired, and after Appellant suggested that his conduct was in part due to not taking his medication, Appellant no longer wishes to take said medication.

In this case, the facts support a finding that Appellant committed the acts for which he was charged, and support a conclusion that he violated the provisions of law under which he was charged. By his own admission Appellant's behavior merits significant discipline. Although we have concerns regarding the lack of testimony from the Fire Chief regarding his decision to dismiss Appellant, we do not find sufficient mitigating circumstances to justify reducing the penalty. Thus, we believe that the County provided an adequate explanation for the Fire Chief's determination that Appellant's serious misconduct justified the highest level of discipline.

Accordingly, we conclude that the discipline of dismissal was appropriate and consistent with law. Although we are denying the Appeal, we encourage Appellant to review the information provided by JC on May 1, 2025, to determine what services are currently available to Appellant.

ORDER

For the foregoing reasons, the Board **DENIES** Appellant's appeal of his dismissal.

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 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
June 24, 2025

DENIAL OF EMPLOYMENT

Montgomery County Code, § 33-9(c), permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with § 6-14 of the Montgomery County Personnel Regulations (MCPR), an employee or an applicant may file an appeal directly with the Board 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 35-3 of the MCPR specifies that an employee or applicant has ten (10) working days after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position to file an appeal with the Board. The appeal must be filed in writing or by completing the Merit System Protection Board Appeal Form on the Board's website. The appeal must include a copy of the notification of nonselection or nonpromotion. MCPR § 35-4(d)(3). Copies of such documents may be uploaded with the online Appeal Form.

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney, Office of Labor Relations, and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receiving the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board considers the written record and issues a written decision.

During fiscal year 2025 the Board issued the following decisions on appeals concerning the denial of employment.

CASE NOS. 24-05 & 24-12

FINAL DECISION

Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) on December 26, 2023, claiming he was denied employment when he applied for a competitive promotion (MSPB Case No. 24-05). That same day, 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 April 10, 2024, Appellant filed a second appeal with the MSPB claiming denial of employment based upon the same nonselection for a promotion (MSPB Case No. 24-12). On April 30, 2024, the Board consolidated the two appeals.

On May 15, 2024, Montgomery County Government (County) filed its Response to the Appeal. On October 10, 2024, the MSPB issued a Request for Additional Information letter to the County, requiring the County to provide responses no later than October 24, 2024. The MSPB also provided Appellant with a November 7, 2024, deadline to reply to the County's responses to the Request for Additional Information, should Appellant wish to file a reply.

The County provided its responses to the MSPB's Request for Additional Information letter on October 24, 2024. Appellant did not reply to the County's response by the November 7, 2024, deadline. Instead, Appellant's counsel propounded Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on the County on November 7, 2024. In response, the County filed a Motion to Quash Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on November 12, 2024. Appellant's Counsel filed Appellant's Response to Respondent's Motion to Quash Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on November 20, 2024. After considering the arguments of the parties, the Board granted the County's Motion to Quash.

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 #259, filed on December 26, 2023.
2. A. Ex. 2 – DPS Letter, filed on December 26, 2023.
3. A. Ex. 3 – Appeal Form #268, filed on April 10, 2024 (3:28 p.m.).
4. A. Ex. 4 – Appeal Form #269, filed on April 10, 2024, (5:06 p.m.).
5. A. Ex. 5 – Notice of Nonselection, filed on April 10, 2024.
6. AR. – Appellant Response, filed on June 4, 2024.

The County provided the following documents:

1. CR. – County Response, filed on May 15, 2024.
2. CRAI. – County Response to Request for Additional Information, filed on October 24, 2024.
3. C. Ex. 1 – IRC60285 MLS 3 Job Advertisement.
4. C. Ex. 2 – IRC61449 MLS 3 Job Advertisement.

FINDINGS OF FACT

Appellant, a merit system employee working as a Fire Code Inspector III with the Montgomery County Department of Permitting Services (DPS), applied for a promotion to the newly created position of Manager III, Special Assistant to the Director (Grade M3) in DPS, competitively advertised in Vacancy Announcement IRC60285, which was posted by the County on October 20, 2023. C. Ex. 1.² The Advertisement was open for two (2) weeks and closed on November 3, 2023. CR., p. 2. The Announcement listed various responsibilities and preferred qualifications, including “[m]anag[ing] specific small business permitting from permit pre-submission to U&O issuance.” C. Ex. 1.

DPS Director RS was the selecting official for the position. C. Ex. 8. Per Director S, the hiring process used to select the successful candidate included the following:

1. After the advertisement closed, the Office of Human Resources (OHR) provided Director S with an eligible list of qualified candidates.
2. Director S and DB (Administrative Services Coordinator, DPS) reviewed the resumes of individuals on the eligible lists and compared them to the advertised preferences. From there, individual candidates were selected for interviews.
3. The candidates selected for interviews were contacted and scheduled for a first-round interview with a three-person panel consisting of LK (Manager II, DPS), GS (Manager III, Offices of the County Executive), and GL (Manager II, DPS).
4. The first-round interview panel asked each interview candidate the same eight questions.³
5. At the conclusion of the interview, each panel member completed an individual evaluation form.
6. The panel members then completed a consensus evaluation form and as a group decided whether to recommend, not recommend, or “save for later” each candidate.

-
5. C. Ex. 3 – IRC60285 Export List.
 6. C. Ex. 4 – Eligible Candidate Resumes (Redacted).
 7. C. Ex. 5 – IRC60285 Appellant [Selection Panel Consensus Evaluation Form].
 8. C. Ex. 6 – Communication Memo to Candidates (Redacted).
 9. C. Ex. 7 – Bypass Hiring Preference Non-Selection DPS M3 Spec Asst (Redacted).
 10. C. Ex. 8 – Affidavit of RS
 11. C. Ex. 9 – Affidavit of CC
 12. C. Ex. 10 – IRC60285 A,C [Selection Panel Consensus Evaluation Form].

² Neither the County nor Appellant provided the original IRC 60285 Vacancy Announcement that was advertised on October 20, 2023. According to CC, Human Resources Specialist with the Office of Human Resources, there were no changes to the body of the announcement between when it was initially advertised and when it was eventually reopened. C. Ex. 9.

³ The eight (8) first-round interview questions can be found in C. Ex. 5 and C. Ex. 10. Note that Director S’s Affidavit incorrectly cites to C. Ex. 3 regarding the eight interview questions that were asked during the first-round interviews.

7. Candidates who were recommended were offered a second-round interview with Director S and DPS Deputy Director, EM.
8. Candidates who participated in the second-round interviews were asked the same six questions.
9. At the conclusion of the second-round interviews, each panel member completed an individual evaluation form.
10. Director S and Deputy Director M then discussed the interview and completed a consensus evaluation form.

C. Ex. 8.

Per the process listed above, Appellant's application was evaluated, and Appellant was placed on the Eligible List. C. Ex. 3; C. Ex. 8. Thereafter, Director S and Ms. B selected Appellant and four (4) other applicants for the first round of interviews, which occurred on or around November 29, 2023. C. Ex. 8.⁴ However, after the first round of interviews Appellant was not recommended for further consideration for the position based on the Selection Panel Consensus Evaluation, receiving four (4) "Below Average" ratings and four (4) "Average" ratings regarding Appellant's eight responses during the interview. C. Ex. 5; C. Ex. 8. Only one applicant – "Candidate A" – was referred to a second-round interview; however, "Candidate A" was not selected for the position. CR., p. 2; C. Ex. 8. According to the County, the second-round interview occurred on December 14, 2023. CR., p. 2.

After the first-round interviews, both Appellant and Director S attended a DPS employee appreciation event on December 11, 2023. C. Ex. 8; A. Ex. 1. Appellant and Director S spoke during the event, though the parties dispute what was discussed during the conversation. Appellant claims that Director S approached Appellant and stated that Appellant "performed exceptionally well in the interview process." A. Ex. 1. Appellant further claims that Director S disclosed that Appellant was "the only candidate recommended for a second interview out of the five." A. Ex. 1. Appellant additionally claims that Director S stated that "DPS was going in a different direction" and was seeking an applicant "with a small business development background." A. Ex. 1; AR., p. 1. Director S denies that he stated during the conversation that Appellant was referred for a second-round interview. In fact, Director S stated that during their conversation, he told Appellant that the position would be re-advertised. C. Ex. 8. Director S also denied that DPS considered any applicant's small business development experience during the hiring process. C. Ex. 8.

Since no candidate was selected, Director S requested that OHR re-advertise the position. C. Ex. 8. On December 20, 2023, Director S issued a letter to all candidates for the position. C. Ex. 6. The letter stated the following:

⁴ There is an inconsistency regarding the interview date between the Selection Panel Documents (November 29, 2023) and Director S's Affidavit (November 27, 2023). Both the County Response and Appellant Response indicate that the interview occurred on November 29, 2023. Per the County Response, the first-round interview sessions occurred the week of November 27, 2023, which may account for the discrepancy.

Thank you for interviewing for the MLS III/Special Assistant to the Director position (IRC60285). The Department has not made a selection and will continue with the recruitment. Your application remains under consideration.

Thank you again for your interest, we wish you every success in your career pursuits.

C. Ex. 6.

Vacancy Announcement IRC60285 was re-advertised on December 21, 2023, permitting applicants to apply until January 12, 2024. CR., p.2; C. Ex. 1. The Announcement included the following language:

This is a re-announcement. The status of applicants who previously applied will remain the same. Applicants may submit an updated resume directly to the recruitment specialist.

C. Ex. 1.

Subsequently, Vacancy Announcement IRC 60285 was merged into Vacancy Announcement IRC61449, due to an “HRIS (Proforms) Expiration.” CR., p. 2; C. Ex. 2. The Announcement closed on March 8, 2024. C. Ex. 2. The Announcement included the following language:

This is a re-announcement. The status of applicants who previously applied will remain the same. Applicants may submit an updated resume directly to the recruitment specialist.

C. Ex. 2. There were no changes to the body of the announcement. C. Ex. 9.

Updated eligibility lists were provided to DPS. CR., p. 2. Additional first-round interviews were conducted in January and February 2024, including Mr. CA.⁵ C. Ex. 8. Mr. A was asked the same questions in his interview that Appellant was asked in his interview. C. Ex. 5; C. Ex. 10. Per the Consensus Evaluation Form, Mr. A received five (5) “Average” ratings and three (3) “Above Average” ratings and was recommended for a second-round interview. C. Ex. 10. Director S and Deputy Director M interviewed Mr. A on February 28, 2024. C. Ex. 10. Per the second-round Consensus Evaluation Form, Mr. A scored one (1) “Average” rating, three (3) “Above Average” ratings, and two (2) “Well Above Average” ratings. C. Ex. 10.

At the conclusion of the recruitment process, Mr. A was the highest-rated candidate per the interview Consensus Evaluation Forms and was offered the position. C. Ex. 8. Per Director S, this was due to Mr. A’s “demonstrated experience in project management, stakeholder management, customer service and field inspections, as well as his in-depth technical knowledge

⁵ Two candidates with hiring preference were interviewed; however, they were not selected as they did not possess the requisite qualifications. C. Ex. 7.

of building codes and working knowledge of the Department of Permitting Services’ operations.” C. Ex. 8. Director S acknowledges that while Mr. A did have direct experience with small business permitting, it was not a deciding factor. C. Ex. 8. Mr. A accepted the offer on March 28, 2024, and began working for DPS on April 7, 2024. CR., p. 2.

On March 29, 2024, Appellant received an email communication from Ms. B informing Appellant that he was not selected for the position. A. Ex 5.

POSITIONS OF THE PARTIES

a. Appellant

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

- the selection was based on factors not included in the job announcement, specifically small business experience, and Appellant was prevented from demonstrating his small business experience in his interview;
- the County failed to provide justification for reopening the advertisement, selecting a candidate that did not apply for the position when it was originally advertised; and
- the County intended to non-competitively select Mr. A for the position but used the selection process to conceal the County’s violation of County competitive recruitment procedures.

To remedy the violation, Appellant requests that the Board either place him in the Special Assistant to the Director (M3) position or place him in an equivalent position.

b. County

The County denies Appellant’s claims, arguing that:

- OHR “adhered to established hiring procedures, including posting job advertisements, reviewing applicant qualifications, providing eligible candidate lists to hiring departments, extending conditional and final job offers, and facilitating the County’s virtual orientation program for new hires”; and
- Appellant has not met his burden of proof, failing to allege any evidence to support that the County’s actions were arbitrary, capricious, or otherwise illegal.

APPLICABLE CODE PROVISIONS AND REGULATIONS

MONTGOMERY COUNTY CODE

Sec. 33-5. Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article.

* * *

- (b) Merit system principles. The merit system established by this chapter encompasses the following principles:

* * *

- (2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment;

* * *

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

6-2. Announcement of open jobs.

- (a) The OHR Director:

* * *

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;

* * *

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.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

* * *

6-9. Eligible list. After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories. The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

* * *

6-13. Selection process. A department director may, in consultation with the OHR Director, use any selection process that meets the department's needs and is consistent with 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 27. PROMOTION

27-4. Appeal of promotional action.

- (a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.
- (b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.
- (c) An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.

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.

* * *

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).

- a. Appellant has failed to prove that the selection was based on factors not included in the job announcement, specifically small business experience, and that he was denied the opportunity to discuss his small business experience in his interview.**

Appellant suggests that the recruitment process was flawed due to his belief that the Department considered criteria not included in the original position announcement or listed in the subsequent re-announcements, specifically that the Department was seeking candidates with small business experience. Appellant supports his argument based on statements he claims were made to him orally by Director S in their December 11, 2023, conversation, that "DPS was going in a different direction and that DPS wanted a candidate with small business experience." AR., p. 1. Director S confirms that he spoke with Appellant on December 11, 2023, and in fact that he informed Appellant that the position would be re-advertised. Director S denies that in re-advertising the position the Department was seeking someone with more small business experience. C. Ex. 8.

The merit system law requires the "full and open consideration of qualified applicants." MCC § 33-5(b)(2). Therefore, the selection process must be open and known to everyone involved from the beginning and throughout the process. MSPB Case. No. 13-12 (2013). The Personnel Regulations require that a job vacancy announcement include the rating process and rating criteria that will be used to create an eligible list. MCPR §§ 6-2(a)(2) & 6-5(b). Consequently, a recruitment selection is flawed and violates the merit system law and the Personnel Regulations if the selection is based upon criteria that is not included in a vacancy announcement. *See* MSPB Case No. 13-12 (2013). *Cf.* MSPB Case No. 04-10 (2004) ("Appellant was disadvantaged by the selecting official's decision to consider only those individuals who possess college degrees when that educational requirement is not mandatory for either the class specification or the position because it is an improper promotion practice in violation of Montgomery County Personnel Regulations. . .").

The record does not support Appellant's argument that the Department added a "small business experience" requirement to the selection criteria. Neither the original announcement nor

the subsequent re-announcement includes a small business experience requirement. C. Ex. 1; C. Ex. 2. In fact, “small business experience” was not the subject of any questions posed to any of the applicants. The record reflects that the only question asked during the first-round interviews that mentioned “small business” focused on skills associated with establishing and maintaining relationships, develop action plans to initiate the County’s initiatives, and effectively monitor and report on the program.⁶ C. Ex. 1; C. Ex. 2. Additionally, the Selection Panel notes provided by the County are devoid of any mention of either Appellant’s or Mr. A’s small business experience. C. Ex. 5; C. Ex. 10. Although Appellant argues that he was not afforded the opportunity to discuss his small business experience, we do not see how that would have changed the trajectory of the selection, as the selected candidate also did not discuss his small business experience during his interview.

To support his argument, Appellant relies heavily on his December 11, 2023, conversation with Director S. Even assuming this conversation occurred as Appellant has alleged, Director S’s statements are at most oral misrepresentations regarding the status of the selection process, as Appellant’s Consensus form states that he was “Not Recommended,” and Appellant was not selected for a second-round interview. C. Ex. 5; C. Ex. 8. While Appellant does not expressly assert a claim of equitable estoppel against the County, that argument might be inferred from Appellant’s submissions. We find that Appellant has not sufficiently alleged the elements of equitable estoppel. Appellant cannot rely solely on oral misrepresentations. *United States v. Vanhorn*, 20 F.3d 104, 112 (4th Cir. 1994) (“estoppel against the Government cannot be premised on oral representations”). Moreover, Appellant did not allege that any County employees engaged in affirmative 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).

Based upon the foregoing, the Board finds that “small business experience” was not a determining factor in the selection process. Appellant, thus, has failed to carry his burden.

b. Appellant has failed to prove that the County failed to provide justification for reopening the advertisement and selecting a candidate that did not apply for the position when it was originally advertised.

Appellant also argues that the County violated the Merit System law by failing to provide justification for extending the advertisement, thereby allowing an individual who did not apply for the position when it was originally advertised in October 2023. We find no merit to this argument.

