

# **Merit System Protection Board Annual Report FY2014**

**Members:**

**Raul E. Chavera, Jr., *Chair***

**Julie Martin-Korb, *Vice Chair***

**Rodella E. Berry, *Associate Member (term ended in April 2014)***

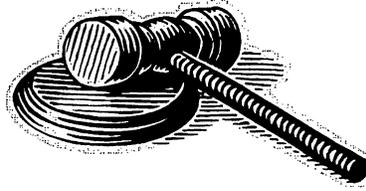
**Michael Kator, *Associate Member (term began in April 2014)***

***Executive Director:***

**Robyn Scates**

**Montgomery County, Maryland  
Merit System Protection Board  
100 Maryland Avenue, Room 113  
Rockville, Maryland 20850  
240-777-6620  
FAX: 240-777-6624**





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**FY2014**  
**ANNUAL REPORT OF THE**  
**MONTGOMERY COUNTY**  
**MERIT SYSTEM PROTECTION BOARD**

**COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD**

The Merit System Protection Board (MSPB or Board) is composed of three members who are appointed by the County Council, pursuant to Article 4, Section 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. One member is appointed each year to serve a term of three years.

The Board members in FY2014 were:

Raul E. Chavera, Jr. - Chair  
Julie Martin-Korb - Vice Chair  
Rodella E. Berry - Associate Member – (term ended in April 2014)  
Michael Kator - Associate Member – (term began in April 2014)

**DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD**

The duties of the Merit System Protection Board are contained in: 1) Article 4, *Merit System and Conflicts of Interest*, Section 404, *Duties of the Merit System Protection Board*, of the Charter of Montgomery County; 2) Chapter 33, Article II, *Merit System*, of the Montgomery County Code; and 3) Section 35, *Merit System Protection Board Appeals, Hearings, and Investigations*, of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011).

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 defines 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.* . . .The Board shall 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 shall submit audit findings and recommendations to the County Executive and County Council.

...

(e) *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.

(f) *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.

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

(h) *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 the 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.

(i) *Publication.* Consistent with the requirements of the 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 of the Montgomery County Personnel Regulations states:

- (a) 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.
- (b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate action as set forth in Section 3-2 of these Regulations.

# **APPEALS PROCESS**

## **DISCIPLINARY ACTIONS**

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, Section 35-4 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011) requires that an employee file a simple notice of intent to appeal a removal, demotion or suspension. In accordance with MCPR, 2001, Section 35-3, the employee must file the notice of intent to appeal within ten (10) working days after the employee has received a notice of disciplinary action involving a demotion, suspension or removal. Once the notice of intent to appeal has been filed, the Board's staff provides the employee with an Appeal Form to be completed within 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

In accordance with Chapter 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, 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 receipt of the Appeal Form, the Board sends a notice to the parties, requiring each side to submit a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which the parties' lists of witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision on the appeal.

During fiscal year 2014, the Board issued the following decisions on appeals concerning disciplinary actions.

# **DISMISSALS**

## **CASE NO. 14-17**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Department of Correction and Rehabilitation (DOCR) Director to dismiss Appellant effective October 18, 2013. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant was a Correctional Officer – Corporal – with DOCR at the time of events that are at issue in this case. *See* County's Prehearing Submission at 1; Hearing Transcript for February 10, 2014 (H.T. I) at 156; Hearing Transcript for March 27, 2014 (H.T. II) at 25. Appellant has been employed by the County since April 30, 2007. *See* County's Prehearing Submission at 1; H.T. II at 24.

During the early morning hours of February 22, 2013, Appellant's spouse, Spouse A, contacted 911 to report a possible heroin drug overdose by Appellant while off-duty. County Exhibit (C. Ex.) 2; H.T. II at 40. Several officers from the Police Department (Police Officers) assisted the Community Rescue Service (CRS) in reference to a possible controlled dangerous substance (CDS) overdose. C. Ex. 3; C. Ex. 9; H.T. I at 67, 107. The Police Officers were dispatched to Appellant's home address. C. Ex. 3; H.T. I at 67, 107. Prior to CRS and the Police Officers arriving, Appellant left Appellant's home. C. Ex. 2; C. Ex. 3; C. Ex. 9 at 4; H.T. I at 71; H.T. II at 19.

The Police Officers testified that, upon arriving on the scene, they spoke with Spouse A. H.T. I at 68, 113. Spouse A advised the officers that Spouse A had found Appellant in Appellant's room slumped over in a chair at the desk. H.T. I at 70-71, 76; C. Ex. 3 at 5. Spouse A thought Appellant was dead because Appellant was turning blue and not moving, so Spouse A called 911. *Id.* Spouse A stated that Appellant woke up and told Spouse A that Appellant was fine and left prior to the police arriving. H.T. at 71-72, 76; C. Ex. 3 at 5-7; C. Ex. 9 at 4. The Police Officers conducted a police canine search of the surrounding area to locate Appellant. H.T. I at 117; C. Ex. 3 at 6.

Spouse A showed the Police Officers the room where Spouse A had found Appellant slumped over. H.T. I at 71-72; C. Ex. 3 at 5. While in the room, the Police Officers found a needle and other items of paraphernalia associated with the use of heroin. *Id.* The items were placed on the sidewalk to be scanned by the canine unit. H.T. I at 117; C. Ex. 3 at 6.

Appellant returned home to find the presence of the Police Officers. H.T. I at 114; C. Ex. 3 at 6. Appellant denied overdosing on anything and refused medical treatment. H.T. I at 115; C. Ex. 3 at 6. Appellant advised the Police Officers that Appellant had consumed several beers

after arriving home from work and fell asleep. *Id.* Appellant was detained and placed in the back of a police cruiser. H.T. I at 117; C. Ex. 3 at 6.

On March 16, 2013, Appellant was criminally charged with possession of a CDS, possession of equipment for the administration of a CDS, and possession of drug paraphernalia. C. Ex. 6 at 4; C. Ex. 8; C. Ex. 13 at 4.

Once DOCR discovered Appellant's involvement in the incident on February 22, 2013, Appellant was placed on administrative leave. H.T. I at 166; C. Ex. 4. Subsequently, on April 2, 2013, the Director of DOCR issued Appellant a Statement of Charges – Suspension (Without Pay) Pending Investigation of Charges or Trial, indicating that the Director intended to place Appellant in a leave without pay status for an indefinite period while Appellant was awaiting trial on Appellant's criminal charges. H.T. I at 173; C. Ex. 6. On May 10, 2013, Appellant received a Notice of Disciplinary Action – Suspension Pending Investigation of Charges or Trial (NODA), placing Appellant in a leave without pay status for an indefinite period while Appellant awaited trial on Appellant's criminal charges. H.T. I at 174; C. Ex. 7.

On July 22, 2013, Appellant pled guilty to possession of drug paraphernalia. C. Ex. 9 at 1-3; Appellant's Exhibit (A. Ex.) 6 at 1. Upon acceptance of the plea and a finding of guilt, the other charges were *not prossed*. *Id.* The guilty finding for possession of paraphernalia was stricken and Appellant received probation before judgment. C. Ex. 9 at 9; A. Ex. 6 at 9.