The selection of the Special Assistant to the Director was based on applicant ratings assigned by the interview panel established through the same job-related questions asked of all applicants selected for interviews. Upon completion of each interview, the panel issued a

⁶ Per the announcements, the successful applicant is responsible for “[m]anag[ing] specific small business permitting from permit pre-submission to U&O issuance.” C. Ex. 1; C. Ex. 2. First-round interview question 5 asked the following: “One of the Department’s planned initiatives is to educate and assist small business owners on the role of the Department of Permitting Services and to provide guidance in navigating the permitting process in Montgomery County. The person in this position will need to know how 1) to establish and maintain relationships with internal and external stakeholders; 2) to develop and execute an action plan to implement the initiative, and 3) to effectively monitor, evaluate, and report on the program. Please describe your experience in applying each skill set.”

Consensus rating for each individual applicant. Applicants who received a Consensus rating of “Recommended” were considered for second-round interviews. Applicants who received “Not Recommended” were not considered for second-round interviews. Indeed, Appellant’s Consensus Evaluation Form indicates that the panel did not recommend Appellant for a second interview. C. Ex. 5. The record indicates that of the five (5) applicants who were interviewed after the position was originally announced, only “Candidate A” was recommended for a second interview. CR., p. 2; C. Ex. 8. Ultimately, the Department did not select “Candidate A.” CR., p. 2; C. Ex. 8. Because there were no applicants who responded to the original announcement in the highest rated category (“Recommended”) after completion of all first- and second-round interviews, the Department re-announced the position. The Department’s desire to broaden the pool of applicants to obtain more qualified candidates is certainly not arbitrary, capricious or illegal. *See* MSPB Case No. 23-01 (2023); MSPB Case No. 20-04 (2020).

c. Appellant has failed to prove that the County intended to non-competitively select Mr. A for the position but used the selection process to conceal the County’s violation of County competitive recruitment procedures.

Finally, without proof, Appellant suggests that the entire selection process was a smokescreen to conceal the Department’s intention to non-competitively select Mr. A for the position. However, there is simply no reliable evidence to support Appellant’s bald allegations of unequal treatment or favoritism. The Board has held that allegations of favoritism without proof may not constitute a basis for upholding an appeal. MSPB Case No 20-04 (2020) (“There is no evidence to support Appellant’s bald allegation of favoritism . . . [a]llegations without proof may not form a basis for us to uphold the appeal . . .”); MSPB Case No. 23-01 (2023); MSPB Case No. 20-11.

Nor did Appellant attempt to provide proof that he was the more qualified candidate. In a nonselection case, the Board will not substitute its judgment for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 20-04 (2020); MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006).

The record clearly shows that, in the end, Mr. A was the highest rated candidate and was properly selected for the position. The interview records submitted by the County indicate that Appellant was appropriately rated as “Not Recommended,” and that Mr. A’s significantly higher scores justified his rating as “Recommended.” Documents submitted by the County indicate that Appellant and the selected candidate were interviewed on the same questions and that the selected candidate performed significantly better than Appellant. The unrebutted evidence of record indicates that the selecting official had sufficient evidence that the candidate selected was the best qualified applicant for the position. While Appellant claims that he was not provided the opportunity to discuss his previous small business experience, the Board has determined that such experience was neither required nor relied upon by the Department in its recruitment for the position. During the first-round interviews, all candidates were asked a question related to the Department’s planned initiative to educate and assist and guide small businesses through the County’s permitting processes (Question 5). Appellant’s Consensus rating on this question was “Below Average,” while Mr. A’s Consensus rating was “Average.” And Mr. A’s Consensus rating was clearly higher than Appellant’s based upon his responses overall to the interview questions.

In fact, there were no questions where Appellant's responses were rated higher than Mr. A's responses. Conversely, Mr. A's responses to five questions were rated higher than Appellant's responses (Questions 2, 4, 5, 6, and 7).

It was entirely appropriate for the Department to select a candidate from the highest rating category. If the Department had for some reason wished to select a candidate from a lower rating category, under § 7-1(c) the Department would have had to justify that unusual selection in writing. Moreover, bypassing the higher rated candidate to select Appellant would have required CAO approval. As Appellant was rated "Not Recommended," the Department would have had to justify bypassing the selected candidate. The County Personnel Regulations and selection guidelines certainly do not require an agency to take those extraordinary steps. MSPB Case No. 20-11 (2020); MSPB Case No. 20-04 (2020).

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Manager III, Special Assistant to the Director (Grade M3) position, and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations, MCPR § 7-1. As we stated in a prior failure to promote case, "[s]election of a higher rated candidate is consistent with the County personnel regulations." MSPB Case No. 17-05 (2017). *See* MSPB Case No. 20-11 (2020); MSPB Case No. 20-04 (2020).

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.

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 10, 2025

Appellant filed a petition for judicial review of this decision on February 26, 2025 (Montgomery County Circuit Court Civil Action No. C-15-CV-25-000886). The Circuit Court affirmed the Board's decision on October 3, 2025.

CASE NO. 24-15

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 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

FINDINGS OF FACT

Appellant holds a Maryland Cannabis Administration certification, which indicates that Appellant has been prescribed cannabis by her provider, NC. 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.

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.
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.

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).
- 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

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.

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 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

CASE NO. 25-02

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

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.

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

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 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.

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.

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 MH, 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.*

On March 14, 2024, Mr. H provided Appellant the communication he drafted for distribution to CRRP term staff. A. Ex. 3. Per Mr. H's 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 MH, Chief Operating Officer.

A. Ex. 3.

At 1:16 p.m. on March 14, 2024, Appellant sent a Microsoft TEAMS message to Mr. H, requesting that Mr. H 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 responded "yes" to Appellant at 1:43 p.m. *Id.* Appellant reacted to Mr. H'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 CH, 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.*

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

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 *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 AY, 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.

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. . .").

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.

* * *

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.

* * *

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

CASE NO. 25-10

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 Recreation Specialist. The Appeal was officially filed February 24, 2025. The County filed its response to the appeal (County Response) on March 27, 2025. The Appellant notified the Board on April 23, 2025, that he did not wish to submit any final 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

FINDINGS OF FACT

Appellant applied for a Grade 21 position as a Recreation Specialist with the Montgomery County Department of Recreation (REC). CR; C. Ex. 1. Per the job announcement, the job “may require work that involves physical demands, occasionally working outdoors in varying weather and extreme temperatures. . .” C. Ex. 1. Per the Classification Specification, the position is

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 #290, filed on February 24, 2025.
2. A. Ex. 2 – Denial of Employment Letter, dated February 5, 2025.

The County provided the following documents:

1. CR. – County Response, filed on March 27, 2025.
2. C. Ex. 1 – Job Bulletin 2024-00089 Rec Specialist Youth Development.
3. C. Ex. 2 – Conditional Offer, dated November 26, 2024.
4. C. Ex. 3 – Not Fit for Duty Notification, dated January 9, 2025.
5. C. Ex. 4 – Withdrawal of Conditional Offer, dated February 5, 2025.
6. C. Ex. 5 – Class Specification No. 001015, Recreation Specialist.
7. C. Ex. 6 – Memorandum from EME to OHR and Appellant, dated March 24, 2025.

subject to the “Limited Core” medical exam protocol. C. Ex. 5. The Classification Specification also states that “[w]ork is primarily sedentary, but typical physical activity may vary considerably by position/team of assignment and it includes some walking, standing, bending, or carrying and delivering of supplies.” *Id.*

At the time of his interview, Appellant claims that he was six (6) days post-shoulder surgery and was in a sling, which was visible during Appellant’s interview. A. Ex. 1. On November 26, 2024, the Office of Human Resources issued a conditional offer of employment to Appellant, with a requirement that Appellant submit to and satisfy the medical requirements of the position. C. Ex. 2. On December 3, 2024, Appellant submitted to the required medical evaluation. A. Ex. 1. Appellant claimed that during the appointment the OMS doctor requested that Appellant obtain a doctor’s note regarding Appellant’s limitations due to the surgery at his next follow-up surgery appointment. *Id.* Appellant also claimed that the OMS doctor stated that Appellant had ninety (90) days to meet the medical clearance. *Id.* On January 23, 2025, after turning in the doctor’s note, Appellant received a telephone call wherein he learned that the conditional offer of employment was being rescinded. *Id.*

On January 9, 2025, the County’s Occupational Medical Services issued a memorandum to REC, indicating that Appellant was “Not Fit for Duty.” C. Ex. 3. On February 5, 2025, OHR issued a letter to Appellant, rescinding the conditional offer of employment based upon OMS’ determination that Appellant was “Not Fit for Duty.” A. Ex. 2; C. Ex. 4. Appellant received the letter from OHR on February 20, 2025. A. Ex. 1.

On March 24, 2025, OMS sent a memorandum to SF, summarizing the Employee Medical Examiner’s (EME) decision designating Appellant as “Not Fit for Duty.” C. Ex. 6. The EME indicated that the decision was based upon Appellant’s disclosure and the Appellant’s medical records that stated Appellant was in a sling recovering from shoulder surgery and would not be cleared for full duty for approximately six (6) to seven (7) months post operation. *Id.* The EME opined that Appellant was unable to perform the essential functions of the job, as Appellant would be responsible for lifting items in excess of 20 lbs. and driving a 12-15 passenger vehicle with staff and program participants. *Id.*

Appellant’s MSPB appeal form alleged that the Department’s decision was wrong because rescission of the job offer was based on a temporary medical inability to complete the role. *See* A. Appeal Form. Appellant further indicated that the action he wanted the Board to take was to “allow for a second physical evaluation and an updated doctors note to be submitted allowing for [Appellant] to pass the medical clearance and accept the position.” *Id.*

POSITIONS OF THE PARTIES

1. Appellant

- a. The decision to rescind the job offer was incorrect.
- b. OMS did not reach out to Appellant prior to issuing the rescission letter.

- c. Had OMS reached out, it would have been revealed that Appellant no longer had any physical restrictions that would prevent Appellant from performing the essential duties of the position.

2. County

- a. Appellant is unable to meet the burden of proof that the County's decision to rescind the conditional offer of employment was arbitrary, capricious, or illegal.

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 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 ACCOMMODATION

8-1. Definitions.

- (a) Applicant: In this section, applicant means an individual who has received a conditional job offer for a County merit system position.

- (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.

* * *

- (o) Reasonable accommodation: A term that means a modification or adjustment:
 - (1) to a job application process that enables a qualified applicant with a disability to be considered for the position the qualified applicant desires;

* * *

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 preemployment 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

* * *

8-5. Reasonable accommodation.

- (a) If the Employee Medical Examiner (EME) finds that an applicant or employee is a qualified individual with a disability that impairs the individual's ability to perform the essential functions of the job, the OHR Director must determine if the employee or applicant can be reasonably accommodated.

* * *

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 the 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) medically certify the individual's need for a work restriction or reasonable accommodation;
- (C) establish baseline health information on an employee that may be used to monitor changes over time; and
- (D) detect health problems in the individual that need follow-up.

(8) The EME must base the determination of whether an individual is medically fit for a position on the medical history and findings that directly reflect on the individual's ability to perform the essential job duties under the expected conditions. The EME must consider only medical findings that

- (A) affect the individual's current ability to perform the essential job duties under the expected conditions; or
- (B) indicate that the individual poses a direct threat to the health and safety of the individual or others.

* * *

(b) Medical exam protocols.

(1) How medical exam protocols are established.

- (A) The EME must establish a medical exam protocol for each County occupational class. The EME may include a medical history review, a physical evaluation, medical or physical tests, and consultations in a medical exam protocol.

(B) The EME may require additional medical evaluations not included in the assigned medical exam protocol or may apply a different medical exam protocol, as appropriate:

- (i) if one or more of the duties of a particular position or the conditions under which the duties are performed present risks or hazards not present in the duties assigned to other positions in the occupational class; or
- (ii) if necessary to determine the applicant's ability to perform the essential functions of the job with or without accommodation.

* * *

(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 preemployment drug screening and which:

- (i) are sedentary, but driving is a recurring and significant duty; or
- (ii) involve significant exposure to communicable diseases.

(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. A rabies vaccination may be required depending on the risks associated with the job. 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.

* * *

(d) Application of ADA and reasonable accommodation.

- (1) The EME must determine if the applicant is a qualified individual with a disability under the ADA when the Employee Medical Examiner finds that an applicant has a medical condition that impairs the individual's ability to perform the essential functions of the job or would be a direct threat to the health or safety of the applicant or others.
- (2) If the EME finds that an applicant is a qualified individual with a disability under the ADA, the department director must provide a reasonable accommodation, unless the OHR Director determines that accommodation would impose an undue hardship on the County.
- (3) The OHR Director may withdraw the conditional job offer and not consider the applicant for employment in that job, if:
 - (A) the EME finds that the applicant with a medical impairment is not a qualified individual with a disability under the ADA; or
 - (B) the applicant is a qualified individual with a disability under the ADA but the OHR Director has determined that reasonable accommodation would impose an undue hardship on the County.

* * *

8-8. Medical reports on applicant or employee fitness. After a required medical examination, the EME must:

- (a) prepare a written report of the medical findings and a determination of the individual's fitness for the position;
- (b) maintain this report as part of the individual's official medical record; and
- (c) advise the applicant or employee in writing if the EME finds the individual to be medically unqualified, the reason for the disqualification, and the manner in which the individual may appeal the decision.

* * *

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 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

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 and interviewed for the position, was provided a conditional offer of employment pending a medical evaluation, submitted to a required medical evaluation, but was unable to satisfy the medical requirements of the job. At the time of his medical evaluation, Appellant was only a few weeks post shoulder surgery. The EME determined, based upon the medical records and other information provided by Appellant, that Appellant could not currently perform the essential functions of the position. Because Appellant could not satisfy the medical requirements of the position, OHR rescinded the conditional offer of employment.

There is no dispute that appellant failed to meet the fitness requirements specified for the Recreation Specialist position. *See* CE Ex. 6. The Board has previously determined on multiple occasions that the County should receive significant deference in its decision-making surrounding medical fitness. *See, e.g.* MSPB Case No. 23-02 (2023); MSPB Case No. 15-30 (2015); MSPB Case No. 13-01 (2012); MSPB Case No. 03-01 (2003). Appellant has provided no evidence that the County's decision to withdraw his conditional offer, based on his 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. Additionally, Appellant chose not to provide a reply to the County's response to the appeal. As such, Appellant has not met Appellant's burden of proof. *See* MSPB Case No. 23-02 (2023). As such, we conclude that Appellant has not met his burden of proof, and his 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.²

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 Recreation Specialist (Job Number 2024-00089). It is further **ORDERED** that, should Appellant apply for a future 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.

² 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.

For the Board
June 24, 2025

CASE NO. 25-12

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 Child Welfare Caseworker. The Appeal was officially filed March 3, 2025.¹ The County filed its response to the appeal (County Response) on April 2, 2025. On April 16, Appellant filed a letter dated April 15, 2025, from her Family Nurse Practitioner.

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

FINDINGS OF FACT

On August 20, 2024, the County issued a recruitment advertisement for the position of Child Welfare Caseworker, Grade 23, with the Department of Health and Human Services (HSS). C. Ex. 1. Per the advertisement, the successful candidate “will need to operate a motor vehicle to transport children, supplies, and equipment, to other locations and would require the need to lift and carry, and manage stairs with children, equipment, and supplies.” C. Ex. 1. The advertisement also stated that “[s]elected candidates for this position will be subject to a pre-employment medical exam, drug and alcohol screening and criminal history records check through the Maryland State Department of Public Safety and Correctional Services.” C. Ex. 1. The advertisement indicated

¹The appeal was submitted online to the MSPB on February 27, 2025, at 8:18 p.m., after Board business hours. The appeal was officially received by the MSPB 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 #292, filed on February 27, 2025.
2. A. Ex. 2 – Denial of Employment Letter, dated February 5, 2025.
3. A. Ex. 3 – Physician’s Note from KC, CRNP, dated April 15, 2025.

The County provided the following documents:

1. CR. – County Response, filed on March 27, 2025.
2. C. Ex. 1 – Job Bulletin 2024-00119 Child Welfare Caseworker.
3. C. Ex. 2 – Conditional Offer, dated November 21, 2024.
4. C. Ex. 3 – Not Fit for Duty Notification, dated January 21, 2025.
5. C. Ex. 4 – Withdrawal of Conditional Offer, dated February 5, 2025.
6. C. Ex. 5 – Class Specification No. 000638, Child Welfare Caseworker.
7. C. Ex. 6 – Memorandum from EME to Appellant, dated February 11, 2025.

that “[a]ny applicant who fails the medical exam . . . may be disqualified from employment for this position.” C. Ex. 1. The Medical Exam Protocol in the Classification Specification includes “Limited Core Exam with a Drug/Alcohol Screen.” C. Ex. 5.