Once Appellant pled guilty to the charge of possession of drug paraphernalia, the Director of DOCR decided to initiate action to dismiss Appellant. C. Ex. 11. On September 17, 2013, Appellant was issued a Statement of Charges – Dismissal, based on Appellant's possession of drug paraphernalia. *Id.* On October 10, 2013, the Director of DOCR issued Appellant a Notice of Disciplinary Action – Dismissal based on Appellant's possession of drug paraphernalia. C. Ex. 14.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Appellant was arrested and charged with crimes associated with the use of heroin.
- The Police Officers found heroin drug paraphernalia in the Appellant's home.
- Appellant admitted to various Police Officers that Appellant took heroin intravenously prior to their arrival.
- Appellant pled guilty and was found guilty for the possession of drug paraphernalia.
- Although the events that resulted in Appellant being charged with committing criminal offenses occurred at Appellant's home, while Appellant was off-duty, there is a nexus between these criminal charges and Appellant's employment with the County.
- Since Appellant was found guilty of a serious dangerous drug charge, Appellant cannot effectively supervise offenders who are incarcerated in a correctional facility.
- This incident occurred approximately three hours after Appellant had concluded

- Appellant's most recent shift for the County.
- When the incident occurred, Appellant was scheduled to work Appellant's next shift for the County beginning at 2:30 p.m. on Friday, February 22, 2013.
- Appellant's admission in a court of law that Appellant possessed drug paraphernalia in Appellant's residence resulted in a probation before judgment finding.
- Appellant was placed on 18 months unsupervised probation.
- Although the guilty finding was stricken, Appellant has totally violated the professional image the County has strived to display to the public and the community.
- Appellant exhibited a lack of judgment that is necessary to perform Appellant's duties in a professional manner.

Appellant:

- Appellant was wrongfully dismissed.
- In accordance to Section 33-2 of the Montgomery County Personnel Regulations, the County should have considered Appellant's entire work record prior to dismissing Appellant.
- Appellant has served the County for 6 ½ years without a negative incident.
- Appellant has received favorable evaluations from every supervisor that Appellant has been assigned to over the years.
- Appellant is being treated differently from other County staff persons that have been charged with more serious crimes than Appellant.
- The County did not take into consideration Appellant's response to the Statement of Charges.
- The County could have issued a less stringent discipline than dismissal.
- The Board should overturn the Department's wrongful dismissal.

**APPLICABLE LAWS, REGULATIONS AND CONTRACTUAL PROVISIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-6, Definitions**, which states in applicable part,

In this article, the following words and phrases have the following meanings:

**Board:** The Merit System Protection Board as described in Section 403 of the County Charter.

...

**Merit system employees:** All 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.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-7, County Executive and Merit System Protection Board responsibilities**, which states in

applicable part,

...

- (e) **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.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board,** which states in applicable part,

...

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

...

- (2) Order change in position status, grade, work schedule, work conditions and work benefits;

...

- (4) Order reinstatement with or without back pay, although the Chief Administrative Officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility;

- (5) Order cancellation of personnel actions found in violation of law or personnel regulation provided that such action may not without due process, adversely affect the employment rights of another employee;

...

- (7) Order removal from administrative or personnel records any reference or document pertaining to an unwarranted disciplinary or adverse personnel action;

...

- (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, *Disciplinary Actions*, which states in applicable part:

**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.
- (b) ***Prompt discipline.***
  - (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
  - (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.
- (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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), Section 35, Merit System Protection Board Appeals Hearing and Investigations,** which states in applicable part:

...

**35-2. Right of appeal to MSPB.**

- (a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status or a Local Fire and Rescue Department employee has the right to 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.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994 and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016 (MCGEO CBA), Article 28, Disciplinary Actions,** which states in applicable part:

**28.1 Policy.**

A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. Except in cases of theft or serious violation of policy or procedure

that create a health or safety risk, disciplinary actions must be progressive in severity. However, the Employer reserves the right to impose discipline at any level based on cause. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors.

## **28.2 Types of Disciplinary Actions.**

Disciplinary actions shall include but are not limited to:

...

(h) Dismissal:

The removal of an employee from County service for cause.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994 and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016, Article 34, *Safety and Health*, which states in applicable part:**

## **34.2 Prevention of Substance Abuse/Employee Rehabilitation**

(a) Alcoholism shall be recognized and treated as a disease. Bargaining unit employees suffering from alcoholism shall be afforded the opportunity for counseling and rehabilitation through an appropriate County program. Alcohol-related disciplinary problems will not be exclusively dealt with in a punitive fashion. Incidents of apparent substance abuse by bargaining unit employees and/or the need for rehabilitation of bargaining unit employees shall be administered pursuant to Administrative Procedure 4-11, Employee Drug/Alcohol Abuse.

### **ISSUE**

Has the County proven by a preponderance of the evidence that Appellant's dismissal was in compliance with applicable laws and regulations?

### **ANALYSIS AND CONCLUSIONS**

#### **The Board's Standards For Determining Credibility.**

Because the testimony of various witnesses conflicted with the testimony of other witnesses, the Board had to make credibility determinations with regard to the witnesses. Credibility is "the quality that makes something (such as a witness or some evidence) worthy of

belief.” *Haebe v. Dep’t of Justice*, 288 F.3d 1288, 1300 n.27 (Fed. Cir. 2002) (quoting Black’s Law Dictionary 374 (7th ed. 1999)).

In *Bailey v. U.S.*, 54 Fed. Cl. 459 (2002), the Claims Court noted that in evaluating credibility,

[i]t is proper for the [fact finder] to take into account the appearance, manner, and demeanor of the witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or uncertainty in testifying.

*Id.* at 462 n.2 (quoting 81 Am. Jur. 2d § 1038 at 848-49 (1992)). The *Bailey* court also noted that credibility determinations include an evaluation of the witness’ demeanor, perception, memory, narration and sincerity. 54 Fed. Cl. at 462 n. 2 (citing 40 Case W. Res. L. Rev. 165, 174 (1989/1990)).

The Third Circuit has held that “[d]emeanor is of utmost importance in the determination of the credibility of a witness.” *Government of the Virgin Islands v. Aquino*, 378 F.2d 540, 548 (1967). “Demeanor reflects a way of acting, behavior, bearing and outward manner.” *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (citing Shorter Oxford English Dictionary 628 (1973)). Likewise, demeanor denotes “outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.” *Haebe*, 288 F.3d at 1300 n. 27 (quoting Black’s Law Dictionary at 442). Thus, in assessing demeanor, the Board considers the carriage, behavior, manner, and appearance of a witness during the witness’ testimony. See *Hillen v. Dep’t of the Army*, 35 M.S.P.R. 453, 462 (1987) (citing *Dyer v. MacDougal*, 201 F.2d 265, 268-69 (2d Cir. 1952)).

### **Applying The Board’s Credibility Standards In The Instant Case, Appellant’s Testimony Lacks Credence.**

The Board had ample opportunity to directly observe the demeanor of Appellant during Appellant’s testimony. The Board finds that Appellant was evasive and less than forthcoming during Appellant’s testimony and that Appellant’s testimony was inconsistent with testimony Appellant had previously given in this matter.

For example, Appellant’s statements regarding whom the drug paraphernalia belonged to changed over the course of time. Appellant was specifically asked by the Police Officers about the paraphernalia and the items found at Appellant’s house. In reply, Appellant stated: “I don’t know whose stuff it is. People come in and out of my house all day while I’m at work.” H.T. I at 117; H.T. II at 17, 26, 46; C. Ex. 3 at 6. Appellant then changed Appellant’s story during the February 28, 2013 County investigation by Captain (Capt.) D regarding the events on February 22, 2013 by stating that “Appellant has Appellant’s father’s belongings at the house some of which has not been sorted. In the belongings was drug paraphernalia . . . .” H.T. I at 21; C. Ex.

5 at 2. During the July 22, 2013 criminal proceeding held in the Circuit Court, Appellant's attorney stated: "There was a gentleman named Mr., ah, T, . . . who's a step-son. He was using a separate room where this drug paraphernalia was found. Now, quite candidly, I'm fairly certain that my client knew it was in there . . . ." H.T. II at 18; C. Ex. 9 at 6. Appellant testified that Appellant did not advise Appellant's attorney to make that statement, but did not correct Appellant's attorney during that proceeding. H.T. II at 18. Nevertheless, on August 19, 2013, Appellant changed Appellant's story again during an email message authored by Appellant to Appellant's superiors by stating: "[W]hat came to light during these past months is that my mother recently married a man whose 20-year old son, T., had an addiction to heroin and has subsequently been admitted into a Drug Rehab Program. T. was hiding his problem from everybody in the family and at first when I came across the paraphernalia equipment he had left behind at my house on the night in question I had assumed that it might have been my deceased father's because of where it was located . . . ." H.T. II at 16; C. Ex. 10.

Similarly, Appellant's version of how many beers Appellant had evolved over the course of time. Capt. D testified that Appellant told Police Officer B that Appellant had 3 beers. H.T. I at 115; C. Ex. 3 at 6. During the County's investigation by Capt. D, Appellant indicated that Appellant drank at least a 6-pack of beer and possibly a 12-pack of beer. C. Ex. 5 at 2. Appellant was adamant during the hearing that Appellant had consumed a total of 4 beers, claiming the 4 beers caused Appellant to pass out. H.T. II at 28, 40, 42. However, Police Officer B testified that Police Officer B was in close proximity to Appellant and did not smell alcohol or see any signs of intoxication. H.T. I at 131, 140.

Accordingly, based on Appellant's demeanor, behavior, and inconsistent testimony, the Board concludes that Appellant was not a credible witness.

**Having Found That Appellant's Testimony Is Not Credible, The Board Concludes That The County Proved By A Preponderance Of The Evidence That Appellant's Behavior Was Consistent With The Use Of Heroin And Not With Excessive Drinking.**

The record of evidence in this case demonstrates that on February 22, 2013, at 2:05 a.m., Appellant's spouse contacted the Police Department after Appellant's spouse discovered Appellant slumped over in front of a table with heroin paraphernalia. C. Ex. 2, 3; H.T. I at 57, 67, 107. Appellant's spouse notified the 911 call taker that Appellant might be the victim of a possible heroin overdose. *Id.* The police responded to the 911 emergency call. *Id.*

Appellant has strenuously argued throughout the course of the proceedings in this case that Appellant did not overdose on heroin, but rather Appellant passed out as the result of drinking beer. H.T. I at 115; C. Ex. 3 at 6. However, there were no reports of any empty beer cans, only heroin paraphernalia found by the Police Officers.

Having found that Appellant's version of the events of February 22, 2013 is not credible, the Board credits the testimony of Police Officer B that Police Officer B was in close proximity to Appellant and did not smell alcohol or see any signs of alcohol intoxication. H.T. I at 131, 140. However, Police Officer B testified that Appellant seemed very, very lethargic and very, very aggravated which are behaviors consistent with the use of heroin. H.T. I at 132, 142.

Furthermore, Appellant admitted in allocution before the Circuit Court that Appellant was in possession of drug paraphernalia “consistent with the use of heroin.” C. Ex. 9 at 2-3. Accordingly the County proved by a preponderance of the evidence that Appellant violated MCPR, 2001, Section 33-5(d) and MCDOCR Policy No. 3007, which require correctional department employees to abide by a high standard of conduct, follow all departmental procedures, and refrain from the use of illegal drugs, and which prohibit personnel from violating any laws, regulations and ordinances. MCDOCR Policy No. 3007, Section D.1, D.6, VII.9, VIII.A.

The Board also finds that Appellant’s possession of heroin paraphernalia was a violation of County regulations and DOCR’s standards of conduct and ethics. Accordingly, the Board finds that Appellant was guilty of a serious infraction, which warrants disciplinary action.

**The Board Finds That The County Imposed A Disparate Penalty From That Given To Other Employees For Similar Misconduct.**

Section 33-2(d) of the Personnel Regulations indicates that, in determining whether a disciplinary action is warranted as well as how severe an action should be taken, the Department Director must consider the employee’s work record and discipline given to other employees in the Department for similar behavior. MCPR, 2001, Section 33-2(d)(2) & Section 33-2(d)(3). The Board finds that in dismissing Appellant instead of demoting Appellant, the County imposed a disparate penalty on Appellant.

The Board heard testimony that several employees in DOCR received criminal convictions while working as uniformed correctional officers. H.T. I at 171, 190-91. These individuals have continued to work for DOCR as Correctional Officers even with a criminal record. *Id.* Appellant pled guilty to the charge for possession of drug paraphernalia, but the Circuit Court stated: “The guilty finding for possession of paraphernalia is stricken. Probation before judgment is entered.” C. Ex. 9 at 10. Based on the Court’s actions, Appellant does not have a criminal conviction.

The County argues that the other Correctional Officers’ criminal convictions are not comparable to Appellant’s as the other Correctional Officers’ were not convicted of drug charges. H.T. I at 191-92. While this may be true, the Correctional Officers, by having criminal convictions, have also violated MCPR, 2001, Section 33-5(d) and MCDOCR Policy No. 3007. Yet, these Correctional Officers are still working for DOCR despite their serious misconduct, while Appellant was dismissed despite Appellant’s conviction being stricken from the record. In light of the other Correctional Officers’ misconduct, the penalty for Appellant’s misconduct is unfair.

The Board finds Appellant’s situation is quite comparable to the other Correctional Officers with criminal convictions. The other Correctional Officers violated criminal statutes and ultimately received criminal convictions but were not dismissed. Appellant should have received the same treatment. Because Appellant was not treated similarly to the other Correctional Officers, the penalty of dismissal cannot stand. *See, e.g., Sims v. Dept’t of the Navy*, 8 M.S.P.R. 680, 682 (1981) (mitigating removal to a 10-day suspension for fraudulent use

of a government purchase document based on showing of similar suspensions of other employees for falsifying travel vouchers, attempted theft of government property and actual theft of government property).

The Board further finds that the County failed to give sufficient consideration to the relationship of the misconduct to the employee's assigned duties and responsibilities and the employee's work record. Warden G and the Director of DOCR testified that Appellant had a spotless work history until this incident. H.T. I at 182, 223. Appellant also provided testimony that Appellant was promoted and selected for Appellant's special position because of Appellant's excellent past performance. H.T. II at 25. The testimony showed that Warden G and the Director of DOCR had no reason to suspect that Appellant was using drugs. Appellant's performance had not suffered, and there was no evidence to suggest that Appellant used or obtained drugs in the workplace. There was no evidence that the public, the inmate population, or Appellant's co-workers knew of Appellant's offense. Thus, there is no evidence in the record to support the County's position that Appellant's off-duty misconduct totally violated the professional image the County has strived to display to the public and the community.

Accordingly, while the Board cannot and does not condone off-duty illegal drug use by Correctional Officers, in the particular circumstances of this case, the Board finds that the County failed to give sufficient consideration to the relationship of the misconduct to the employee's assigned duties and responsibilities and the employee's work record. The County's failure to give appropriate consideration to this factor lends further weight to the Board's conclusion that the County imposed a disparate penalty in this case.

**The Board Finds That A Demotion Is The Appropriate Penalty.**

The Board is particularly concerned about Appellant's drug activity. There is clear evidence that Appellant, through Appellant's conduct, was involved with drugs on some level. Appellant's admission to possessing heroin paraphernalia is conduct unbecoming of an officer in Appellant's position even if off-duty.

Nevertheless, having considered both aggravating and mitigating circumstances, the Board finds the penalty of dismissal is not warranted. This action is inconsistent with DOCR's current practices.

The Board finds that the County did prove all the charges by a preponderance of the evidence. However, where, as here, the Board finds that a disparate penalty has been imposed, the dismissal cannot stand. The Board, in reaching its determination on what constitutes as an appropriate penalty in this manner, considered the fact that Warden G and Director stated that other Correctional Officers with criminal convictions still work for DOCR. Therefore, despite the seriousness of Appellant's misconduct, the Board is of the opinion that based on the totality of circumstances, mitigation of the penalty to demotion is warranted. *Cf. Kruger v. Dep't of Justice*, 32 M.S.P.R. 71, 76-77 (1987) (mitigating penalty of correctional officers who publically smoked marijuana while off duty from removal to 60-day suspension).