Appellant applied for a Grade 23 position as a Child Welfare Caseworker with the Montgomery County Department of Health and Human Services (HHS). The class specification, job posting, and conditional offer indicated that candidates were required to successfully complete a medical examination protocol. *See* C. Ex. 1; C. Ex. 2; C. Ex. 5. The medical examination protocol specified for the position was a Limited Core Exam with a Drug/Alcohol Screen. *See* C. Ex. 5.

On November 21, 2024, Appellant was issued a conditional offer of employment for the position, subject to her satisfying the County’s medical standards for employment. *See* C. Ex. 2. Appellant presented for the physical examination on January 2, 2025. *See* C. Ex. 3.

On January 21, 2025, OMS issued a Memorandum, indicating that Appellant was “not fit for duty.” C. Ex. 3. On February 5, 2025, 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* A. Ex. 2; C. Ex. 4.; C. Ex. 6.

On February 11, 2025, OMS doctor Dr. NM, MD, sent a memorandum to Appellant, explaining that the decision to designate Appellant in a “not fit for duty” status was based upon a review of Appellant’s medical records, specifically information from Appellant’s treating physician that stated “without surgery, [Appellant] would have a restriction that would not allow [Appellant] to lift more than 10 pounds.” C. Ex. 6. The Memorandum also stated that OMS reached out to the department to see if there were any ways to accommodate Appellant’s restrictions; however, due to the nature of the duties, the County determined that it was unable to reasonably accommodate Appellant’s restrictions. C. Ex. 6.

Appellant’s MSPB appeal form alleged that the Department’s decision was made in error because Appellant disclosed her disability as requested on the medical history form prior to her pre-employment exam. A. Ex. 1. Appellant further indicated that the job posting did not list any physical requirements, nor were any discussed during the interview process. *Id.* “After my exam, I was informed that the position requires the ability to react in compromising situations and lift/push/pull more than 10 pounds, but I was not given the opportunity to discuss possible accommodations before my offer was rescinded.” *Id.*

POSITIONS OF THE PARTIES

1. Appellant

- a. The decision to rescind the job offer was in error.
- b. The job posting did not list any physical requirements, nor were any discussed during the interview process.
- c. The County failed to provide Appellant with the opportunity to discuss possible accommodations.

2. County

- a. Appellant has not alleged and is otherwise unable to prove that the County's decision to rescind the conditional offer of employment was arbitrary, capricious, or illegal.

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 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 ACCOMMODATION

8-1. Definitions.

- (a) Applicant: In this section, applicant means an individual who has received a conditional job offer for a County merit system position.
- (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.

* * *

(o) Reasonable accommodation: A term that means a modification or adjustment:

- (1) to a job application process that enables a qualified applicant with a disability to be considered for the position the qualified applicant desires;

* * *

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

* * *

8-5. Reasonable accommodation.

- (a) If the Employee Medical Examiner (EME) finds that an applicant or employee is a qualified individual with a disability that impairs the individual's ability to perform the essential functions of the job, the OHR Director must determine if the employee or applicant can be reasonably accommodated.

* * *

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 the 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) medically certify the individual's need for a work restriction or reasonable accommodation;
- (C) establish baseline health information on an employee that may be used to monitor changes over time; and
- (D) detect health problems in the individual that need follow-up.

(8) The EME must base the determination of whether an individual is medically fit for a position on the medical history and findings that directly reflect on the individual's ability to perform the essential job duties under the expected conditions. The EME must consider only medical findings that

- (A) affect the individual's current ability to perform the essential job duties under the expected conditions; or
- (B) indicate that the individual poses a direct threat to the health or safety of the individual or others.

* * *

(b) Medical exam protocols.

(1) How medical exam protocols are established.

- (A) The EME must establish a medical exam protocol for each County occupational class. The EME may include a medical history review, a physical evaluation, medical or physical tests, and consultations in a medical exam protocol.

(B) The EME may require additional medical evaluations not included in the assigned medical exam protocol or may apply a different medical exam protocol, as appropriate:

- (i) if one or more of the duties of a particular position or the conditions under which the duties are performed present risks or hazards not present in the duties assigned to other positions in the occupational class; or
- (ii) if necessary to determine the applicant's ability to perform the essential functions of the job with or without accommodation.

* * *

(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 and which:

- (i) are sedentary, but driving is a recurring and significant duty; or
- (ii) involve significant exposure to communicable diseases.

(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. A rabies vaccination may be required depending on the risks associated with the job. 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.

* * *

(d) Application of ADA and reasonable accommodation.

- (1) The EME must determine if the applicant is a qualified individual with a disability under the ADA when the Employee Medical Examiner finds that an applicant has a medical condition that impairs the individual's ability to perform the essential functions of the job or would be a direct threat to the health or safety of the applicant or others.
- (2) If the EME finds that an applicant is a qualified individual with a disability under the ADA, the department director must provide a reasonable accommodation, unless the OHR Director determines that accommodation would impose an undue hardship on the County.
- (3) The OHR Director may withdraw the conditional job offer and not consider the applicant for employment in that job, if:
 - (A) the EME finds that the applicant with a medical impairment is not a qualified individual with a disability under the ADA; or
 - (B) the applicant is a qualified individual with a disability under the ADA but the OHR Director has determined that reasonable accommodation would impose an undue hardship on the County.

* * *

8-8. Medical reports on applicant or employee fitness. After a required medical examination, the EME must:

- (a) prepare a written report of the medical findings and a determination of the individual's fitness for the position;
- (b) maintain this report as part of the individual's official medical record; and
- (c) advise the applicant or employee in writing if the EME finds the individual to be medically unqualified, the reason for the disqualification, and the manner in which the individual may appeal the decision.

* * *

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 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

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 appointed to the position. *See* MCPR § 8-3(a). The County may withdraw an offer of employment if the applicant fails to meet the medical requirements for the position. *See* MCPR § 8-1(b).

In the instant case, Appellant applied for a position as a Child Welfare Caseworker and the job specifications stated that her employment was conditioned on her successful clearance of the medical examination protocol for the position.

The County's decision to rescind the conditional offer of employment was not arbitrary, capricious, or illegal. The uncontested facts in this case are that the County included information in the job advertisement that the position required the successful candidate to be able to carry children and equipment up and down flights of stairs and drive a vehicle. Thus, the County determined that applicants for the position must successfully pass a medical evaluation to receive a final offer of employment. Appellant submitted to the required medical evaluation, and based upon a review of Appellant's medical history, the EME determined that Appellant's current condition, without surgical intervention, would prevent Appellant from lifting more than ten (10) lbs. The EME consulted with the department and determined that there were no reasonable accommodations that would permit Appellant to perform the required duties of the position. Appellant did not contest the facts as stated above.³

Appellant's argument that the position advertisement did not list any physical requirements is without merit. The posting clearly included language that indicates that successful candidates for the position "will need to operate a motor vehicle to transport children, supplies, and equipment, to other locations and would require the need to lift and carry, and manage stairs with children, equipment, and supplies." C. Ex. 1.

Appellant's contention that the County improperly failed to discuss possible accommodations with Appellant is not supported by the Personnel Regulations. Nowhere in the County Code or the Personnel Regulations does it require the County to discuss accommodations with an applicant for County employment. The only requirement is that the OHR Director must evaluate reasonable accommodations should the EME find that a job applicant is a qualified individual with a disability that impairs the individual's ability to perform the essential functions of the job. *See* MCPR § 8-5(a) & (d). The OHR Director concurred with the EME's decision regarding the lack of reasonable accommodations, as evidenced by OHR's issuance of the rescission letter. C. Ex. 4.

In reply to the County's response to the appeal, Appellant provided a medical provider's note from KC, CRNP, which indicated that Appellant does not have any restrictions that would

³ We note that it's the OHR Director's responsibility to determine whether an applicant can be reasonably accommodated. *See* MCPR § 8-5(a). In this case, the EME asked the Department whether Appellant's current condition could be accommodated. It does not appear that the OHR Director was consulted when the decision was made. However, we believe that the OHR Director adopted the EME's determination regarding reasonable accommodation when the conditional offer of employment was rescinded. To avoid issues in the future, the Board suggests that the County review its current policies and procedures with the EME and OMS to ensure compliance, as well as revisit the MCPR to evaluate whether the applicable provisions require amendment.

prevent Appellant from performing the duties of the position. Appellant's submission is problematic for two reasons.

First, the Board gives significant deference to the County's evaluation of whether an applicant is medically capable of performing the essential functions of a position unless the Appellant can show the County's decision was arbitrary or capricious. *See* MSPB Case No. 23-02. Appellant's submission fails to show that the County's decision was arbitrary or capricious, as there is no explanation as to why Appellant's condition changed since the last doctor note that indicated Appellant was unable to lift more than 10 lbs. without surgical intervention.

Second, and more importantly, the note was not part of the record when the County made its decision to rescind the conditional offer of employment. Nor could it have been, as it was issued on April 15, 2025, more than two months after Appellant's conditional offer was rescinded. The Board has previously determined that absent extraordinary circumstances, the Board will not consider evidence that was not revealed during the application process unless the Board conducts a hearing in a non-selection case. *See* MSPB Case. No. 15-23 (Footnote 9). Accordingly, Appellant's submission has no probative value under the circumstances.

There is no dispute that Appellant failed to meet the fitness requirements specified for the Child Welfare Caseworker position. *See* C. Ex. 6. 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* MCC § 33-9(c); MCPR § 6-14. As such, we conclude that Appellant has not met the burden of proof and the 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 Child Welfare Caseworker (Job Number 2024-00119). 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 may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

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.

For the Board
June 24, 2025

CASE NO. 25-14

FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on March 12, 2025¹. Appellant is appealing denial of employment for a Police Officer Candidate position.

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

FINDINGS OF FACT

Appellant applied for a Police Officer Candidate position (Grade P1) with the Montgomery County Police Department (MCPD), in response to the County job bulletin for Job Number 2024-00070. C. Ex. 1. The job bulletin stated that applicants who successfully complete the written exam will be provided instructions to complete an online background investigation booklet. *Id.* The job bulletin further advised that candidates must, among other criteria, successfully complete the background investigation “in order to receive a final offer of employment.” *Id.*

Appellant took and passed the written exam on January 15, 2025, and then began the background investigation process on January 29, 2025. CR; C. Ex. 4. The employment history review portion of the background investigation revealed information that would potentially disqualify Appellant. *Id.* Appellant was notified and asked to provide additional information. *Id.* Appellant responded that Appellant filed a FOIA request to another government agency to obtain the information. *Id.*

¹ The appeal was submitted online to the MSPB on March 11, 2025, at 6:12 p.m., after Board business hours. The appeal was officially received by the MSPB 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 #294, filed on March 11, 2025.
2. A. Ex. 2 – Notice of Nonselection, dated March 4, 2025.
3. A. Ex. 3 – Appellant reply to County Response, filed May 13, 2025.

The County provided the following documents:

1. CR. – County Response, filed on April 14, 2025.
2. C. Ex. 1 – Job Bulletin 2024-00070 Police Officer Candidate.
3. C. Ex. 2 – Notice of Nonselection, dated March 4, 2025.
4. C. Ex. 3 – Release of Information Form.
5. C. Ex. 4 – Affidavit of AM.

Without the additional information, MCPD was unable to approve Appellant's background investigation. *Id.* Due to the need to fill Session 79, on March 4, 2025, Appellant received an email from HS, informing Appellant that Appellant will no longer be considered for employment as a police officer candidate. C. Ex. 2; C. Ex. 4. Appellant was also instructed to disregard the oral interview that was scheduled for March 5, 2025. *Id.*

POSITIONS OF THE PARTIES

1. Appellant

- a. The County failed to provide Appellant with information regarding why his application was denied.

2. County

- a. Appellant is unable to meet the burden of proof that the County's decision on the application was arbitrary, capricious, or illegal, or based on political affiliation or other non-merit factors.

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 6. RECRUITMENT AND APPLICATION RATING PROCEDURES

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; or

* * *

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 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

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 his 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).

In this case, Appellant was asked to provide clarifying information regarding his background check submission dealing with his prior work history. Appellant was unable to timely provide the information. Thus, the County decided not to continue processing Appellant's application for employment. We have previously determined that an applicant's failure to provide complete and accurate information during the recruitment process is reasonable grounds for the County to rescind a conditional offer of employment. *See* MSPB Case No. 16-15 (2016). Thus, the County's actions were not arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors.

Appellant's argument that the County should provide more specific information regarding the reason for the decision to end its consideration of Appellant's application is without merit. We find that the County's decision was due to the fact Appellant did not provide requested information regarding his prior employment. Had Appellant done so, an inquiry into the rationale may have been necessary.

For these reasons the Board finds that Appellant has failed to prove that the County's decision on his application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors. We note that the County indicated in its Response that Appellant was not disqualified from applying for future police recruit classes. C. Ex. 4.

ORDER

Based on the above analysis, Appellant's appeal of the County's denial of employment for the position of Police Officer, 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
June 18, 2025

GRIEVANCES

In accordance with § 34-10(a) and § 33-9(b) of the Montgomery County Personnel Regulations (MCPR), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. The appeal must be filed in writing or by completing the Appeal Form on the Board's website. The appeal must include a copy of the CAO's decision. MCPR § 35-4(d)(2).

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney, Office of Labor Relations, and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee with a copy of all information provided to the Board. After receiving the County's response, the employee is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board considers the written record and issues a written decision.

The Montgomery County Code, § 33-56, also permits an appeal to the MSPB from a decision of the CAO regarding a retirement issue. Appeals of retirement grievances must be filed within fifteen (15) calendar days.

During fiscal year 2025 the Board issued the following grievance decisions.

CASE NO. 24-20

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 County's Chief Labor Relations Officer denying her grievance and requested relief. On June 25, 2024, Appellant filed an appeal with the Board. However, Appellant had yet to exhaust the steps of the grievance procedure per the Montgomery County Personnel Regulations, 2001. The Board stayed the matter until Appellant submitted a Step 2 grievance decision from the Chief Administrative Officer (CAO).

After conducting a Step 2 meeting, the Office of Labor Relations (OLR) issued the CAO Step 2 grievance decision on December 2, 2024. The MSPB subsequently acknowledged the appeal and ordered the County to submit a response on or before January 8, 2025. The County submitted a response to the appeal (County Response) on January 8, 2025. Appellant filed her response to the County's submission on February 13, 2025 (Appellant Response).

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

FINDINGS OF FACT

Appellant, a Montgomery County government merit system employee, was promoted from an Administrative Specialist II (grade 22 on the OPT/SLT salary schedule) in the Department of General Services (DGS) to an Administrative Specialist III (grade N23 on the General Salary Schedule (GSS)) with the Department of Technology and Enterprise Business Solutions (TEBS), effective May 5, 2024. C. Ex. 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 #281, filed on June 25, 2024.
2. A. Ex. 2 – Appellant Performance Evaluation.
3. A. Ex. 3 – Christmas Card.
4. A. Ex. 4 – Timeline.
5. A. Ex. 5 – CAO Decision, issued on December 2, 2024.
6. A. Ex. 6 – Appellant Response, filed on February 13, 2025.

The County provided the following documents:

1. CR. – County Response, filed on January 8, 2025.
2. C. Ex. 1 – Email dated April 15, 2024, from NM to Appellant.
3. C. Ex. 2 – Email dated April 16, 2024, from NM to Appellant.
4. C. Ex. 3 – April 17, 2024, Promotional Offer Letter.
5. C. Ex. 4 – Fiscal Year 2024 (FY24) Salary Schedule.
6. C. Ex. 5 – Appellant Grievance form with attachments.
7. C. Ex. 6 – Appellant Written Statement.

On March 14, 2024, Appellant received a conditional offer via email from NM, Human Resources Specialist with the Office of Human Resources. C. Ex. 5, p. 6 – 8. Appellant’s new salary listed in the conditional offer email was \$114,550.58. C. Ex. 5, p. 7. Later that evening, Appellant responded to the conditional offer email, requesting clarification on a few items, including Appellant’s new salary. C. Ex. 5, p. 6. Appellant received a response via email on March 15, 2024, clarifying that Appellant’s base County salary upon promotion will be \$110,588.00, and Appellant’s “Total County Salary,” including a 16-year longevity increment that Appellant previously received, will be \$114,182. C. Ex. 5, p. 13. The decrease in total County salary was the result of an error. C. Ex. 5, p. 13.

In its April 15, 2024, offer letter to Appellant, OHR indicated that Appellant’s “Total County Salary,” including a 16-year longevity step Appellant previously received in her former position, was \$109,095.79, that her new salary upon promotion would be \$114,182.00, and that she was required to accept the position on OHR’s online web page. C. Ex. 1. The salary quoted in the April 15, 2024, offer letter would have been at the maximum salary range plus a 16-year longevity increment on the GSS salary schedule. C. Ex. 4.