The Board also urges the County to provide random drug testing for twelve (12) months

to Appellant and document each test result.

### **ORDER**

Based on the foregoing, the Board sustains Appellant's appeal and hereby orders the County to do the following:

1. The Board orders the Director to revoke the dismissal of Appellant and instead demote Appellant to the next lowest ranking officer, effective October 18, 2013.

2. Appellant shall be made whole for lost wages and benefits.

3. Having mitigated the penalty, the Department must pay reasonable attorney fees and costs. Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have 10 days from receipt to respond. Fees will be determined by the Board in accordance with the factors listed in Montgomery County Code Section 33-14(c)(9). *See also* Md. Rules 2-701 through 2-706.

## **CASE NO. 14-19**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of the Montgomery County's Chief of Police to dismiss Appellant effective November 19, 2013. The appeal was considered and decided by the Board.<sup>1</sup>

### **FINDINGS OF FACT**

Appellant was a Security Officer II with the Montgomery County Police Department (MCPD), Security Services Division (SSD) at the time of events that are at issue in this case. County Exhibit (C. Ex.) 11 at 3; Hearing Transcript for March 24, 2014 (H.T. II) at 247. Appellant has been employed by the County with the MCPD SSD for seventeen years. C. Ex. 11 at 6. Appellant's duties include monitoring cameras, monitoring employees and members of the public coming into County buildings, patrolling County buildings, and ensuring the safety of County employees. C. Ex. 11 at 12-15.

At the time of the events that led to Appellant's termination, Appellant was living with a

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<sup>1</sup> The Board Chair was not present for the first day of hearing held in this matter on February 19, 2014. Pursuant to the Administrative Procedures Act, Montgomery County Code Section 2A-10(c), the Board Chair has certified in writing that the Board Chair has read the transcript for the portion of the hearing the Board Chair missed and reviewed the record of evidence in this matter. Therefore, the Board Chair was able to participate in the vote on this matter. The Board Chair's Certification has been made part of the official record in this matter.

County MC311 Customer Service Representative (hereinafter Customer Service Representative). Appellant's Exhibit (A. Ex.) 6; H.T. II at 174-75. On July 4, 2012 at about 7:00 p.m., Appellant sent an email to the Customer Service Representative's supervisor in which Appellant identified that Appellant was in a relationship with the Customer Service Representative and asked to meet with the Customer Service Representative supervisor's. C. Ex. 7 at 9-11; C. Ex. 11 at 41-43; C. Ex. 12 at 15-16, 50-51; H.T. II at 283-84, 287, 293. Appellant also contacted two of the Customer Service Representative's co-workers at the MC311 center and talked with them about the relationship between the Customer Service Representative and their joint supervisor. C. Ex. 12 at 18; *see also* C. Ex. 7 at 13-16; C. Ex. 11 at 74-80. The Customer Service Representative's supervisor contacted Appellant's supervisor, who contacted Appellant and told Appellant not to contact the Customer Service Representative supervisor's. C. Ex. 12 at 15-17, 50. Appellant then told the Customer Service Representative that the Customer Service Representative needed to move out noting "when your supervisor contact[s] my supervisor, now you're interfering with my job . . . ." C. Ex. 12 at 16; *see also* C. Ex. 7 at 12-13; C. Ex. 11 at 67-68.

On July 6, 2012, the Customer Service Representative contacted 911 to seek police assistance with the collection of the Customer Service Representative's property from the apartment where the Customer Service Representative had lived with Appellant. C. Ex. 1 at 4; H.T. II at 160. While on the 911 call, the Customer Service Representative notified the dispatcher that Appellant put a gun to the Customer Service Representative's face on July 4, 2012. C. Ex. 1 at 4; Hearing Transcript for February 19, 2014 (H.T. I) at 185; H.T. II at 161. Several Police Officers from the MCPD responded to a possible domestic dispute. C. Ex. 1 at 4; H.T. I at 185, 189. The Police Officers were dispatched to Appellant's home address. C. Ex. 1 at 4. Prior to the police arriving, Appellant left Appellant's home. C. Ex. 1 at 4; H.T. I at 186; H.T. II at 159, 256.

The Police Officers testified that, upon arriving on the scene, they spoke with the Customer Service Representative. C. Ex. 1 at 4; H.T. I at 186. The Customer Service Representative advised the Police Officers that the Customer Service Representative had contacted the police because as the Customer Service Representative was moving out of the apartment, Appellant began to throw the Customer Service Representative's property in the trash. C. Ex. 1 at 4; H.T. I at 188. When the Police Officers asked about the gun incident two days prior, the Customer Service Representative described the incident in detail. C. Ex. 1 at 4; C. Ex. 9; H.T. I. at 187-89.

The Police Officers worked with the Customer Service Representative to complete both the Domestic Violence Supplemental Form (DVSF) and the Domestic Violence Lethality Screening (DVLS). C. Ex. 8; H.T. I at 191-92. On the DVSF, the Customer Service Representative wrote: "On 7/3 Appellant got angry when I confronted Appellant on some infidelity issues. Appellant got enraged and said 'Let me get my shit' and grabbed the gun and pushed it in my face." C. Ex. 8.<sup>2</sup> On the DVLS, the Customer Service Representative answered "Yes" to eight out of eleven questions to include: "Has he/she ever used a weapon against you or threatened you with a weapon?" and "Do you think he/she might try to kill you?" *Id.* The

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<sup>2</sup> The Board notes the discrepancy in the date; however, the discrepancy appears to have been prompted by the Police Officer. *See* C. Ex. 1 at 4.

Customer Service Representative also signed the DVLS affirming that the information the Customer Service Representative had given was true and correct. *Id.*

Appellant returned home to the presence of officers, and was arrested at gunpoint. C. Ex. 1 at 4; C. Ex. 9; H.T. I at 196. While in custody, Appellant gave permission for the officers to retrieve Appellant's handgun from Appellant's bedroom. C. Ex. 1 at 4; C. Ex. 9; H.T. I at 197. The unsecured loaded gun was found on the top shelf of the bedroom closet underneath some clothes. C. Ex. 1 at 4; C. Ex. 9; H.T. I at 197. Appellant was transported to the MCPD's Family Crimes Division (FCD) where Appellant was criminally charged with one count each of First Degree Assault, Second Degree Assault, and Reckless Endangerment. C. Ex. 1 at 4; *see also* C. Ex. 2 at 6-7.

After Appellant's arrest, the Customer Service Representative was taken to the Montgomery County Family Justice Center (MCFJC) where the Customer Service Representative and the Customer Service Representative's six-year old son met with an investigator. C. Ex. 1 at 4; C. Ex. 10. The investigator interviewed the Customer Service Representative and the Customer Service Representative's six-year old son.<sup>3</sup> C. Ex. 7; C. Ex. 10; H.T. I at 225-26, 241-42. The Customer Service Representative stated during the interview that the gun incident on July 4, 2012 started when Appellant told the Customer Service Representative that Appellant was going to send an email to the Customer Service Representative's supervisor about the supervisor's relationship with the Customer Service Representative. C. Ex. 7 at 23-24. The Customer Service Representative stated that Appellant and the Customer Service Representative began arguing; then Appellant said, "Let me go get my shit, I'm sick of this. I'm going to get my shit," and Appellant got Appellant's gun. C. Ex. 7 at 24. The Customer Service Representative stated that they argued some more and then Appellant put the gun to the Customer Service Representative's face and stated: "You need to shut up." C. Ex. 7 at 26-30.

The FCD investigators learned that the Customer Service Representative sent a text message to a co-worker of Appellant's on July 4, 2012, stating: "Appellant e-mailed my supervisor, telling my supervisor that Appellant wants to have a conversation with my supervisor tomorrow. Appellant put a gun in my face and threw my stuff in the hallway." H.T. II at 274-76; *see also* C. Ex. 13 at 9; H.T. II at 17-18. An FCD investigator interviewed the co-worker of Appellant on July 13, 2012, and observed the Customer Service Representative's text, dated July 4, 2012 at 8:24 p.m. H.T. II at 274-76; *see also* C. Ex. 13 at 9; H.T. II at 17-18.

On July 7, 2012, the day after Appellant was released from police custody, Appellant filed theft charges against the Customer Service Representative for allegedly taking Appellant's prescription drugs. C. Ex. 12 at 25, 28; H.T. II at 261, 293-97, 299, 304.

The criminal charges against Appellant were dismissed on December 3, 2012. C. Ex. 2 at 7. The criminal records were expunged. A. Exs. 8, 11, 12.

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<sup>3</sup> The Board recognizes that a six-year old child witness can be unreliable. The Board did not reach any opinion in regards to this matter based on the child's statement to the investigator.

In December 2012, the Department had its Internal Affairs Division (IAD) begin an administrative investigation into the events occurring on or about July 4, 2012. C. Ex. 2 at 7. Subsequently, on September 17, 2013, the Chief issued Appellant a Statement of Charges, indicating that the Chief intended to dismiss Appellant. C. Ex. 3. The factual predicate for the charges included the July 4, 2012 incident where Appellant put a gun to the Customer Service Representative's face; Appellant's bringing Appellant's domestic dispute with the Customer Service Representative into the workplace; the conflicting statements Appellant made to FCD and the IAD investigators; and Appellant's prior disciplinary record which included an 80-hour suspension in July 2013 for Conduct Unbecoming when Appellant failed to act professionally and created tension in the workplace. *Id.* at 3-4.

On November 12, 2013, the Chief issued Appellant a Notice of Disciplinary Action – Dismissal (NODA). C. Ex. 4. The effective for the dismissal was November 19, 2013. *Id.*

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Appellant was accused of threatening the Customer Service Representative with a handgun.
- Appellant was arrested and charged with crimes associated with assault and the use of a deadly weapon.
- The police found an unsecured loaded gun in Appellant's home.
- Although the incident happened while Appellant was off-duty, Appellant brought the incident into the workplace and created a hostile working environment.
- The Customer Service Representative only recanted the Customer Service Representative's story because the Customer Service Representative could not afford to go out and live on the Customer Service Representative's own.
- Appellant has shown an unwillingness to accept responsibility for any of Appellant's actions.
- Appellant lacks credibility.
- Appellant's fellow security officers can no longer trust Appellant.
- Appellant has a history of disciplinary actions.

#### **Appellant:**

- Appellant has been an employee for seventeen years with the County and for most of the seventeen years Appellant has a solid record.
- The Customer Service Representative recanted the Customer Service Representative's statement proving that Appellant did not do anything wrong.
- The State's Attorney's Office dropped all criminal charges against Appellant.
- Appellant has been targeted and continues to be treated differently from other County employees.
- Appellant was wrongfully dismissed.

- The County should have considered Appellant’s entire work record prior to dismissing Appellant.
- The Board should overturn the Department’s wrongful dismissal.

**APPLICABLE LAWS, REGULATIONS AND CONTRACTUAL PROVISIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-6, Definitions**, which states in applicable part,

In this article, the following words and phrases have the following meanings:

**Board:** The Merit System Protection Board as described in Section 403 of the County Charter.

...

**Merit system employees:** All 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.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-7, County Executive and Merit System Protection Board responsibilities**, which states in applicable part,

...

- (e) **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.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board**, which states in applicable part,

...

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

...

- (2) Order change in position status, grade, work schedule, work conditions and work benefits;

...

- (4) Order reinstatement with or without back pay, although the Chief Administrative Officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility;
- (5) Order cancellation of personnel actions found in violation of law or personnel regulation provided that such action may not without due process, adversely affect the employment rights of another employee;

...

- (7) Order removal from administrative or personnel records any reference or document pertaining to an unwarranted disciplinary or adverse personnel action;

...

- (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, *Disciplinary Actions*, which states in applicable part:**

**33-2. Policy on disciplinary actions.**

- (c) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.
- (d) ***Prompt discipline.***
  - (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
  - (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.
- (c) ***Progressive discipline.***

- (2) 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
  - (6) Any other relevant factors.

**33-3. Types of disciplinary actions.**

...

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

...

**33-5. 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 other established policy or procedure;
- (d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal law, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment; . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), Section 35, Merit System Protection Board Appeals Hearing and Investigations,** which states in applicable part:

...

**35-3. Right of appeal to MSPB.**

...

- (b) Except as provided in Section 29-7 of these Regulations, an employee with merit system status or a Local Fire and Rescue Department employee has the right to 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 Department of Police, Department Rules (MCDPDR), dated 12/26/01,** which states in applicable part:

Rule 1 – Conformance to Law

Employees are required to adhere to Departmental Rules and Regulations, Departmental Directives and Memoranda, Montgomery County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public.

...

Rule 14 – Conduct Unbecoming

No employee will commit any act which constitutes conduct unbecoming an employee of the department. Conduct unbecoming includes, but is not limited to, any criminal, dishonest or improper conduct.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994 and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016 (MCGEO CBA), Article 28, *Disciplinary Actions*, which states in applicable part:**

**28.1 Policy.**

A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. Except in cases of theft or serious violation of policy or procedure that create a health or safety risk, disciplinary actions must be progressive in severity. However, the Employer reserves the right to impose discipline at any level based on cause. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors.

**28.2 Types of Disciplinary Actions.**

Disciplinary actions shall include but are not limited to:

...

(h) Dismissal:

The removal of an employee from County service for cause.

**ISSUE**

Has the County proven by a preponderance of the evidence that Appellant's dismissal was in compliance with applicable laws and regulations?

**ANALYSIS AND CONCLUSIONS**

**The Board Finds That Appellant's Testimony And The Testimony Of Appellant's Witness, The Customer Service Representative, Are Not Credible.**

A. The Board's Standards For Determining Credibility.

Because the testimony of various witnesses conflicted with the testimony of other witnesses, the Board had to make credibility determinations with regard to the witnesses. Credibility is "the quality that makes something (such as a witness or some evidence) worthy of belief." *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002) (quoting Black's Law Dictionary 374 (7th ed. 1999)).

In *Bailey v. U.S.*, 54 Fed. Cl. 459 (2002), the Claims Court noted that in evaluating

credibility

[i]t is proper for the [fact finder] to take into account the appearance, manner, and demeanor of the witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or uncertainty in testifying.

*Id.* at 462 n.2 (quoting 81 Am. Jur. 2d § 1038 at 848-49 (1992)). The *Bailey* court also noted that credibility determinations include an evaluation of the witness' demeanor, perception, memory, narration and sincerity. 54 Fed. Cl. at 462 n. 2 (citing 40 Case W. Res. L. Rev. 165, 174 (1989/1990)).

The Third Circuit has held that “[d]emeanor is of utmost importance in the determination of the credibility of a witness.” *Gov’t of the Virgin Islands v. Aquino*, 378 F.2d 540, 548 (1967). “Demeanor reflects a way of acting, behavior, bearing and outward manner.” *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (citing Shorter Oxford English Dictionary 628 (1973)). Likewise, demeanor denotes “outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.” *Haebe*, 288 F.3d at 1300 n. 27 (quoting Black’s Law Dictionary at 442). Thus, in assessing demeanor, the Board considers the carriage, behavior, manner, and appearance of a witness during the witness’ testimony. See *Hillen v. Dep’t of the Army*, 35 M.S.P.R. 453, 462 (1987) (citing *Dyer v. MacDougal*, 201 F.2d 265, 268-69 (2d Cir. 1952)).