On April 16, 2024, OHR sent Appellant an email indicating that the offer letter acceptance was currently offline, and that Appellant should reach out to JT in OHR to discuss Appellant’s salary. C. Ex. 2. On April 17, 2024, OHR issued a second offer letter to Appellant, this time listing Appellant’s new salary upon promotion as \$110,588.00, which was the maximum salary for Appellant’s new N23 salary grade. C. Ex. 3. Appellant also received another email from OHR, informing Appellant of the need to accept the offer via OHR’s online system. C. Ex. 5, p. 34 – 35. Appellant responded, requesting to speak with Mr. T. C. Ex. 5, p. 34. Mr. T replied on April 17, 2024, informing Appellant that Appellant’s 16-year longevity increment will be added to Appellant’s base salary, and that Appellant’s promotional salary will be the maximum of the N23 pay range. Appellant responded shortly thereafter, continuing to question what Appellant’s “Total County Salary” will be. C. Ex. 5, p. 33. Mr. T replied later in the day, informing Appellant that since her 16-year longevity step was on a different salary schedule, Appellant was not eligible for the GSS 16-year longevity step. C. Ex. 5, p. 32. Appellant replied, providing her concerns regarding the loss of the 16-year longevity increment that she previously earned. C. Ex. 5, p. 31.

On April 18, 2024, OHR reached out, apologizing for the confusion and extending the deadline for Appellant to accept the offer until April 22, 2024. C. Ex. 5, p. 31. Appellant ultimately accepted the position, but subsequently filed a grievance on May 28, 2024, claiming that the decision regarding her salary was incorrect. C. Ex. 5.

POSITIONS OF THE PARTIES

1. Appellant

- a. The County arbitrarily and capriciously moved Appellant’s 16-year longevity increment into her base salary from her total county salary (it appears she is arguing that the County should have first applied the promotional increase up to the salary grade maximum, and then add the 16-year service increment to that).

- b. The policy creates a situation where an employee will never be able to reach their maximum salary potential.
- c. The policy creates an inequity where employees who did not receive a longevity increment prior to promoting into a position will be able to earn more money than employees who promote into a position after they receive a longevity increment.
- d. As a principle of the matter, the policy creates a situation where employees feel undervalued.

2. County

- a. The MCPR states that salary after promotion cannot exceed the maximum of the new salary grade; therefore, the County was required by the MCPR to limit Appellant's salary.
- b. The County followed the MCPR and Appellant has failed to show that the County's action was arbitrary, capricious, or illegal.

APPLICABLE CODE PROVISIONS AND REGULATIONS

CHARTER OF MONTGOMERY COUNTY, MARYLAND

Sec. 401. Merit System.

* * *

The merit system shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force with personnel actions based on demonstrated merit and fitness. Salaries and wages of all classified employees in the merit system shall be determined pursuant to a uniform salary plan. The Council shall establish by law a system of retirement pay.

* * *

Sec. 402. Personnel Administration.

The County Executive shall be responsible for adopting personnel regulations for the administration and implementation of the merit system law. These regulations shall be adopted in the manner provided for by law. The Chief Administrative Officer, under the direction of the County Executive and subject to merit system laws and regulations, shall be responsible for administering the County's merit system.

MONTGOMERY COUNTY CODE

Sec. 2A-16. Administrative procedures.

* * *

- (d) Prohibition. If a law expressly delegates the authority to adopt a regulation, an issuer must not adopt an administrative procedure instead of a regulation if the subject affects or requires action by:

* * *

- (2) any unit of government not under the issuer's control. An administrative procedure must not be adopted to implement Chapter 19A or Chapter 33.

* * *

Sec. 33-5. Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article.

- (a) *Statement of legislative intent.* It is the legislative intent of the county council that this article foster excellence in the public service; high individual competence among employees; recognition that respect for the employee as an individual is first required for achieving such excellence and competence; and harmonious and efficient operation within the various components of county government.

- (b) Merit system principles. The merit system established by this chapter encompasses the following principles:

- (1) All county government authority, including internal supervisory authority, is for service to the people, is derived from law and the people and must not be abused;
- (2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment;
- (3) Merit system employees shall be provided compensation consistent with standard of comparability with other public agencies and the private sector;
- (4) Merit system employees shall be provided training as needed to assure high quality performance and such training where possible should also provide increased opportunity to facilitate their career advancement;
- (5) Merit system employees are encouraged to excel in their work performance; they shall be retained if they meet standards of satisfactory overall performance and shall be separated from merit system service if they do not; both supervisors and subordinates have an equal responsibility to facilitate work performance correction and improvement;

- (6) All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other nonmerit factors in all aspects of personnel administration.
- (7) Merit system employees shall be protected against coercion to engage in illegal or improper actions or partisan political activities and shall be prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or nomination for office;
- (8) The merit system established under this chapter shall be interpreted in accordance with these principles.

* * *

Sec. 33-7. County executive and merit system protection board responsibilities.

- (a) *Generally.* In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein must be exercised by the Board as needed to rectify personnel actions found to be improper. The Board must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, must establish staffing requirements and define the duties of its staff.
- (b) Personnel regulations. The County Executive must adopt personnel regulations under method (1).

The personnel regulations must provide the framework for:

* * *

- (8) Similar personnel matters as may be provided by law.

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.

Sec. 33-11. Classification; salary and wage plans.

* * *

(b) *Uniform salary plan.*

(1) The uniform salary plan consists of:

* * *

(I) a general salary schedule for all other employees.

(2) The Chief Administrative Officer may recommend to the County Council amendments to the uniform salary plan.

(3) The Council must approve the uniform salary plan and any amendments by resolution.

* * *

MONTGOMERY COUNTY PERSONNEL REGULATIONS, 2001

SECTION 1. DEFINITIONS

1-4. Base hourly salary: The base hourly salary for an employee is an amount equal to the annual salary for the employee's position, divided by the number of work hours per year normally assigned to the position. Base hourly salary is calculated on the basis of full-time salary and full-time work hours per year for a given position. The base hourly salary includes only pay differentials that apply even if the employee is not in work status, as, for example, if the employee is on paid leave. The base hourly salary does not include overtime or differentials, such as shift differentials, that are paid only if an employee is in work status.

SECTION 10. EMPLOYEE COMPENSATION

10-5. Salary setting policies.

(a) General. A department director must ensure that an employee's base salary does not exceed the pay rate or range for the pay grade or pay band assigned to the employee's class, unless the department director:

- (1) demoted the employee because of reduction-in-force or disability under Section 10-5(d); or
- (2) reclassified or reallocated the employee's position to a lower pay grade or pay band under Section 10-5(f).

* * *

(c) Salary on promotion.

- (1) Compensation for a regular (non-temporary) promotion.
 - (A) A department director must ensure that an employee's base salary following promotion is not less than the minimum or more than the maximum salary for the new pay grade or pay band.
 - (B) A department director must give a merit system employee who is promoted at least a 5 percent increase in base salary, except as provided in (C) below.
 - (C) A department director must not give a salary increase upon promotion to an employee who took a voluntary demotion in the past but did not lose salary, unless:
 - (i) a salary increase is necessary to restore the employee to the salary that the employee would have had if the employee had not been demoted; or
 - (ii) the employee is promoted to a higher-graded position than the position from which the employee was demoted.
 - (D) In addition to the non-discretionary 5 percent increase provided for in (B) above, a department director may approve an additional increase in base salary of up to 5 percent for a single promotion, or a total increase not to exceed 10 percent.
 - (E) In addition to the maximum 10 percent increase in base salary for a single promotion that a department director may approve under (D) above, a department director may recommend and the OHR Director may approve an additional increase in base salary of 5 percent for a single promotion, or a total increase not to exceed 15 percent.
 - (F) A department director should consider the following factors when recommending to the OHR Director an additional 5 percent salary increase for a single promotion under I above, which would constitute a total increase of 15 percent:

- (i) whether the employee being promoted received an “Exceptional” overall performance rating prior to the promotion; or
 - (ii) whether the position that the employee is being promoted to is a difficult position for which to recruit and retain employees.
- (G) A department director’s recommendation to the OHR Director for a maximum increase of 15 percent in base salary for a single promotion must:
 - (i) document that the promotional increase requested is consistent with the department’s pay practices and policies;
 - (ii) provide justification for the request.
- (H) In extraordinary circumstances, the department director may recommend and the OHR Director may approve a total increase not to exceed 20 percent of base salary. Extraordinary circumstances means:
 - (i) a promotion of at least 3 grades; or
 - (ii) a promotion to a supervisory position after which the employee’s salary would be less than that of the employees supervised.
- (I) The CAO may approve a total increase in base salary greater than 20% in extraordinary circumstances (as defined in section 10-5I(1)(H)) based upon the factors identified in section 10-5(b) where a promotion arises from a competitive promotion that was open to the general public and at least one non-County employee was either in the highest rating category or was interviewed for the vacancy.

* * *

SECTION 12. SERVICE INCREMENTS

* * *

12-9. Twenty-year longevity/performance increment.

- (a) A 20-year longevity/performance increment is a one-time increase to an employee’s base salary.

- (b) A department director must award a one-time 20-year longevity/performance increment of 2 percent of base salary to an employee in a position on the General salary schedule if the employee has:
 - (1) a base salary equal to the maximum salary of the pay range; and
 - (2) 20 years of actual County service; and
 - (3) Received an annual overall performance rating of *Highly Successful Performance* or *Exceptional Performance* for the 2 most recent consecutive years.
- (c) An employee is eligible to receive only one 20-year longevity/performance increment.
- (d) Awarding longevity/performance increments to promoted employees.

* * *

- (3) When an employee is promoted from a bargaining unit position to a non-bargaining unit position:
 - (A) the 20-year longevity increment is added to the employee's base salary before the promotional increase is added;
 - (B) the employee is eligible to receive a 2% longevity/performance increment under Section 12-9(b); and,
 - (C) the employee's new base salary cannot exceed the maximum salary of the new pay range.

SECTION 27. PROMOTION

* * *

27-3. Compensation for a promotion. A department director must compensate an employee for a promotion as described in Section 10-5I.

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.

* * *

- (b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

* * *

ISSUE

Was the County's action regarding Appellant's salary upon promotion arbitrary, capricious, illegal, or nonmerit factors?

ANALYSIS AND CONCLUSIONS

Appellant bears the burden of proof to show by a preponderance of the evidence that the County's actions violated a law, regulation, or policy, or were arbitrary, capricious, or illegal. *See* MCPR 34-9(d)(2).

Application of the 16-year Longevity Increment to Base Salary

Appellant first argues that the County's decision to apply Appellant's 16-year longevity increment to her base salary was arbitrary and capricious. It is notable that Appellant does not argue that the County's actions violated the Personnel Regulations. A. Ex. 6. Hence, the question for the Board is whether the inclusion of Appellant's 16-year longevity increment in Appellant's base salary was arbitrary and capricious.

The County relies upon MCPR § 10-5I(1)(a) to support its argument that Appellant's salary was properly set at the grade 23N maximum, rather than the grade 23N maximum with the 16-year longevity step. Specifically, the provision states that an employee's salary upon promotion cannot exceed the maximum salary of the new pay grade. The salary schedules provided by the County

indicate that each salary grade has a minimum, a midpoint, and a maximum. C. Ex. 4. The longevity increments are not included in the maximum of the salary grade; rather they are in addition to the salary grade.

It appears the County properly calculated Appellant's promotional salary. The current language in MCPR § 10-51 states that base salary upon promotion cannot exceed the maximum salary for the new grade. Although "base salary" isn't defined in the MCPR, "base hourly salary" is and includes all employee pay other than differentials paid only when an employee is considered in a work status. Because Appellant was already receiving the 16-year increment before promotion, and because the longevity increment is paid even when the employee is not in a work status (i.e., paid when the employee is on paid leave), the 16-year longevity increment is considered part of Appellant's "base hourly salary." Appellant's annual salary was less than the pay band Appellant was promoting into. Consequently, when applying the promotional salary increase to Appellant's salary, per the Personnel Regulations, the County could only provide a promotional salary increase up to the salary maximum for the new grade.

Other than general complaints about how longevity increments are contemplated in promotional salaries, Appellant has failed to provide the Board with any specific factual evidence to suggest that the County's application of the Personnel Regulations to Appellant's salary upon promotion was either arbitrary or capricious. The Board has previously held that generalized complaints are insufficient to carry the burden of proving that the County's actions were either arbitrary or capricious. *See* MSPB Case. No. 16-01. Therefore, Appellant has failed to prove beyond a preponderance of the evidence that the County's actions were arbitrary or capricious.

Outdated Personnel Regulations

Appellant also argues that the MCPR language regarding longevity increments is outdated.

The General Salary Schedule for FY24 (July 1, 2023, to June 30, 2024) that the County provided to the Board includes a 16-year longevity increment that is not referenced in MCPR Section 12. C. Ex. 4. Per Chapter 33 of the County Code, the County Council must approve the salary schedules through resolution. MCC § 33-11(b)(3). Per Resolution 20-184, adopted by the County Council on May 25, 2023, the County Council approved the salary schedule that added a new 3.25% longevity increment at sixteen (16) years of County service to the GSS, and increased the 20-year longevity increment from 2% to 3.25%. Accordingly, qualified employees were eligible to receive the 16-year longevity increment beginning in FY24.

The County Code further requires that provisions in Chapter 33 of the County Code may only be implemented via regulation. MCC § 2A-16(d). Thus, the implementation of the procedures affecting the 16-year longevity step must be accomplished through regulation. Regulations associated with longevity increments are found in MCPR Section 12. However, as previously noted, the current language in Section 12 only contemplates a 20-year longevity increment.

While we agree that the Personnel Regulations are outdated, the fact remains that the application of the current language to Appellant's situation does not violate county merit system

principles.² Because Appellant has provided no evidence that the County violated any law, regulation, or policy, or that the County's actions were arbitrary, capricious or discriminatory, we conclude that Appellant has failed to meet the burden of proof.

However, because nearly two years have passed since Council approved funding for the 16-year longevity increment, the Board strongly recommends that, should Council approve amendments to the Personnel Regulations that would have benefited Appellant and any other similarly situated employees had they been implemented in FY24, the County should consider retroactively applying the amendments to those employees.

ORDER

For the above discussed reasons, it is hereby **ORDERED** that the appeal in Case No. 24-20 be and hereby is **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 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
May 22, 2025

² The current language in the Personnel Regulations contemplates 2% longevity increment at 20 years of County service. The additions of the 16-year longevity increment and the increase in percentage to the 20-year longevity increment to the GSS have created a situation that is, at the very least, problematic. Applying the current promotional salary regulations as written may require merit system employees who have received longevity increments to accept reductions in pay to promote into positions with increased responsibilities. For instance, if the facts of the present case were slightly different and Appellant had already received a 20-year longevity step prior to promotion, Appellant would have had to accept a reduction in pay for the promotion, as the maximum salary for grade N23 is approximately \$2,000 less than her former grade 22 salary with the 20-year longevity step added. It's not clear to the Board how this situation, while not violative of any County law, regulation, or merit system principle, would be of any benefit to the County, as long-tenured merit system employees would not have any incentive to promote once they reach certain longevity milestones.

DISMISSAL OF APPEALS

Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if, among other reasons, the appeal is untimely, the appellant fails to prosecute the appeal or comply with appeal procedures, the Board lacks jurisdiction, the appeal is or becomes moot, the appellant failed to exhaust administrative remedies, there is no actual (*i.e.*, justiciable) controversy, or the appellant fails to comply with a Board order or rule. The County's Administrative Procedures Act (APA), Montgomery County Code § 2A-8(j), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal.

During fiscal year 2025, the Board issued the following dismissal decisions.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 24-17

ORDER OF DISMISSAL

On May 7, 2024, Appellant, filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a 30-day suspension he received as discipline. On that same day, the Board issued a scheduling letter ordering Sandy Spring Volunteer Fire Department (SSVFD) to file its prehearing submission by June 6, 2024. SSVFD did not file a prehearing submission. Appellant filed a prehearing submission on June 27, 2024.

On the Appellant's Appeal Form, he listed his Title/Position as "Board Member/Quartermaster/Administrative Member." According to the SSVFD website, the Appellant is listed under Active Administrative not Active Firefighters or Active EMS. Also, the Statement of Charges from the SSVFD provided in the Appellant's prehearing submission refers to Appellant as "administrative member/Board of Director [Appellant]." AX 3, p.4.

The Montgomery County Code provides that "the Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee." Montgomery County Code § 21-7(a). Under the Montgomery County Personnel Regulations (MCPR), "a volunteer firefighter or rescuer" has appeal rights under MCPR Section 35-2(f) which states:

A volunteer firefighter or rescuer may file an appeal with the MSPB over an adverse final action of the Fire Chief or local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire rescue activities, as if the individual were a County merit system employee. A volunteer firefighter or rescuer is entitled to a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal or involuntary resignation. The MSPB must hear and decide each such appeal except for an appeal of a personnel matter subject to an employee grievance procedure under a collective bargaining agreement.