B. Appellant and One of Appellant's Witnesses Lacked Credibility.

1. Appellant’s Testimony Was Self-Serving and Simply Not Credible.

The Board had ample opportunity to directly observe the demeanor of Appellant during Appellant’s testimony. The Board finds that Appellant’s was less than forthcoming during Appellant’s testimony and that Appellant’s testimony was inconsistent with Appellant’s own prior statements and with the testimony of other witnesses.

For example, Appellant’s statements regarding the gun changed over the course of time. When Appellant was arrested on July 6, 2012, the Police Officer asked Appellant where the Police Officer could find the gun. Appellant stated that the gun was in a gun box in Appellant’s bedroom closet under clothes; however, the Police Officer found the gun outside of the gun box. H.T. I at 197. Later the same day, Appellant was brought to the FCD and interviewed by Detective E. H.T. I at 258. During this interview, Appellant was asked how Appellant kept Appellant’s gun, and Appellant stated that “at night time, I would lay it next to the bed, you know, for protection” and Appellant kept the bullets “right next to it.” C. Ex. 12 at 22-23; H.T. I at 267. Later in the interview, however, Appellant stated that “the gun was loaded today . . . .” C. Ex. 12 at 44. Appellant further stated that “today . . . it wasn’t locked” in the fireproof box because “I took it out” because “I was going to take it with me . . . wherever I went when I left

the house . . . .” C. Ex. 12 at 46-47. During Appellant’s interview with the IAD investigator on March 18, 2013, Appellant stated that the gun was kept loaded “most of the time” in the closet in a gun case under some clothes. C. Ex. 11 at 35-36, 52. Appellant further stated, however, that “there’s no key” to the box and implied that the box could not be locked. C. Ex. 11 at 69. Finally, during the Board hearing on March 24, 2014, Appellant changed Appellant’s story again, stating: “I kept it in my closet, well hidden, for no one to see, under clothes . . . I didn’t know if it was in a secured box. Sometimes I kept it in a box but I took it out. Sometimes it was in the box. . . . In the closet it was loaded. When I slept with it that one time next to my bed, it was not loaded.” H.T. I at 290-91. Appellant then later testified to the Board that the gun had been up in the closet “for years” and “nobody knew where it was, not even the Customer Service Representative.” H.T. II at 320-21. Again, this contradicted Appellant’s prior statements to the FCD investigator that Appellant kept the gun next to the bed at night for protection and that the Customer Service Representative “knows where the gun is.” C. Ex. 12 at 44.

Similarly, Appellant’s version of why Appellant contacted the Customer Service Representative’s supervisor evolved over the course of time. On July 6, 2012, Appellant told FCD investigators that Appellant contacted the Customer Service Representative’s supervisor because the supervisor was talking badly about the Customer Service Representative’s co-workers with the Customer Service Representative. C. Ex. 12 at 15. During the March 13, 2013 IAD investigation, Appellant repeatedly told the investigator that Appellant had contacted the Customer Service Representative’s supervisor to tell the supervisor about the Customer Service Representative’s drug use. C. Ex. 11 at 34, 41-43, 69, 79-80. Appellant confirmed, however, that Appellant had made prior statements during the FCD interview that Appellant contacted the Customer Service Representative’s supervisor to meet with the supervisor to discuss how the supervisor treated workers under the supervisor. C. Ex. 11 at 42. When the IAD investigator asked why Appellant did not mention the Customer Service Representative’s drug use during the FCD interview on July 6, 2012, Appellant stated that “I didn’t think it was gonna go that far” and “I didn’t want to see the Customer Service Representative get into trouble . . . .” *Id.* at 29, 34. However, this did not prevent Appellant from filing criminal theft charges on July 7, 2012 against the Customer Service Representative for using Appellant’s prescription drugs. C. Ex. 12 at 28; H.T. II at 293. Finally, during the Board hearing, Appellant testified that on the night of the gun incident, Appellant told the Customer Service Representative that Appellant was going to contact the Customer Service Representative’s supervisor about the Customer Service Representative’s drug use and how badly the Customer Service Representative talked about the Customer Service Representative’s supervisor because “I was trying to calm the Customer Service Representative down.” H.T. II at 283-85.

Accordingly, based on Appellant’s demeanor, behavior, and inconsistent testimony, the Board concludes that Appellant was not a credible witness.

2. The Customer Service Representative’s Testimony Was Simply Not Credible.

The Board had the opportunity to assess the Customer Service Representative demeanor while the Customer Service Representative was testifying. Notably, the Customer Service Representative’s demeanor during the Customer Service Representative’s testimony was

defensive and the Customer Service Representative's testimony was contradictory to the Customer Service Representative's previously statements.

For example, during direct-examination by Appellant's attorney, the Customer Service Representative admitted that on July 6, 2012 the Customer Service Representative had called the police to report that Appellant had pulled a gun on the Customer Service Representative on July 4, 2012. H.T. II at 161. When asked why the Customer Service Representative stated this, the Customer Service Representative responded: "Because I was angry . . . that's the first thing, it's something that just popped in my head. I just said it. I was mad." *Id.* However, the Customer Service Representative thought enough of the event that the Customer Service Representative sent a text message regarding the gun incident to Appellant's co-worker on July 4, 2012. H.T. II at 274-76. It is clear from the record of evidence that this event did not just "pop" into the Customer Service Representative's head on July 6, 2012.

The Customer Service Representative new version of what occurred on July 4, 2012 differed markedly from the Customer Service Representative's initial report to the 911 dispatcher and Police Officers at the scene. The Customer Service Representative told the 911 dispatcher that the Customer Service Representative was contacting the police because the Customer Service Representative was moving out of the apartment and Appellant began to throw the Customer Service Representative's property in the trash. C. Ex. 1 at 4. Further, the Customer Service Representative notified the dispatcher that two days prior to this incident, Appellant had also pulled a gun on the Customer Service Representative and held it to the Customer Service Representative's head during one of their arguments. *Id.* The Customer Service Representative told the same thing to the Police Officers who responded to the 911 call. H.T. I at 207. The Customer Service Representative was able to recall these same events in detail hours later on the DVSF and DVLS forms which the Customer Service Representative signed and affirmed. C. Ex. 8. The Customer Service Representative also recounted the same events during the Customer Service Representative's MCFJC interview on July 6, 2012. C. Ex. 7 at 22-28. The documentary evidence submitted by Appellant reflected that the Customer Service Representative only began to recant the Customer Service Representative's story on July 9, 2012. A. Exs. 2, 3; *see also* H.T. II at 167-68. Thus, the record reflects that the Customer Service Representative recanted only after Appellant had criminal theft charges filed against the Customer Service Representative.

Accordingly, the Board concludes that the Customer Service Representative's testimony that the Customer Service Representative fabricated accusations about the July 4, 2012 gun incident given the Customer Service Representative's anger with Appellant is not credible.

**Having Found That Appellant's Testimony Is Not Credible, The Board Concludes That The County Proved By A Preponderance Of The Evidence That Appellant Engaged In Misconduct That Failed To Conform To Law And This Was Conduct Unbecoming An Employee Of The Police Department.**

The record of evidence in this case demonstrates that on July 6, 2012, the Customer Service Representative contacted the MCPD to seek help with removing the Customer Service Representative's belongings from Appellant's apartment. C. Ex. 1 at 4. The Customer Service

Representative also notified the 911 dispatcher that Appellant had put a gun to the Customer Service Representative's head on July 4, 2012 during one of their arguments. *Id.* Appellant and the Customer Service Representative strenuously argued throughout the course of the proceedings in this case that the Customer Service Representative lied and made up the gun incident because the Customer Service Representative was angry with Appellant. H.T. II at 161, 257, 282, 304. However, the Customer Service Representative consistently provided the same story to multiple individuals without wavering in any significant respect from the details.<sup>4</sup>

Having found that Appellant's version and the Customer Service Representative's recanted version of the events of July 6, 2012 are not credible, the Board credits the testimony of Police Officer R that Police Officer R noted upon arriving on the scene that the Customer Service Representative "was very upset, seemed very fearful, very nervous and very concerned about the Customer Service Representative's safety." H.T. I at 187, 208. In addition, Police Officer R testified that the Customer Service Representative was "terrified" when the Customer Service Representative gestured how the gun was pointed at the Customer Service Representative's head, and "the Customer Service Representative's body language and gestures were consistent with somebody who was very, very scared." H.T. I. at 208. Furthermore, the Customer Service Representative recanted the Customer Service Representative's accusations only after Appellant used coercive measures such as having criminal theft charges filed against the Customer Service Representative for using Appellant's prescription drugs. H.T. II at 293-97, 299, 304. Accordingly, the County proved by a preponderance of the evidence that Appellant violated MCPD, Department Rules 1 and 14, which require Police Department employees to abide by a high standard of conduct, follow all departmental procedures, and refrain from violating any laws, regulations and ordinances. MCDPDR No. 1 and No. 14.

The Board further finds that there was a nexus between Appellant's misconduct and Appellant's County employment. Appellant brought Appellant's domestic dispute with the Customer Service Representative into the workplace by contacting the Customer Service Representative's supervisor and co-workers to discuss personal disputes between the Customer Service Representative and Appellant. *Cf. Doe v. Dep't of Justice*, 113 M.S.P.R. 128 (2010) (finding nexus where employee's unprofessional conduct of videotaping his sexual encounters with two other employees adversely affected job performance of those employees and disrupted workplace as a whole). The Board also notes that Appellant had previously been disciplined for similar conduct unbecoming an employee when Appellant failed to act professionally and disrupted the workplace. Finally, the Board notes that engaging in domestic violence by putting a gun to a live-in partner's face is incompatible with the responsibilities of a security officer to protect the safety of County employees. *Cf. Soc. Sec. Admin. v. Long*, 113 M.S.P.R. 190 (2010) (upholding removal of administrative law judge who engaged in physical altercation with his domestic partner resulting in police intervention, because such misconduct was clearly inconsistent with judge's duty to uphold the law). Under these circumstances, although Appellant committed the misconduct while off-duty, there is sufficient nexus with Appellant's County employment to warrant disciplinary action.

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<sup>4</sup> Again, the Board notes that any discrepancies regarding the date of the gun incident appear to have been prompted by other individuals. *See* C. Ex. 1 at 4; C. Ex. 7 at 18-22; H.T. I at 232-33.

**Given The Nature of Appellant's Misconduct And Appellant's Refusal To Accept Responsibility For Appellant's Behavior, The Penalty of Dismissal Is Appropriate.**

Appellant has committed serious misconduct. The Board has considered Appellant's seventeen years of service. However, Appellant's continued refusal to accept responsibility for Appellant's conduct, along with Appellant's prior disciplinary record, demonstrates that Appellant lacks the potential for rehabilitation. The Board finds no evidence in the record to support Appellant's contention that Appellant has been targeted or treated differently than other employees.

Particularly egregious is that Appellant sought to accuse the victim, the Customer Service Representative, of lying about the incident, rather than taking responsibility for Appellant's own actions. Appellant continued to insist throughout the administrative investigation and before the Board that "the Customer Service Representative lies." *E.g.*, H.T. II. at 281-82. Also egregious is the fact that after the Appellant was released from police custody, Appellant filed theft charges against the Customer Service Representative for allegedly using Appellant's prescription drugs. H.T. II at 293-97, 299, 304. While Appellant denied that this was done in retaliation for the domestic violence charges filed against Appellant, Appellant also admitted that Appellant was aware that the Customer Service Representative had been using Appellant's prescription medications for some time. *Id.*

Finally, Appellant has a lengthy disciplinary record of charges involving multiple instances of conduct unbecoming an employee and making untruthful statements. C. Ex 3 at 4; C. Ex. 4 at 4. Appellant's repeated misconduct after these prior disciplinary actions demonstrates that Appellant cannot be rehabilitated.

Therefore, the Board finds that the penalty of dismissal was appropriate in this case.

**ORDER**

Based on the foregoing, the Board denies Appellant's appeal of Appellant's dismissal.

# **TERMINATION**

## **CASE NO. 14-01**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Director of the Department of Health and Human Services (DHHS or the Department) to terminate Appellant effective June 26, 2013 in accordance with Section 29-2(a)(7) of the Montgomery County Personnel Regulations, 2001, as amended ("MCPR" or "Personnel Regulations"), which provides that a department director may terminate the employment of an employee "who has not returned to work within 30 calendar days of exhausting all FMLA leave and paid leave of any type, including leave from sick leave donor program, because of an on-going medical or personal reason." The appeal was considered and decided by the Board.<sup>1</sup>

### **FINDINGS OF FACT**

Appellant began working for the County as an Office Service Manager with the County Council on April 6, 1987. *See* County's Prehearing Submission. Appellant resigned from County employment on September 12, 1988, and was noncompetitively reappointed on December 31, 1990, as an Office Services Manager with the Council. *Id.* Appellant was promoted to an Income Specialist II, Income Maintenance, DHHS on May 4, 1992. *Id.* Appellant has been an Income Assistance Program Supervisor with DHHS since August 31, 2008. *Id.* Appellant only worked fourteen (14) hours in calendar year 2013, on January 15 and 16, 2013. Hearing Transcript (H.T.) at 49-50, 93-94, 194-95. The last day that Appellant was actually in attendance at work was January 16, 2013. H.T. at 49-50.

On May 7, 2013, Appellant was issued a letter regarding Appellant's employment status by the Director of DHHS (Director). County Exhibit (C. Ex.). 2. In the letter, the Director informed Appellant that Appellant was not currently eligible for Family and Medical Leave Act (FMLA) leave because Appellant did not work the required number of hours in the previous twelve (12) months. *Id.* In addition, the Director informed Appellant that Appellant had exhausted all of Appellant's personal leave on April 16, 2013. *Id.* The Director indicated that, per Appellant's request, the Department had solicited sick leave donations on behalf of Appellant

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<sup>1</sup> The Associate Member was not present for part of the hearing held in this matter on October 16, 2013. Pursuant to the Administrative Procedures Act, Montgomery County Code Section 2A-10(c), the Associate Member has certified in writing that the Associate Member has read the transcript for that part of the hearing and reviewed the record of evidence in this matter. Therefore, the Associate Member was able to participate in the vote on this matter. The Associate Member's Certification has been made part of the official record in this matter.

and that, as of May 3, 2013, forty (40) hours of sick leave had been donated and applied to Appellant's leave from April 17, 2013 through April 23, 2013. *Id.* Nevertheless, as of April 24, 2013, Appellant had been placed on leave without pay (LWOP) by default due to Appellant having exhausted all available paid leave. *Id.* In closing, the Director informed Appellant that if Appellant did not return to work on a full-time, consistent basis by May 24, 2013, the Director would issue a Notice of Intent to Terminate. *Id.* at 2.

On May 31, 2013, Appellant was issued a Notice of Intent to Terminate by the Director. C. Ex. 3. In this letter, the Director informed Appellant of the Director's intention to terminate Appellant's employment in accordance with Section 29-2(a)(7) of the Personnel Regulations, which provides that a department director may terminate the employment of an employee "who has not returned to work within 30 calendar days of exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal reason." *Id.* The Director again informed Appellant of Appellant's excessive leave usage over the past two years and of the County's efforts to accommodate Appellant's leave requests. *Id.* The Director reminded Appellant of the Director's May 7, 2013 letter advising Appellant to return to work by May 24, 2013 on a full-time consistent basis and informing Appellant that if Appellant did not return, the County would issue a notice to terminate. *Id.* The Director noted that Appellant had not returned to work. *Id.* Finally, the Director provided Appellant an opportunity to respond in writing by ten (10) working days from notice. *Id.*

On June 14, 2013, Appellant responded to the Notice of Intent to Terminate. C. Ex. 4. Appellant sent an email to the Director requesting a formal meeting, but did not address Appellant's intent to return to work or any of the issues referenced in the May 21, 2013 Notice of Intent to Terminate. *Id.* Instead, Appellant argued that the County could not terminate Appellant under Sections 29-2(a)(9) and 29-3(c) of the Personnel Regulations because the County had not made an effort to provide a reasonable accommodation for Appellant's disability. *Id.* Despite Appellant's request for a meeting, the Director did not meet with Appellant because they had already had prior meetings, negotiations, and conversations that had not resulted in Appellant returning to work, and at that point the only issue was whether Appellant was going to return to work. H.T. at 18-19, 32, 52.