MCPR Section 35-7(c) states that the MSPB must dismiss an appeal if it determines it lacks jurisdiction. On July 16, 2024, the Board issued a Show Cause Order which ordered the Appellant to provide a statement of such good cause as exists for why the Board should not dismiss this matter. The statement was to include documentation showing Appellant's status as a "volunteer firefighter or rescuer." The Appellant filed a response (Appellant Response) on August 6, 2024, which stated, in part, "As I am a retired disabled firefighter/EMT, I am physically and legally unable to perform Fire and or EMS duties..." Appellant Response, p. 1. Appellant also stated, "If I were not retired/disabled, I would still be an active Firefighter/Rescuer." Appellant Response, p.1. Appellant closed his response with, "I have attached my Transcripts to show my previous status as a firefighter/rescuer." Appellant Response, p. 5.

SSVFD filed a response (SSVFD Response) on Friday, August 23, 2024, which was officially received by the Board on August 26, 2024. In their response, SSVFD pointed out that Article 19, Section 2 of the Agreement between Montgomery County Volunteer Fire Rescue Association, and Montgomery County Government / Montgomery County, Maryland distinguishes between a volunteer firefighter and/or rescuer and Appellant's position as a quartermaster. SSVFD Response, p. 2 and SSVFD Ex 1. SSVFD referred to Section 3(a) of the Montgomery County Fire and Rescue Service Personal Protective Equipment and On-Duty Apparel Policy for LFRD [Local Fire and Rescue Departments] Volunteer Personnel which specifically defines Administrative Personnel. SSVFD Ex 2. Additionally, SSVFD cited the Uniform and Grooming title of Sandy Spring Volunteer Department Policies and Procedures, which distinguishes between firefighters/rescuers and administrative/operational officers. SSVFD Response, p. 3 and SSVFD Ex 3.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 14-42 (2015). *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 19-08 (2019); MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See* Montgomery County Personnel Regulations (MCPR), § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction.").

The Montgomery County Code provides the MSPB with jurisdiction over the discipline of volunteer firefighters and rescuers. Under the County Code, § 21-1(c), a "volunteer" is defined as "an individual who, without salary, performs fire, rescue, emergency medical, or related services as provided in this Chapter with the Montgomery County Fire and Rescue Service." This definition does not encompass membership on a local fire and rescue department's (LFRD) governing board.

Montgomery County Code § 21-7(a) gives the MSPB jurisdiction over any volunteer firefighter aggrieved by an adverse final action of a LFRD, and § 21-7(a) says that the MSPB has jurisdiction when a volunteer firefighter is "aggrieved by an adverse final action . . . involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual *as if the individual were a County merit system employee*." (emphasis added). The provision expressly applies to individuals serving as volunteer firefighters acting in roles that are akin to employees, not to persons serving as members of the organization's corporate governing body.

In fact, Appellant provided no evidence to contradict SSVFD's declaration that Appellant's current position as quartermaster is the only relationship he had with SSVFD when he received the discipline. As such, the Board has no jurisdiction over this dispute.

The Board finds that it lacks jurisdiction to hear Appellant's appeal of his suspension from SSVFD. Accordingly, Appellant's appeal is **DISMISSED**, and we need not reach the merits of dismissing Appellant's appeal pursuant to MCPR Section 35-7(f).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §21-7(f), *Appeals of Board decisions*, 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
November 4, 2024

CASE NO. 25-11

ORDER OF DISMISSAL

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 26, 2025, seeking to appeal the decision of the federal Department of Health and Human Services to terminate Appellant from Appellant's position.

On February 27, 2025, an acknowledgement letter was sent to Appellant and the County from the MSPB's Executive Director. The letter also advised Appellant that:

It appears you are appealing a termination from a federal government position within the federal Department of Health and Human Services. Please be advised that the Montgomery County Government MSPB only has jurisdiction over termination appeals filed by Montgomery County Government merit system employees. Thus, there is a question whether the Montgomery County MSPB has jurisdiction over your appeal. Accordingly, I urge you to explore your appeal rights and any applicable filing deadlines and procedures to the federal Merit Systems Protection Board as stated in the Notification of Termination During Probationary Period letter which you attached to your appeal form.

In consideration of this, if you wish to withdraw your appeal with the Montgomery County Government MSPB, please advise the Board as soon as possible. If you believe that the Board may assert jurisdiction over the termination of a federal government employee, you may file an appropriate pleading, and the Board will take it and any County response under consideration.

To date, Appellant has not responded or filed an appropriate pleading.

This Board's jurisdiction is not plenary but is limited to that which is granted to it by statute. *See* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; *see also Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are

specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See* MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009); *see also* *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). If the Board lacks jurisdiction to hear an appeal, the appeal must be dismissed. *See* Montgomery County Personnel Regulations (“MCPR”) § 35-7© (“The MSPB must dismiss an appeal if it determines it lacks jurisdiction.”).

The Board has jurisdiction to hear appeals from merit system employees. *See* MCPR § 35-2 (employees with merit system status have a right of appeal to the MSPB). Merit system employees are defined by § 33-6 of the Montgomery County Code as “[a]ll persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law.” *See also* MCPR §§ 1-38, 1-39 and 1-40.

It is undisputed that Appellant is appealing Appellant’s termination from a federal government position within the federal Department of Health and Human Services which is not within the executive and legislative branches of the County government. As such, Appellant was not terminated from a merit system position with the County government.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over the instant appeal. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 25-11 is dismissed for lack of jurisdiction.

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*, an appeal 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 24, 2025

DISMISSAL FOR MOOTNESS

CASE NO. 24-14

ORDER OF DISMISSAL

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on April 25, 2024. The County filed a timely prehearing submission on May 22, 2024. Appellant's prehearing submission due date was June 20, 2024. Having not received Appellant's prehearing submission by June 24th, the Board's Office Services Coordinator sent an email to Appellant notifying her that her prehearing submission was overdue.¹ That same day, Appellant responded by email stating, in part, "I do want to continue with my appeal. Therefore, I am requesting an extension." The County stated there was no objection to Appellant's request, and the Board extended Appellant's due date to July 17, 2024.

On July 17, Appellant requested and was granted a second extension until August 7, 2024. On August 7 at 6:44 p.m., Appellant indicated that she wished to withdraw her appeal: "This email notification shows that I have decided to rescind my appeal no. 24-14. I do apologize for any inconvenience and thank you for your assistance."

Pursuant to MCPR, §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 21-02 (2020); MSPB Case No. 17-18 (2017).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 24-14 be and hereby is **DISMISSED**.

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
September 9, 2024

¹ The June 24th mail said the following:

This office has not received your prehearing submission. As stated in the attached April 25 acknowledgment letter, Thursday (6/20) was the deadline to file your prehearing submission. If you no longer intend to pursue your appeal, please notify the Board in writing. If you need to request an extension, you must do so in writing and indicate whether the County objects to your request.

Please contact us if you have any questions.

CASE NO. 25-07

ORDER OF DISMISSAL

On December 4, 2024, Appellants filed this direct grievance appeal with the Merit System Protection Board (MSPB or Board). Appellants' grievance concerns the failure of the Office of Human Resources to apply the 25-year longevity awards.

On January 8, 2025, the Board issued an Order Requesting Decision. Pursuant to MCPR § 34-9(a)(4), the Board ordered that MSPB Case No. 25-07 be held in abeyance, that a Step 2 meeting be conducted by the CAO or his designee in accordance with the grievance regulations on or before February 7, 2025, and that the CAO provide a response to the grievance no later than February 27, 2025. The Board's Order Requesting Decision stated that upon receiving the CAO's response Appellants may either submit a written request that the Board resume processing their appeal or, if satisfied with the CAO's response, withdraw their appeal. The Board's Order Requesting Decision also encouraged the parties to pursue alternative dispute resolution and engage in good faith settlement negotiations.

On February 28, 2025, Appellant H emailed the Board and requested that their appeal be withdrawn due to time considerations and "undue stress." Appellant T concurred with the request in an email dated March 3, 2025.¹

Pursuant to MCPR, §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 21-02 (2020); MSPB Case No. 17-18 (2017).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 25-07 be and hereby is **DISMISSED**.

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 19, 2025

¹ Although the Board is dismissing this matter per the Appellants' request, the Board encourages the Office of Human Resources to investigate the claims Appellant H listed in her February 28, 2025, email, and to correct any equitable disparities to ensure the County is properly applying merit system principles to all merit system employees.

DISMISSAL ON MULTIPLE GROUNDS

CASE NO. 24-18

ORDER OF DISMISSAL

Appellant filed an appeal of a disciplinary action or termination on May 9, 2024, and perfected his appeal on August 1, 2024, when the Merit System Protection Board (MSPB or Board) officially received Appellant's Notice of Termination (NOT). On August 1, 2024, the Board's Office Services Coordinator (OSC) sent Appellant a letter acknowledging receipt of the NOT and setting the due dates for the parties' prehearing submissions.

The County timely filed its prehearing submission on September 3, 2024. When Appellant did not file his prehearing submission by his September 25, 2024, due date, the OSC sent Appellant an email on October 14 notifying him that the Board was allowing him until October 24, 2024, to do so. Appellant did not respond or file a prehearing submission by October 24, so on December 10, 2024, the OSC called Appellant by telephone. Appellant told the OSC that he no longer wished to pursue his appeal. The OSC followed the phone conversation with an email requesting "confirmation of this decision or to request an extension of the prehearing submission filing deadline."

On December 16, 2024, Appellant emailed, "I would like an extension so I can talk to someone about my charges against me that there was no investigation, and I was found guilty without and *[sic]* evidence." The OSC responded to Appellant:

I have forwarded your extension request to the Board. I will follow up with you and Ms. H via email once the Board makes a decision on your request.

Despite repeated written notifications advising Appellant of his obligation to file a prehearing submission Appellant has failed to do so and then requested an extension. For the above reasons, on January 29, 2025, the Board issued a Show Cause Order for Appellant to provide a statement of such good cause as exists for why he has failed to timely file the required prehearing submission related to the appeal of his termination. The statement was to be filed with the Board on or before close of business February 6, 2025, with a copy served on the County. The County had the right to file a response on or before February 13, 2025.

Appellant was notified that absent the proper filing of an explanation and a finding by the Board of good cause for his failure to timely file the prehearing submission, the Board will dismiss his appeal. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

To date, Appellant has not shown such good cause as exists for why he has failed to file the required prehearing submission or provided a satisfactory explanation for his failure to do so. While we recognize that Appellant is pursuing his appeal without the benefit of counsel, it is a longstanding principle of Maryland law that procedural rules apply equally to *pro se* litigants in quasi-judicial administrative proceedings. *Department of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 411 (1999) ("It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by

counsel.”). *See Tretick v. Layman*, 95 Md. App. 62, 68 (1993) (“The principle of applying the rules equally to *pro se* litigants is so accepted that it is almost self-evident.”).

Accordingly, the Board must dismiss this matter for failure to comply with established appeal procedures and due to Appellant’s failure to prosecute his case. MCPR, § 35-7(b). *See* MSPB Case No. 22-34 (2022); MSPB Case Nos. 19-19 & 19-26 (2019); MSPB Case Nos. 19-24 & 19-25 (2019).

Accordingly, it is hereby **ORDERED** that Appellant’s extension request is denied, and the appeal in Case No. 24-18 be and hereby is **DISMISSED**.

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 27, 2025

DISMISSAL FOR TIMELINESS

CASE NO. 25-15

ORDER OF DISMISSAL

On February 13, 2025, Appellant, a Bus Operator with the Montgomery County Department of Transportation, received a Notice of Disciplinary Action – Dismissal (NODA) dated February 3, 2025. The NODA advised Appellant:

The Union may file a Grievance on your behalf under Article 10 of the Collective Bargaining Agreement between MCGEO, Local 1994, and Montgomery County, within 30 calendar days of the date on which you receive this notice. Alternatively, as the County did not participate in the Alternative Dispute Resolution Conference, you may file an appeal with the Merit System Protection Board, pursuant to the Montgomery County Personnel Regulations, Sec. 35, within 10 days of the date you receive this notice.

On Monday, May 5, 2025, the MSPB received Appellant’s appeal challenging the dismissal. Under the applicable personnel regulations, Appellant had ten (10) working days to file an appeal. The Appeal was filed fifty-five (55) working days after receipt of the NODA.

The County filed a motion to dismiss on May 21, 2025. In support of its motion, the County argued that the appeal was untimely.¹ Appellant was entitled to respond to the County’s motion within ten (10) calendar days under Montgomery County Personnel Regulations (MCPR), §35-11(a)(4).

Appellant provided a timely response in which Appellant requested that Appellant’s appeal not be dismissed for untimely filing because Appellant was not familiar with the grievance process or the associated filing deadlines. Per his response, Appellant acknowledged that Appellant should have read the NODA more carefully and that Appellant should have “acted more swiftly and sought further clarification,” but suggested that Appellant “acted based on the information [Appellant] had, [Appellant’s] trust in the process, and the consistent lack of communication and support from those [Appellant] reached out to.”

Under the Montgomery County Personnel Regulations Appellant had ten (10) working days to file a direct appeal to the Board challenging his dismissal. MCPR, § 35-3(a)(1) (“An employee has 10 working days to file an appeal with the MSPB in writing after the employee: . . . (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal”). “Working days” is defined as “[a]ll days except Saturdays, Sundays and official or special County holidays.” MCPR § 35-1(i). Additionally, per the Personnel Regulations, the last

¹ The County also argued that the Board lacks jurisdiction over some of Appellant’s allegations associated with Appellant’s union, the Montgomery County Government Employee Organization (MCGEO).

day of a time period is not counted if it falls on a day when the relevant County office is closed. *See* MCPR § 2-5(b). It is undisputed that Appellant received the NODA on February 13, 2025. Because President's Day (a County holiday per MCPR § 24-2(b)(3)) fell within the filing period and because the Board is closed on Friday, the appeal to the MSPB was thus due on March 3, 2025. *See* MCPR § 2-5(c). However, the appeal was not received by the MSPB until May 5, 2025.

Appellant's explanation that he was unaware of the filing deadline is contradicted by the NODA that Appellant signed, which included specific instructions that Appellant must appeal the decision within ten (10) days.² Accordingly, we find that the appeal in this matter was officially received by the Board on May 5, 2025, forty-five (45) working days late.

In the past, the Board has not waived the 10-day period for filing an appeal without good cause, and we have not been provided with good cause why we should do so here. *See* MSPB Case No. 20-06 (2020) (eleven (11) working days after receipt); MSPB Case No. 19-27 (2020) (eleven (11) working days after receipt); MSPB Case No. 14-43 (2014) (twenty-three (23) working days after receipt).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 25-15 be, and hereby is, dismissed because it was not filed within the time limits specified in MCPR § 35-3(a).³

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 26, 2025

² The NODA did not specifically say "working days." In the future, the Board recommends that the County be more precise in its appeal right language to avoid disputes over whether employees have sufficient notice of their appeal rights. *See* MSPB Case No. 25-03 (2025) (motion to dismiss denied due to improper appeal rights notice).

³ Because the Board is dismissing the matter as untimely, it is not necessary for the Board to address the County's jurisdictional arguments.

RECONSIDERATION

There are two different types of requests for reconsideration that may be filed with the Board. The first, during proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code, § 2A-7(c) of the Administrative Procedures Act (APA) and Montgomery County Personnel Regulation (MCPR) § 35-11(a)(5). A request to reconsider a ruling on a preliminary matter must be filed within five (5) calendar days from the date of the ruling.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days of a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within ten (10) days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

During fiscal year 2025 the Board issued the following decision on a request for reconsideration of a Final Decision.

CASE NO. 25-08

ORDER DENYING RECONSIDERATION

Appellant filed a grievance appeal with the Merit System Protection Board (Board or MSPB) challenging the County's decision regarding Appellant's recent promotion to Program Manager II (grade 25) and subsequent removal and reassignment back to her current position as a Program Manager I (grade 23). On December 27, 2024, Appellant requested the Board place an immediate stay on the recruitment for Appellant's former job position until Appellant's grievance is processed by the Board. The Board issued an Order Denying Appellant's Stay Request on February 18, 2025. Appellant filed Appellant Appeal to the Order Denying Appellant's Stay Request on February 24, 2025. Upon review, the Board determined it would consider Appellant's filing as a Motion for Reconsideration. The County filed its Opposition to Appellant's Motion to Reconsider on March 4, 2025, arguing that the Board's Order Denying Appellant's Stay Request was appropriate. Appellant subsequently filed a document titled, "Supplemental Evidence" on March 4, 2025, and a document titled, "Appellant's Response to County Motion Opposition" on March 6, 2025.

After considering the parties' filings, the Board sees no reason for it to reconsider and alter its February 18, 2025, Order. No error of law or fact has been brought to our attention, and it remains our view that any harm to Appellant caused by her removal and reassignment may adequately be addressed by the Board should Appellant ultimately prevail on the merits.

Accordingly, the Board hereby **DENIES** the reconsideration request.

For the Board
March 25, 2025

MOTIONS AND OTHER ORDERS

The County's Administrative Procedures Act (APA), Montgomery County Code, § 2A-7(c), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to dismiss a party and substitute another, motions to quash subpoenas, motions *in limine* (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions for summary decision may also be filed before a hearing. § 2A-7(d). The opposing party is typically given ten (10) calendar days to respond to a motion on a preliminary matter. Montgomery County Personnel Regulations (MCPR) § 35-11(a)(4). The Board may issue a written decision or may, at the Prehearing Conference or at the merits hearing, rule on a motion.

Motions may be filed at any time during a proceeding to decide offers of proof, rule on the admission of evidence, and to address issues of privilege. Motions may also include procedural requests, including those for continuance, to amend a pre-hearing statement, or to obtain reopened or consolidated hearings or rehearings § 2A-8(h); MCPR § 35-10(f) and § 35-11(c).

The Board also issues orders on other matters, including but not limited to a party's request for stay or in situations where a grievance appeal lacks the required Step 2 decision.

The following are decisions on motions and other orders the Board issued in fiscal year 2025.

CASE NO. 24-05 & 24-12

DECISION GRANTING MONTGOMERY COUNTY GOVERNMENT’S MOTION TO QUASH

Appellant is a Fire Code Inspector III with the Department of Permitting Services (DPS) who filed an appeal with the Merit System Protection Board (Board or MSPB) on December 26, 2023, claiming a denial of employment (MSPB Case No. 24-05). That same day, 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 April 10, 2024, Appellant filed a second appeal with the MSPB claiming denial of employment based upon the same nonselection (MSPB Case No. 24-12). On April 30, 2024, the Board consolidated the two appeals.

On May 15, 2024, Montgomery County Government (County) filed its Response to the Appeal. On October 10, 2024, the MSPB issued a Request for Additional Information letter to the County, requiring the County to provide responses no later than October 24, 2024. The MSPB also provided Appellant with a November 7, 2024, deadline to reply to the County’s responses to the Request for Additional Information, should Appellant wish to file a reply.

The County provided its responses to the MSPB’s Request for Additional Information letter on October 24, 2024. Appellant did not reply to the County’s response by the November 7, 2024, deadline. Instead, Appellant’s counsel propounded Appellant’s First Set of Interrogatories and First Set of Requests for Production of Documents on the County on November 7, 2024. In response, the County filed a Motion to Quash Appellant’s First Set of Interrogatories and First Set of Requests for Production of Documents on November 12, 2024. Appellant’s Counsel filed Appellant’s Response to Respondent’s Motion to Quash Appellant’s First Set of Interrogatories and First Set of Requests for Production of Documents on November 20, 2024.

ARGUMENTS OF THE PARTIES

In support of its Motion, the County argues that appeals processed via the development of a written record do not contemplate discovery practice. The County points to language in the Board’s Appeals Process.¹ The County distinguishes written record appeals with appeals that require a hearing, which the MSPB Hearing Procedures expressly provide for up to and until a pre-hearing submission is filed.² The County further argues that the discovery request was filed well after the matter was originally filed (approximately seven (7) months) and that the information sought is not relevant for the MSPB’s analysis and decision.

¹ See <https://www.montgomerycountymd.gov/mspb/appeals.html>.

² See <https://www.montgomerycountymd.gov/mspb/hearing-procedures.html>.

Appellant argues that discovery, including interrogatories and the right to inspect documents, is permitted in denial of employment appeals. Appellant suggests that the discovery is necessary “to prove that the appellant was the best qualified person for the position and that an arbitrary and non-merit-based interview and selection process led to a biased and wrongful selection decision.” Appellant Response, p. 1-2. Appellant specifically claims that “[t]he workforce composition and hiring/promotion data is needed to determine it [sic] employment parity exists in the department compared to the relevant labor market.” *Id.* Appellant additionally argues that “the number of formal grievances, discrimination cases and lawsuits filed by similar situated persons and levied against the County can indicate a systemic problem in the County’s hiring and promotion practices.” *Id.*

ANALYSIS AND CONCLUSIONS

There are two types of appeals that MSPB processes: 1) those that a merit system employee has a right to an evidentiary hearing, and 2) grievances where the MSPB issues a decision based upon a review of a written record. See Montgomery County Code (MCC) § 33-12³; MCPR § 35-10(a).⁴ Matters that require an evidentiary hearing are limited to demotions, suspensions,

³ Sec. 33-12. Appeals of disciplinary actions; grievance procedures.

- (a) *Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.
- (b) *Grievances.* A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. The determination of the board as to what constitutes a term or condition of employment shall be final. Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process. A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the even to such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal. The county executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. In providing these procedures, the county executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution after a fact-finding inquiry authorized by the board. Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

* * *

⁴ 35-10. Appellant’s right to review; right to hearing.

- (a)

dismissals, terminations, or involuntary resignations. MCPR § 35-10(a)(1). For matters that require a hearing, the County's Administrative Procedures Act (APA) applies. MCC § 2A-2(c)⁵. In matters where a hearing is required, the APA authorizes discovery. *See* MCC § 2A-7(b)⁶.

-
- (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.
 - (2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.

* * *

⁵ **Sec. 2A-2. Applicability.**

This Chapter governs the following administrative appeals and proceedings and applies whether a hearing is conducted by a hearing examiner or another designated official.

* * *

- (c) Appeals, grievances and complaints filed pursuant to Chapter 33, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Merit System Protection Board.

* * *

⁶ **Sec. 2A-7. Prehearing procedures.**

* * *

- (b) Discovery. Subject to the provisions of the state public information law:
 - (1) Any party shall have the right to review at reasonable hours and locations and to copy at its own expense documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law.
 - (2) No investigative agency involved in the complaint or proceeding shall unreasonably refuse to any party to a hearing access to files and personnel connected with any matter relevant to the complaint.
 - (3) The provisions contained herein shall not infringe upon any attorney-client privilege and shall not include the work product of counsel to any party to the proceedings.
 - (4) Where it appears that a party possesses information or evidence necessary or helpful in developing a complete factual picture of a case, a hearing authority may order such party to answer interrogatories or submit itself or its witnesses to depositions upon its own motion or for good cause shown by any other party. Failure of a party to submit to ordered discovery may be cause for entry of a default judgment against the offending party or such other equitable sanction as the hearing authority may deem appropriate and just.

The MSPB reviews all other matters based upon a review of the written record. MCPR § 35-10(a)(2). In such cases, the MSPB may require a hearing if it “believes that the record is incomplete or inconsistent and requires oral testimony to clarify issues.” MCPR § 35-2(b)⁷.

An Employee who applies but is not selected for a merit system position may file a direct appeal with the MSPB alleging that the nonselection was “arbitrary and capricious, illegal, based on political affiliation . . . or non-merit factors . . .” MCC § 33-9(c)⁸. See also MCPR § 6-14⁹; MCPR § 35-2(c)¹⁰. While an employee may file a direct appeal with MSPB for nonselection, the employee is not entitled to a hearing. See MSPB Case No. 15-04 (“As Appellant is alleging a nonselection, there is no right to a hearing before the Board. MCPR, 2001, Section 35-10(a)(1) & (2).”).

The Board has previously held that discovery is only permitted under the County’s Administrative Procedure Act in cases involving hearings before the Board. See MSPB Case No. 18-19 (2018); MSPB Case No. 15-04 (2015). Generally, grievances are not entitled to hearings;

⁷ **35-2. Right of appeal to MSPB.**

* * *

- (b) An employee with merit system status may file an appeal with the MSPB over the other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

* * *

⁸ **Sec. 33-9. Equal employment opportunity and affirmative action.**

* * *

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.

⁹ 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.

¹⁰ **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.

thus, discovery is not permitted. *See* MSPB 15-04 (2015). However, if the MSPB determines there is a need for a hearing per MCPR § 35-2(b), discovery is permitted in accordance with the County’s Administrative Procedures Act. *See Id.*; MCPR § 35-12(b).

After reviewing the County’s submission in response to the MSPB’s requests for additional information, the MSPB has determined that there is a complete record for the MSPB to review and issue a decision on the merits, and that there is no need for a hearing in this matter. Accordingly, the discovery sought by Appellant is not permitted in this case and the County’s Motion to Quash is granted. The County is not required to respond to Appellant’s First Set of Interrogatories and First Set of Requests for Production of Documents.

ORDER

For the reasons discussed above the County’s Motion to Quash Appellant’s First Set of Interrogatories and First Set of Requests for Production of Documents is **GRANTED**.

For the Board
December 17, 2024

CASE NO. 24-06

DECISION GRANTING MOTION TO DISMISS

On August 16, 2024, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging his termination from the Montgomery County Department of Transportation (DOT), Division of Traffic Engineering and Operations. On August 28, 2024, the County filed a Motion to Dismiss arguing that the MSPB lacked jurisdiction over the matter. Appellant filed his response to the Motion to Dismiss on October 23, 2024.

FINDINGS OF FACT

Appellant was a supervisor in the Sign and Marking Unit with DOT’s Division of Traffic Engineering and Operations. County Prehearing Submission Exhibit (C. Ex.) 2. On December 26, 2023, DOT issued a Notice of Termination (NOT) to Appellant, terminating his employment with the County for failing to provide DOT with a copy of a valid Commercial Driver’s License (CDL), which is a requirement for Appellant’s position. *Id.* The NOT was defective, as the effective date of the termination – “upon receipt” – did not comply with the Montgomery County Personnel Regulations, 2021 (MCPR). *See* MCPR § 29-6(b)¹. *Id.* The appeal rights language in the NOT was also

¹ 29-6. Effective date of termination.

* * *

(b) A department director must issue a notice of termination to an employee with merit system status at least 5 working days before the effective date of the proposed termination.

defective as it failed to inform Appellant of his right to file a grievance per MCPR Section 34. *See* MCPR § 29-7².

On April 9, 2024, the MSPB Office Services Coordinator (OSC) sent an email to the Appellant on behalf of the Board. The email stated:

It has come to our attention that your Notice of Termination, dated December 26, 2023, failed to inform you of your right to file a grievance under the County grievance procedure pursuant to Montgomery County Personnel Regulations Section 34-5. This regulation allows you to file a direct appeal to the MSPB, which you did on January 4, 2024, or to file a grievance. If you choose to file a grievance, you may appeal the final grievance decision by the Chief Administrative Officer to the MSPB.

If you would like to file a grievance, MSPB will stay your appeal until the completion of the grievance process. If you do not wish to file a grievance and instead decide to proceed with the direct appeal to the MSPB you have previously filed, the appeal process will continue and the next step will be scheduling a prehearing conference. Please let us know your decision within the next 14 days.

On April 24, 2024, Appellant notified the Board that he “would like to go with the grievance process.” The Board found that it was appropriate to hold the instant appeal in abeyance until the end of the grievance process. *See* MCPR 35-6(b)³. The Board issued a Stay Order on April 29, 2024, which stated that if Appellant is not satisfied with the Chief Administrative Officer’s (CAO) response at Step 2 of the grievance procedure, he may appeal the final grievance decision to the MSPB within 10 working days after the CAO’s decision is received.

² **29-7. Appeal of Termination.**

- (a) An employee with merit system status who is terminated may appeal the termination under Section 34 or Section 35, unless the employee is a term employee:
 - (1) whose term of employment has expired; or
 - (2) who has completed the work the employee was employed to perform.

* * *

³ **35-6. Appeal does not act as automatic stay of action.**

* * *

- (b) The MSPB on its own motion may stay the action or grant a stay requested by the appellant based on reasons that the MSPB believes are proper and just.

* * *

Appellant filed a grievance with DOT on May 23, 2024. County MTD, p. 1. Per Step 1 of the MCPR Section 34 grievance process, DOT filed a response on June 7, 2024. County Motion Exhibit (CM. Ex.) 1. However, the June 7, 2024, Step 1 response failed to include a notice of appeal rights to Step 2 of the process. *Id.* DOT corrected the error by reissuing the Step 1 response on August 7, 2024, with the following appeal rights language:

. . . The Department is amenable to proceeding with the alternative dispute resolution (ADR) process in conjunction with this grievance submission. If you are not satisfied with the Department Director's response to your grievance, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OLR within 10 calendar days after receiving the Department's response. The process can be found online at: https://www.montgomerycountymd.gov/HR/Resources/Files/Regulation/SECTION_34_10_18_2021.pdf. Please note that you were served with the response on June 7, 2024 and now have 10 days to request step two of the process.

CM. Ex. 2.

On August 16, 2024, Appellant sent an email to the Board notifying the Board of his intent to appeal DOT's decision to the MSPB, stating in part, "Here is a copy of appeal from my termination." Attached to the email was a Word document in which the Appellant outlined his version of events leading to his termination, his findings, and his questions. That same day, the County responded by email acknowledging receipt and questioning whether Appellant had elected to proceed with a grievance.

On August 19, 2024, the Board's OSC sent an email to Appellant which copied the County:

You notified the Board on April 24 that you chose the grievance process, and that same day Ms. T provided the link to the grievance form as well as the email address for the form's submission (see attached emails). On April 29, the Board issued the attached Stay Order explaining that if you are not satisfied with the Chief Administrative Officer's (CAO) response at Step 2 of the grievance procedure, you may appeal the final grievance decision to the MSPB within 10 working days after the CAO's decision is received.

It is not clear in your email whether you have received the CAO's decision. If you have received the CAO's decision and wish to proceed with your MSPB appeal, you must provide the Board with a copy of the CAO's decision per Section 35-4(d)(2) of the Montgomery County Personnel Regulations (MCPR).

If you have not yet received the CAO's decision, please indicate so.

On August 21, 2024, Appellant responded by email, “I was told I could appeal the grievance decision to the MSPB if I did not like the decision. If I read the process that was sent to me this is where it should go unless I misread it. Here is the letter I forgot to attach from Mr. [P].” The MSPB’s OSC was unable to open the attachment, but on August 22, 2024 the County replied to Appellant’s email, indicating that a Step 1 response was issued to Appellant, and that the response included specific instructions on how to appeal the matter to the Office of Labor Relations (OLR). The County’s August 22 email reply stated, in part, that the Appellant did not appeal to the CAO in a timely manner and that the appeal to the MSPB “is not triggered.” On August 27, 2024, the County confirmed with the Chief Labor Relations Officer (CLRO) that as of that date, Appellant had not communicated with OLR as instructed to initiate the Step 2 process. County MTD, p. 2.

On August 28, 2024, the County filed a Motion to Dismiss (County MTD), asserting on page 3 that:

Appellant has failed to comply with established appeal procedures in both MCPR section 34 and section 35. Additionally, as Appellant pursued a grievance which did not result in a decision by the CAO, the MSPB lacks jurisdiction to hear this matter. Therefore, this appeal is no longer properly before the MSPB and should be dismissed.

Appellant responded to the Motion on October 23, 2024. However, he did not address the allegation in the Motion regarding his failure to appeal to Step 2 of the MCPR Section 34 grievance process.

ISSUE

Does the Board have jurisdiction over Appellant’s appeal?

ANALYSIS AND CONCLUSIONS

This Board’s jurisdiction is not plenary but is limited to that which is granted to it by statute. *See* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; *see also Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See* MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009); *see also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). If the Board lacks jurisdiction to hear an appeal, the appeal must be dismissed. *See* MCPR § 35-7⁴.

⁴ 35-7. Dismissal of an appeal.

The grievance procedure found in MCPR Section 34 includes various prerequisites before a merit system employee may appeal to the MSPB. *See* MCPR § 34-9 (e)⁵. In matters where a merit system employee files a grievance per MCPR Section 34, the MSPB has consistently held that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal to bring the matter before the Board for review. *See* MSPB 17-28 (2017); MSPB 11-08 (2011).

Appellant was informed on various occasions that he must receive a CAO decision regarding his grievance prior to appealing to the MSPB. The April 9, 2024, email sent to the parties notified

(c) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.

⁵ **34-9. Grievance procedure.**

* * *

Steps of the grievance procedure. The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of individual*
1	Employee	Present job-related problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor and department director within 30 calendar days.
		If the grievance is based on an action taken or not taken by OLR, submit the written grievance to the OLR Chief.
	Department Director	Give the employee a written response within 15 working days after the written grievance is received.
2	Employee	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the OLR within 10 calendar days after receiving the department's response.
	CAO's Designee	Must meet with the employee, employee's representative, and department director's designee within 30 calendar days to attempt to resolve the grievance.
	Employee and Dept. Director	Present information, arguments, and documents to the CAO's designee to support their positions.
	CAO's Designee	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	CAO	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.
3	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under 33.07.01.35 of these Regulations.
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

Appellant that a CAO decision was required prior to appealing a grievance to the MSPB, should he decide to file a grievance in the matter. Rather than continue with his original direct appeal, Appellant opted to file a grievance. The subsequent Stay Order also notified Appellant that a Step 2 CAO decision was a prerequisite for filing a grievance appeal with the MSPB. DOT's Step 1 response to the grievance reissued on August 7, 2024, included the proper appeal rights, notifying Appellant that if he wasn't satisfied with DOT's Step 1 response, he could appeal to the CAO at Step 2 of the process by filing his grievance with OLR. However, Appellant appealed directly to the MSPB on August 16, 2024, skipping the Step 2 requirement. Appellant was subsequently informed by the MSPB OSC that a CAO response was required before MSPB could process his appeal. The County's August 22, 2024, response also indicated that Appellant had not exhausted the MCPR Section 34 grievance procedure.

Appellant has not provided any proof that he has exhausted the various steps of the MCPR Section 34 grievance process. He has not provided the MSPB with a copy of a CAO Step 2 decision; nor has he provided any information in his response to the County's Motion to Dismiss that he filed the grievance with the CAO at Step 2 of the process. The CLRO's acknowledgment on August 27, 2024, that OLR had not received Appellant's to process at Step 2 further indicates that Appellant has failed to exhaust the steps of the MCPR Section 34 grievance process. Accordingly, for the foregoing reasons, the Board concludes that it lacks jurisdiction over Appellant's appeal.

ORDER

Because the Appellant has not provided the Board with a copy of the CAO's decision per MCPR § 35-4(d)(2), the Board concludes that it lacks jurisdiction over the instant appeal. Accordingly, the County's Motion to Dismiss is **GRANTED** and Case No. 24-06 is dismissed for lack of jurisdiction.

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*, an appeal 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
December 11, 2024

CASE NO. 25-01

DECISION GRANTING MOTION TO DISMISS

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 15, 2024¹, challenging: 1) a disciplinary action for a three-day suspension, issued on July 31, 2024, 2) two disciplines involving written reprimands, one issued in April 2024,

¹ The appeal was submitted electronically at 11:08 p.m. on August 14, 2024, a time when 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).

and one issued in May 2024, and 3) Appellant's FY2023 Performance Evaluation². The County filed a Motion to Dismiss (MTD) on October 2, 2024, stating that because the three-day suspension has been rescinded, the grievance related to that discipline is moot and that the MSPB lacks jurisdiction over Appellant's complaints regarding the two written reprimands and the FY23 Performance Evaluation. *See* County MTD.

The County provided proof with the MTD that the Department rescinded the three-day suspension, that the Office of Human Resources (OHR) deleted the suspension from Appellant's OHR file and in Oracle, and that the Department issued a timecard correction to ensure Appellant receives pay for the days she was suspended. *See* C. Ex. 2, Recission Memo, C. Ex. 3, OHR Emails Showing Removal of Suspension, and C. Ex. 4, Timecard Correction.

In fact, on October 2, 2024, Appellant also appeared to acknowledge the facts in the County's Motion.³ The Board's Office Services Coordinator provided Appellant with Montgomery County Personnel Regulation (MCPR) § 35-11(a)(4) which stated the opportunity for Appellant to respond to the motion before the Board rules on the motion. Appellant did not respond to the motion or otherwise object to the actions taken.

Pursuant to MCPR, §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where the action appealed has been completely rescinded. *See, e.g.*, MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014). The County has demonstrated to the Board that it has fully rescinded the three-day suspension.

The MSPB does not have jurisdiction over the two reprimands or Appellant's complaints regarding her FY2023 performance evaluation. This Board's jurisdiction is not plenary but is limited to that which is granted to it by statute. *See* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; *see also Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See* MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009); *see also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). If the Board lacks jurisdiction to hear an appeal, the appeal must be dismissed. *See* MCPR § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction.").

² Appellant stated the following in the Appeal Form she submitted to the MSPB: ". . . I am appealing to the [three-day suspension] NODA because there are inaccuracies with the basis explained in the memo for a 3-Day suspension and the two prior NODAs that I responded orally and in writing to Mr. MH as requested . . . [i]n addition, I was denied the revaluation [sic] I requested to the HHS Director Dr. JB for the FY23 Performance Evaluation to me by MS . . ."

³ In her October 2, 2024, email sent to the County's counsel and the OSC, Appellant stated that she had "seen the exchange of emails today about the actions taken to resolve this matter. I just would like to make sure if there is anything expected from my end."

Written reprimands may not be appealed directly to the MSPB. MSPB Case no. 19-07; MSPB Case No. 18-26 (2018); MSPB Case No. 15-10 (2015). A merit system employee must first exhaust the grievance procedure found in MCPR Section 34 before appealing a grievance to the MSPB. There is no evidence that Appellant has done so in this case. MSPB 17-28 (2017); MSPB 11-08 (2011). Furthermore, performance ratings may not be appealed to the MSPB. *See* MCPR 11-10(d) (“The CAO’s decision on a grievance over an employee’s performance rating may not be appealed to the MSPB.”).

Accordingly, for the foregoing reasons, it is hereby **ORDERED** that the appeal in Case No. 25-01 be and hereby is **DISMISSED** as the grievance related to the three-day suspension is moot and the MSPB lacks jurisdiction over the balance of Appellant’s claims.

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 Decision 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
December 18, 2024

CASE NO. 25-03

ORDER DENYING MOTION TO DISMISS

Appellant, a uniformed Firefighter/Rescuer III, filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) concerning a Notice of Disciplinary Action - Dismissal issued by the Fire and Rescue Service (FRS). The appeal was submitted electronically on September 10, 2024, at 9:49 p.m., a time when the MSPB office is not open. The appeal was officially received by the Board on September 11, 2024, which is the next Board business day. *See* MSPB Case No. 18-13 (2018). On October 23, 2024, the County filed a Motion to Dismiss the appeal as untimely. Appellant did not file a response to the County’s Motion to Dismiss.

Appellant was initially served with a Notice of Disciplinary Action on August 8, 2024. County Motion Attachment (Cx.) A. On August 14, 2024, Appellant’s certified representative, Montgomery County Career Firefighters Association, International Association of Fire Fighters, AFL-CIO, CLC, Local 1664, (IAFF) filed an “Informal Grievance” with the County, noting that while contract grievance rights were provided, the August 8 Notice of Disciplinary Action lacked language providing Appellant with notice of his appeal rights to the MSPB. Cx. B. The County subsequently amended the Notice of Disciplinary Action, which was served on the Appellant on August 28, 2024. Cx. C. The Amended NODA included the following appeal rights notice:

An appeal or grievance may be filed in accordance with Article 38 of the CBA within twenty (20) calendar days of the employee’s in-hand receipt of the final Notice of Disciplinary Action. You may appeal this action in accordance with Section 35 of the MCPR by

noting an appeal to the Merit System Protection Board (“MSPB”) within 10 working days of the date that you receive this notice. If you elect to have the Union file a grievance, you waive your right to file an appeal with the MSPB and if you elect to file an appeal with the MSPB, you waive your right to have the Union file a grievance on your behalf.

Appellant then appealed to the MSPB using the Board’s online Appeal Form on September 10, 2024, at 9:49 p.m. Cx. D. On Thursday, September 12, 2024, the MSPB issued an acknowledgement of appeal letter, noting the following:

This is to acknowledge receipt of your online appeal of a dismissal, which was submitted on September 10, 2024, at 9:46 p.m. [sic] after Merit System Protection Board (MSPB or Board) business hours. Accordingly, the appeal is considered to have been officially received yesterday, the MSPB’s next business day.

Cx. E. Thus, the MSPB officially received the Appeal on Wednesday, September 11, 2024.

In its motion, the County argues that the appeal was untimely, as it was filed more than twenty-nine (29) business days from the date the original NODA was issued, and eleven (11) business days from the date of the amended NODA.

Original NODA

The County’s argument that the appeal is untimely as it was filed more than twenty-nine (29) days from the date of the original NODA is without merit. The original NODA was clearly procedurally deficient, as it lacked language regarding the Appellant’s right to appeal to the MSPB, which is required per Montgomery County Personnel Regulations (MCPR), 2001 § 33-6(c)(1)(E).¹ Therefore, the Appellant was without notice regarding his appeal rights to MSPB when the original NODA was issued. Additionally, the Amended NODA changed the effective date of the discipline from August 15, 2024, to September 2, 2024. Accordingly, the 10-day period for Appellant to file his appeal must be based upon the date the Amended NODA was served on Appellant.

Amended NODA

¹ The MSPB recognizes that, per Article 30, Section 30.2(E)(6) of the Collective Bargaining Agreement between the County and the IAFF, the right to appeal to MSPB is not specifically included in the Notice of Disciplinary Action requirements. However, Per MCPR § 2-9, “[i]f a provision of these Regulations is inconsistent with a collective bargaining agreement, the agreement applies to any employee in the bargaining unit.” The Board finds no conflict between the CBA language and the MCPR; rather the provisions can be read in harmony. The CBA language requires that the County include “a statement of the employee’s right to grieve or appeal the disciplinary action, other than an oral admonishment.” IAFF CBA § 30.2(E)(6). Because employees in the bargaining unit represented by IAFF may appeal disciplinary actions (excluding oral admonishments) to the MSPB per MCPR § 33-9(b), the right to appeal to MSPB must be included in a Notice of Disciplinary Action issued to a bargaining unit employee covered by the IAFF CBA.

Generally, an employee has ten (10) “working days” from the date they receive a Notice for Disciplinary Action for dismissal to file an appeal with the MSPB. *See* MCPR § 35-3(a)(1). The MCPR defines “working days” as “[a]ll days except Saturdays, Sundays, and official or special County holidays.” *See* MCPR § 35-1(i). However, “calendar days” are used for calculating periods of time for appeals filed by uniformed fire/rescue employees, such as Appellant. *See* MCPR § 2-5(d). When a deadline falls on a Saturday, Sunday, legal holiday, or a day which MSPB is closed, the deadline is extended to the next business day that the MSPB is open. *See* MCPR § 2-5(c). Applying MCPR § 2-5(c) & (d) to the facts of this case, the deadline for Appellant to file his appeal was Monday, September 9, 2024. Because the appeal was officially received by the MSPB on Wednesday, September 11, 2024, the appeal is technically untimely.

Waiver of 10-day Period for Filing Appeal

The Board’s decision to dismiss an untimely appeal is discretionary. *See* MCPR § 35-7. In the past, the Board has not waived the 10-day period for filing an appeal without good cause. *See* MSPB Case No. 21-113 (2021) (29 working days after receipt); MSPB Case No. 20-06 (2020) (11 working days after receipt); MSPB Case No. 19-27 (2020) (11 working days after receipt); MSPB Case No. 14-43 (2014) (23 working days after receipt).

The Board notes that the appeal rights notice provided in the Amended NODA did not notify the Appellant that he had ten (10) calendar days to file his appeal; rather, the notice indicated that the Appellant had ten (10) *working days* to file his appeal. Applying the appeal rights notice language contained in the Amended NODA to the facts of this case by excluding Saturdays, Sundays, and Labor Day, the deadline to file the appeal was September 12, 2024. Because the appeal was officially received by the MSPB on September 11, 2024, the appeal would technically be timely filed per the appeal rights language in the Amended NODA.²

In circumstances where an appeal is untimely, the MSPB typically issues Show Cause Orders requiring appellants to provide good cause why the 10-day period for filing an appeal should be waived. Had Appellant not filed within the timeframe listed in the Amended NODA, the MSPB would have issued a Show Cause Order to Appellant. However, considering the circumstances surrounding this appeal, a Show Cause Order is not necessary. Because Appellant filed his appeal within the period that the County listed in the Amended NODA, and because the County failed to provide the proper appeal rights notice to Appellant, the Board finds good cause and will exercise its discretion and waive the 10-day filing period.

Accordingly, the Motion to Dismiss is **DENIED**.

For the Board
November 25, 2024

² The MSPB suggests that the County review its process and procedures to ensure the appeal language contained in future NODAs is consistent with the MCPR.

CASE NO. 25-05

DECISION GRANTING MOTION TO DISMISS

Appellant is a Program Manager I (grade 23) with the Montgomery County Department of Housing and Community Affairs who filed an appeal with the Merit System Protection Board (Board or MSPB) on October 14, 2024, challenging the County's decision regarding Appellant's recent promotion to Program Manager II (grade 25) and subsequent removal and reassignment back to her current position. On October 23, 2024, the County filed a Motion to Dismiss arguing that the MSPB lacked jurisdiction over the matter. Appellant did not file a response to the County's Motion.

FINDINGS OF FACT

On February 11, 2024, Appellant was promoted from Program Manager I (grade 23) to Program Manager II (grade 25) with the Department of Housing and Community Affairs (DHCA). County Motion Exhibit (CX) 2. In accordance with Section 7 of the Montgomery County Personnel Regulations (MCPR), 2001, as amended, Appellant was subject to a six (6) month promotional probationary period. *Id.* The six (6) month period was scheduled to end on August 10, 2024. *Id.* On August 9, 2024, in accordance with MCPR Section 7, DHCA issued a Memorandum to Appellant extending her promotional probationary period for three (3) months, ending on November 10, 2024. *Id.* The stated purpose of the extension was "to further evaluate [Appellant] and [Appellant's] ability to satisfactorily perform the duties of [the Program Manager II position]." *Id.*

On Wednesday, October 9, 2024, DHCA issued another Memorandum to Appellant, this time informing Appellant that effective Sunday, November 17, 2024, Appellant will be removed from the Program Manager II (grade 25) position and reassigned to a Program Manager I (grade 23) position. CX 3. The reason provided for the removal and reassignment was that Appellant's "performance in the new position has been inadequate during the promotional probationary period." *Id.* The Memorandum included the following appeal rights language:

Pursuant to MCPR Section 7-2(f)(4) and MCPR Section 34-9(a), you may file a grievance over your removal from the promoted position within 30 calendar days of the date of your removal from the promoted position and reassignment.

Id.

On October 14, 2024, Appellant appealed DHCA's action using the MSPB's online appeal form. CX 1. Per the online appeal form, Appellant characterized the action as an involuntary demotion. *Id.* Appellant noted a number of grievances in the online appeal form; however, Appellant did not state in any of these grievances that she was seeking review over the demotion and reassignment back to her former position from Program Manager II (grade 25) to Program Manager I (grade 23). Nor did she attach a copy of a final decision of a grievance from the Chief Administrative Officer on that specific allegation.

ISSUE

Does the Board have jurisdiction over Appellant's appeal?

ANALYSIS AND CONCLUSIONS

Appellant is appealing her removal from the Program Manager II (grade 25) position and reassignment back to the Program Manager I (grade 23) position, requesting the Board to reinstate her to the Program Manager II position. Per her appeal, Appellant suggests that the County's actions amounted to an involuntary demotion, which provides her the ability to file a direct appeal to the MSPB. In its Motion to Dismiss, the County contends that the MSPB lacks jurisdiction over the subject matter of this appeal, arguing that because Appellant was still within her promotional probationary period, Appellant cannot file a direct appeal to the MSPB. The County further contends that the MSPB also lacks jurisdiction because Appellant failed to either submit or pleaded to the existence of a final decision on a grievance from the Chief Administrative Officer (CAO) under the County's grievance procedure.

This Board's jurisdiction is not plenary but is limited to that which is granted to it by statute. *See* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16; *see also Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See* MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009); *see also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). If the Board lacks jurisdiction to hear an appeal, the appeal must be dismissed. *See* MCPR § 35-7(c).¹

Generally, County non-probationary merit system employees have a right to a direct appeal to the MSPB for disciplinary actions resulting in suspension, demotion, or removal. *See* MCC § 33-

¹ **35-7. Dismissal of an appeal.**

* * *

- (a) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.

12(a)²; MCPR § 35-2(a)³. Non-probationary merit system employees may also file a grievance or direct appeal with the MSPB if they are the subject of an involuntary demotion. *See* MCPR § 36-4(a)⁴. Notwithstanding the foregoing, employees in a promotional probationary status do not have a right to a direct appeal to MSPB if the County removes the employee from the promoted position and reassigned the employee during the promotional probationary period.

All employees who are promoted must serve a promotional probationary period of at least six (6) months. *See* MCPR § 7-2(a)(4) & (b)(4)⁵. The purpose of the promotional probationary period

² **Montgomery County Code § 33-12. Appeals of disciplinary actions; grievance procedures.**

- (a) *Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.

* * *

³ **35-2. Right of appeal to MSPB.**

- (a) Except as provided in 29-7, of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the MSPB.

* * *

⁴ **36-4. Appeal of involuntary demotion.**

- (a) An employee with merit system status may appeal an involuntary demotion and the amount of the salary reduction associated with the demotion by filing a grievance under Section 34 of these Regulations or by filing a direct appeal with the MSPB under Section 35.

* * *

⁵ **7-2. Probationary period; promotional probationary period.**

- (a) Purpose of probationary period and promotional probationary period.

* * *

- (4) An employee promoted to a full-time or part-time merit position must serve a promotional probationary period, as defined in Section 1-63, in order to demonstrate that the employee is able to perform the duties of the new job satisfactorily.

* * *

- (b) Length of probationary period.

* * *

- (4) The promotional probationary period is 6 months for an employee newly promoted to a full-time or part-time position.

* * *

is for the employee to “demonstrate that the employee is able to perform the duties of the new job satisfactorily.” *Id.* The promotional probationary period may be extended up to an additional three (3) months. *See* MCPR § 7-2(c)(1)⁶. If during the promotional probationary period the County determines that the employee’s performance has been inadequate, the County must remove the employee from the promoted position and “reassign the employee to a position at the same grade as the employee had before the employee was promoted.” MCPR § 7-2(f)(1)⁷. An employee who is removed and reassigned during the promotional probationary period may file a grievance pursuant to the grievance procedures listed in MCPR Section 34. *See* MCPR § 7-2(f)(4)⁸. MCPR Section 7 does not provide merit system employees who are removed and reassigned during a promotional probationary period for inadequate performance the right to file a direct appeal with the MSPB. Accordingly, a removal and reassignment under MCPR § 7-2(f) is not an “involuntary demotion” for the purposes of determining direct appeal rights to the MSPB.

In this case, Appellant is not appealing an involuntary demotion; rather, she is appealing the County’s decision to remove and reassign her during the required promotional probationary period. The County extended the original promotional probation by three months, ending on November 10,

⁶ **7-2. Probationary period; promotional probationary period.**

* * *

(c) Extension of probationary period or promotional probationary period.

- (1) The CAO may approve an extension of the probationary period or promotional probationary period for a person appointed or promoted to a full-time or part-time merit system position, up to 50 percent of the original probationary period.

* * *

⁷ **7-2. Probationary period; promotional probationary period.**

* * *

(f) Reassignment of a merit system employee during the promotional probationary period.

- (1) The OHR Director must reassign a merit system employee who has been promoted if the employee’s performance in the new position has been inadequate during the promotional probationary period. The OHR Director must reassign the employee to a position at the same grade as the employee had before the employee was promoted. The OHR Director must not reduce the grade of, or terminate, another employee to reassign the employee who was promoted.

* * *

⁸ **7-2. Probationary period; promotional probationary period.**

* * *

(f) Reassignment of a merit system employee during the promotional probationary period.

- (4) A merit system employee who is reassigned during the promotional probationary period may file a grievance under Section 34 of these regulations.

* * *

2024, consistent with the County’s authority per MCPR Section 7. The Appellant was still within the promotional probationary period at the time the County provided notice of the County’s action to Appellant on October 9, 2024. Consistent with MCPR § 7-2(f)(4), for Appellant to challenge the County’s action, Appellant was required to file grievance through the MCPR Section 34 grievance procedure rather than appeal directly to the MSPB.

The grievance procedure found in MCPR Section 34 includes various prerequisites before a merit system employee may appeal to the MSPB. *See* MCPR § 34-9(a) & (e)⁹. In matters where a

⁹ **34-9. Grievance procedure.**

(a) Time for filing a grievance.

(1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or

(B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

* * *

(e) Steps of the grievance procedure. The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of individual*
1	Employee	Present job-related problem informally to immediate supervisor.
		If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor and department director within 30 calendar days.
		If the grievance is based on an action taken or not taken by OLR, submit the written grievance to the OLR Chief.
	Department Director	Give the employee a written response within 15 working days after the written grievance is received.
2	Employee	If not satisfied with the department director’s response, may file the grievance with the CAO by submitting it to the OLR within 10 calendar days after receiving the department’s response.
	CAO’s Designee	Must meet with the employee, employee’s representative, and department director’s designee within 30 calendar days to attempt to resolve the grievance.
	Employee and Dept. Director	Present information, arguments, and documents to the CAO’s designee to support their positions.
	CAO’s Designee	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	CAO	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.

grievance must be filed per MCPR Section 34, the MSPB has consistently held that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal to bring the matter before the Board for review. *See* MSPB 17-28 (2017); MSPB 11-08 (2011).

Appellant has not provided any proof that she has exhausted the various steps of the MCPR Section 34 grievance process. Accordingly, for the foregoing reason, the Board concludes that it lacks jurisdiction over Appellant's appeal.

ORDER

For the reasons discussed above the County's Motion to Dismiss is **GRANTED** and the appeal is **DISMISSED WITHOUT PREJUDICE** because the Board lacks jurisdiction to address Appellant's appeal. The Board encourages Appellant to review MCPR Section 34 to determine her appeal rights on the specific matter about which she is seeking Board review.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 21-7(f), *Appeals of Board decisions*, 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
December 5, 2024

CASE NO. 25-07

ORDER REQUESTING DECISION

On December 4, 2024, Appellants filed this direct grievance appeal with the Merit System Protection Board (MSPB or Board). Appellants' grievance concerns the failure of the Office of Human Resources to apply the 25-year longevity awards.

Under Montgomery County Personnel Regulation (MCPR) § 34-5, an employee may file a direct appeal with the MSPB in cases of demotion, suspension, termination, dismissal, or involuntary resignation. Appellants do not allege that their grievance involves any of those issues.

3	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under 33.07.01.35 of these Regulations.
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

Section 34-5 provides that an employee may appeal a Step 2 grievance decision of the County's Chief Administrative Officer (CAO) to the MSPB.

Even though Appellants claim that they have not yet received a Step 2 grievance decision of the CAO, they nevertheless filed this appeal with the Board. On the record before us the Board sees no reason to believe that adherence to the requirement that the grievance process be exhausted before appealing to the Board would be futile or unfair to Appellants. The Board thus concludes that the processing of Appellants' grievance appeal would benefit from adherence to the steps of the grievance procedure and a Step 2 decision by the CAO. The Board will hold this appeal in abeyance until the CAO has held a Step 2 meeting with Appellants and issued a written decision. MCPR § 34-9(a)(4) ("[i]f an employee files an appeal with the MSPB . . . before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time."). At a Step 2 hearing Appellants may argue the issues and present the facts they believe support their grievance.

Accordingly, pursuant to MCPR § 34-9(a)(4), the Board hereby **ORDERS** that MSPB Case No. 25-07 be held in abeyance, that a Step 2 meeting be conducted by the CAO or his designee in accordance with the grievance regulations on or before **February 7, 2025**, and that the CAO provide a response to the grievance no later than **February 27, 2025**. Upon receiving the CAO's response Appellants may either submit a written request that the Board resume processing their appeal or, if satisfied with the CAO's response, withdraw their appeal.

The Board also encourages the parties to pursue alternative dispute resolution and engage in good faith settlement negotiations.

For the Board
January 8, 2025

CASE NO. 25-08

ORDER

On December 9, 2024, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the County's decision regarding Appellant's recent promotion to Program Manager II (grade 25) and subsequent removal and reassignment back to her current position as a Program Manager I (grade 23).¹ On December 27, 2024, Appellant requested the Board place an immediate stay on the recruitment for Appellant's former job position until Appellant's grievance is processed by the Board.

The Board hereby provides notice of the request for a stay and orders the County to respond to the stay request by close of business (COB)² on **January 16, 2025**. After review of the County's

¹ The appeal was submitted to the MSPB on Friday, December 6, 2024, a date when the Board office was not open.

² The Board notes that its hours of business are Monday-Thursday from 9:30 a.m. to 3:00 p.m. Thus, the County must file its response to Appellant's stay request by 3:00 p.m. on January 16, 2025.

response to the stay request, the Board will issue a written decision on Appellant's request for a stay.

For the Board
January 8, 2025

CASE NO. 25-08

ORDER DENYING APPELLANT'S STAY REQUEST

On December 9, 2024, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the County's decision regarding Appellant's recent promotion to Program Manager II (grade 25) and subsequent removal and reassignment back to her current position as a Program Manager I (grade 23). On December 27, 2024, Appellant requested the Board place an immediate stay on the recruitment for Appellant's former job position until Appellant's grievance is processed by the Board. Appellant's request did not include an explanation why she would suffer irreparable harm if the stay was not granted. The Board issued an Order directing the County to respond to the request. The County submitted its Opposition to the Stay on January 16, 2025. Appellant filed a response to the County's Opposition on January 19, 2025.

In her response, Appellant argues that the stay is necessary to "repair the harm" that Appellant claims was "unfairly inflicted, and to uphold the Merit System Protection Board's guiding principles outlined in Section 33-5(b)(1-8)." Appellant also includes six (6) remedies she is requesting should she be successful in her appeal.

Pursuant to Montgomery County Personnel Regulations (MCPR), §35-6(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm or extraordinary circumstances. *See* MSPB Case No. 05-07 (2005), 08-12 (2008), 09-10 (2009), 11-10 (2011), 22-05 (2022).

Appellant's concern regarding the position vacancy is primarily economic, as she is ultimately requesting, in addition to placement in the position, "all applicable back pay, pay increments, benefits, and zero negative compensation consequences." However, the Board has consistently held where monetary relief will make an individual whole, no irreparable harm will be found. *Id.* *See also Sampson v. Murray*, 415 U.S. 61, 84, 89-92 (1974) (loss of earnings and reputation is not irreparable harm in government personnel cases); *In re Frazier*, 1 MSPR 280, 282 (1979) ("It is well settled that in order to enjoin an agency's taking of a personnel action, the affected employee must show irreparable harm; and where monetary relief will make an employee whole, no irreparable harm exists."). Appellant also failed to provide sufficient reasons to support her claim that she will be irreparably harmed if she is not placed back into this exact position. We note that there are other equitable remedies at the Board's disposal to make Appellant whole again should the Board grant Appellant's Appeal without requiring the County to stay its recruitment efforts.

ORDER

For the reasons discussed above, the Board finds that any harm to Appellant caused by her removal and reassignment may adequately be addressed by the Board should Appellant ultimately prevail on the merits.

Accordingly, the Board **DENIES** Appellant's request for a stay.

For the Board
February 18, 2025

ENFORCEMENT OF BOARD DECISIONS AND ORDERS

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions. Montgomery County Personnel Regulations, § 35-15.

The Board may also be asked to enforce a final decision. The Board, where appropriate, may seek enforcement of its decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. Montgomery County Code, § 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly failed to comply with the Board decision to determine whether there is a basis for seeking enforcement.

During FY25, settlement agreements in MSPB Case Numbers 24-07, 25-04, and 25-06, were entered into the record.

SHOW CAUSE ORDERS

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to the grievance procedure, MCPR § 34-9(a)(3), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, § 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a show cause order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the Personnel Regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a show cause order to determine whether the appeal is in fact timely.

Finally, the Board may issue a show cause order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

The following is an example of a show cause order issued in fiscal year 2025.

CASE NO. 25-13

ORDER

Appellant filed an appeal of a suspension on March 11, 2025.¹ The County timely filed its prehearing submission on April 23, 2025. On May 13, 2025, Appellant requested a filing extension, which the Board granted. When Appellant did not file his prehearing submission by his June 2, 2025, due date, the Board's Office Services Coordinator (OSC) sent Appellant an email on June 3 notifying him that he missed his deadline. The email also requested that Appellant notify the Board in writing if he no longer intends to pursue his appeal.

Appellant called the MSPB office on June 5, 2025, and told the OSC that he has been out on medical leave but that he saw the email regarding his submission deadline. The OSC asked Appellant if he still intends to pursue his appeal. Appellant asked if he still can. The OSC told Appellant he would need to request an extension in writing, providing a good reason and how long he needs, as well as whether the County objects. The OSC reminded him that the process would be the same as his previous extension request and to remember to copy the County. The OSC explained to Appellant that he would be able to submit a prehearing submission if the Board grants his extension request. The OSC also restated to Appellant that if he no longer wishes to pursue his appeal, he needs to let the Board know in writing.

To date, Appellant has failed to file a prehearing submission, request an extension, or withdraw his appeal. For the above reasons, the Board hereby **ORDERS** Appellant to file his prehearing submission and provide a statement of such good cause as exists for why he has failed to timely file the required prehearing submission related to the appeal of his suspension no later than **3:00 p.m. on June 30, 2025**, with a copy served on the County. **Should Appellant fail to file Appellant's prehearing submission and statement of good cause by the June 30, 2025, deadline, the Board will dismiss the Appeal.** MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015). The County shall have the right to file a response to Appellant's prehearing submission and statement of good cause on or before **July 8, 2025**. The statement may be filed by email to MSPB.Mailbox@montgomerycountymd.gov or hardcopy mailed to and received by the Board's office at 100 Maryland Avenue, Suite 113, Rockville, Maryland 20850 by the due date. The prehearing submission must be filed in accordance with the Board's filing requirements that were previously provided to Appellant.

For the Board
June 18, 2025

¹ The appeal was submitted online to the MSPB on March 10, 2025, at 9:15 p.m., after Board business hours. The appeal was officially received by the MSPB the next Board business day. *See* MSPB Case No. 18-13 (2018).

ATTORNEY'S FEE REQUESTS

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In *Montgomery County v. Jamsa*, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided with a chance to respond. The Board then issues a decision based on the written record.

The Board did not issue any attorney fee decisions during fiscal year 2025.

INVESTIGATIONS - RETALIATION COMPLAINTS

Employees are encouraged to report illegal or improper acts in County government and are protected from retaliation for providing such information pursuant to Montgomery County Code (MCC) § 33-10.

Per MCC § 33-10(c), an employee who claims retaliation for disclosing an illegal or improper act of County government in accordance with MCC § 33-10(a) and MCPR § 3-2 may file an appeal in the form of a complaint with the MSPB, requesting that the Board investigate the allegations of retaliation. Montgomery County Personnel Regulations (MCPR), §§ 35-20 – 35-22, applies when the Board receives such a complaint.

Prior to filing an appeal, the employee must first disclose the illegal or improper act to the individual responsible for taking appropriate action. Once received the Board, within its discretion, must determine whether an investigation is warranted. If the Board determines that an investigation is warranted, it must process the appeal in accordance with the procedure found in MCPR § 35-22.

The Board does not have jurisdiction over investigations regarding appeals alleging retaliation for filing Equal Employment Opportunity (EEO) complaints. Such investigations are conducted by the County EEO office per MCPR § 5. Employees may not appeal the results of the County EEO office's investigation to the Board per MCPR § 5-4(j). Additionally, the Office of Labor Relations (OLR) is responsible for investigating complaints involving allegations of retaliation for filing grievances per MCPR § 34-7. Employees who are not satisfied with the results of OLR's investigation may file an appeal with the Board.

The Board received two requests for investigation of retaliation during fiscal year 2025. One of the requests was denied due to lack of jurisdiction; the Board's decision regarding the other request is pending the outcome of a related active MSPB appeal.

OVERSIGHT

The Board is required to perform certain oversight functions.

Personnel Regulation Review. Pursuant to the County Charter, § 404, and the Montgomery County Code, § 33-7(a), the MSPB has long engaged in the prior review of proposed personnel regulations. In fiscal year 2025 the Board reviewed and commented on the following proposed personnel regulation:

- 1) Executive Regulation 11-25 - Amendment to MCPR – Service Increments

Classification Creation. The Montgomery County Code, § 33-11, provides in applicable part that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service

Based on the above-referenced provision of the Code, § 9-3(b)(3) of the Montgomery County Personnel Regulations provides that the Office of Human Resources Director shall notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class. During fiscal year 2025, the Office of Human Resources brought no class creations to the Board for review.

Temporary Promotions. The Montgomery County Personnel Regulations require that County agencies obtain the approval of the MSPB for noncompetitive temporary promotions of longer than 12 calendar months. MCPR § 27-2(c)(1)(B). The County Code, § 1A-105(c) and (g) also requires the Merit System Protection Board to approve a merit employee serving as an acting director beyond 12 months. The MSPB reviews such requests to determine if they are supported by “exigent or compelling circumstances.” MCPR § 27-2(c)(3).

In fiscal year 2025 the MSPB did not review any requests for extension of a temporary promotion.

Classification and Compensation Audit

Under § 404 of the Montgomery County Maryland Charter, the Merit System Protection Board is required to, “...conduct on a periodic basis, special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council.” The County Council appropriated funding in the Fiscal Year 2023 and 2024 budgets to allow the MSPB to hire a consultant to conduct an independent analysis of the County’s classification and compensation plan and procedures. *See* Montgomery County Personnel Regulation § 9-3(h)(2)(A) (“At least once every 5 years, the MSPB must have a consultant who is a specialist in the field and independent of the County government conduct an objective audit of the entire classification and compensation plan and procedures”).

In June 2023 the Board entered into a contract with The Segal Company (Eastern States), Inc., to design and conduct a comprehensive review and audit of the County’s classification and compensation program and procedures. The objective of the review was: (1) to ensure the accuracy, equity, justice, validity, and integrity in the administration of the classification and

compensation program and execution of its procedures; and (2) to determine the effectiveness of the current classification and compensation models and methodologies.

The audit report was finalized in March 2025. Segal provided the Board with a comprehensive final report that identifies the current classification and compensation system's strengths and opportunities for improvement, along with specific recommendations. Segal concluded that overall, the County "demonstrates the basic foundations of an effective classification and compensation program," but that there are areas "where process improvement is needed."

The Office of Human Resources provided written comments on the final audit report, which were included with the Board's recommendations and submitted along with the audit report to the County Council, County Executive, and the Chief Administrative Officer on September 17, 2025. Electronic versions are posted to the MSPB website.