On June 18, 2013, Appellant was issued a Notice of Termination, effective June 26, 2013, by the Director. C. Ex. 5. The letter referenced the May 31, 2013 Notice of Intent to Terminate which provided Appellant with up to ten days to respond in writing. *Id.* The letter stated that on June 14, 2013, the Director received an email from Appellant which was considered, but did not persuade the Director not to proceed with the termination. *Id.* Again, the letter highlighted Appellant's excessive leave use over a two-year period. *Id.* The letter advised Appellant that a termination action was being taken since Appellant had exhausted all paid leave of any type as of April 24, 2013 and Appellant had not returned to work within 30 calendar days of exhausting Appellant's leave because of an ongoing medical condition. *Id.*

This appeal followed.

## POSITIONS OF THE PARTIES

### County:

- Appellant’s leave utilization over the last two years has been excessive.
- Appellant exhausted all medical and paid leave of any type as of April 24, 2013.
- The County notified Appellant that Appellant needed to return to work by May 24, 2013 on a full-time, consistent basis and, if Appellant did not return to work, the County would issue a notice to terminate.
- Appellant was placed on LWOP by default, effective April 24, 2013.
- Appellant did not return back to work within 30 days after exhausting leave in accordance with Section 29-2(a)(7) of the Personnel Regulations.
- Appellant has on-going medical and personal reasons for not returning to work.
- DHHS had the right to terminate Appellant.
- Appellant’s termination was non-disciplinary and only based upon Appellant exhausting all of Appellant’s leave.
- Since the termination was non-disciplinary, the Department did not issue a Statement of Charges nor a Notice of Disciplinary Action.
- Appellant fails to state the specific action Appellant wants the Board to take.
- The sole issue in this case is whether Appellant was terminated in compliance with Section 29-2(a)(7) of the Personnel Regulations.

### Appellant:

- Appellant has a chronic illness that was brought on by the actions of certain managerial staff within County Government.
- Appellant has been in constant contact with the County’s designee regarding the use of FMLA leave.
- Appellant worked diligently as an employee and has been a good worker up until the time Appellant began having significant chronic health problems that were triggered by Appellant’s working environment.
- Appellant has been in constant contact with County personnel regarding Appellant’s chronic health problems and working conditions.
- The County was aware of Appellant’s chronic health problems and working conditions.
- Appellant had not exhausted all of Appellant’s leave when Appellant received the County’s May 7, 2013 letter.
- Appellant believed that Appellant had leave options under FMLA.
- Appellant requested a meeting with the Director of DHHS to discuss alternative solutions and avoidance of a termination.
- Appellant was denied Appellant’s right to meet and be heard in regards to the charges against Appellant until Appellant’s hearing before the Board.
- Section 29-3(c) of the Personnel Regulations requires a director, prior to terminating a qualified employee with a physical or mental disability, to provide reasonable accommodations.

- The County failed to show that it made any attempts to reasonably accommodate Appellant's medical conditions.
- Appellant was wrongfully terminated.
- The Board should overturn the Department's wrongful termination.

**APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-6, Definitions**, which states in applicable part,

In this article, the following words and phrases have the following meanings:

**Board:** The Merit System Protection Board as described in Section 403 of the County Charter.

...

**Merit system employees:** All 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.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-7, County Executive and Merit System Protection Board responsibilities**, which states in applicable part,

...

- (e) **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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 21, 2008), Section 29, Termination**, which states in applicable part:

**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 Section 29-2.

**29-2. Reasons for termination.**

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

...

- (7) who has not returned to work within 30 calendar days after exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal problem;

...

- (9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee's job; . . .

**29-3. Management responsibility for termination.**

...

- (b) Before a department director terminates the employment of an employee with merit system status for the reason described in Section 29-2(a)(7) (failure to return to work within 30 calendar days of exhausting all paid leave), the director must send written notice of the possible termination to the employee at the most recent home address given by the employee at least 10 calendar days in advance of the issuance of a notice of proposed termination.
- (c) A department director must not terminate a qualified employee with a physical or mental disability under 29-2(a)(9) above unless efforts at reasonable accommodation as described in Section 8 of these Regulations are unsuccessful.

**29-4. Notice of proposed termination and notice of termination for employees with merit system status.**

- (a) ***Notice of proposed termination.*** A department director must give an employee with merit system status written notice of proposed termination that includes:
  - (1) the reason for termination;
  - (2) that the employee may submit a written response to the proposed termination;
  - (3) the person to whom the employee may submit a response; and
  - (4) that the employee's response must be filed within 10 working days of the employee's receipt of the notice.
- (b) ***Notice of termination.*** If a department director decides to terminate an

employee with merit system status, the department director must give the employee a written notice of termination and include the following in the notice:

- (1) the effective date of the termination;
- (2) the reason for the termination;
- (3) that the employee did or did not respond to the notice of proposed termination and, if the employee responded, whether the response, influenced the termination decision;
- (4) if the employee may file a grievance or MSPB appeal; and
- (5) the deadline for filing a grievance or an appeal.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), Section 35, Merit System Protection Board Appeals Hearing and Investigations**, which states in applicable part:

...

**35-4. Right of appeal to MSPB.**

- (c) Except as provided in Section 29-7 of these Regulations, an employee with merit system status or a Local Fire and Rescue Department employee has the right to 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.

**ISSUE**

Has the County proven by a preponderance of the evidence that Appellant's termination was in compliance with Section 29-2(a)(7) of the Personnel Regulations?

**ANALYSIS AND CONCLUSIONS**

**The County Proved That It Properly Terminated Appellant's Employment For Failing To Return To Work After Exhausting All Available Leave.**

Section 29-2(a)(7) of the Personnel Regulations permits the County to effect a nondisciplinary termination when an employee has not returned to work within 30 calendar days of exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal reason. MCPR, 2001, § 29-2(a)(7). However, prior to terminating an employee under this section, the department director must send

written notice of the possible termination to the employee at the most recent home address given by the employee at least ten calendar days in advance of the issuance of a notice of proposed termination. MCPR, 2001, § 29-3(b).

In the instant case, the County introduced into evidence four documents relevant to Appellant's nondisciplinary termination: the May 7, 2013 letter regarding Appellant's employment status; the May 31, 2013 Notice of Intent to Terminate; Appellant's June 14, 2013 email response to the Notice of Intent to Terminate; and the June 18, 2013 Notice of Termination. C. Exs. 2, 3, 4, 5. The Board finds that these letters and notices fulfilled the requirements for a nondisciplinary termination under Section 29-2(a)(7) of the Personnel Regulations.

Appellant attempted to establish through cross-examination of the Department's witnesses, i.e., the Department's Director and its Human Resources Manager, that the Department's letters and notices reflected a disciplinary action rather than a nondisciplinary termination because the letters and notices gave a detailed accounting of Appellant's use of leave and the language used sounded disciplinary in nature. *See* H.T. at 32-40, 65-66, 79-80; Appellant's Exhibit (A. Ex.) 5. The Board does not agree. The Board finds that the detailed accounting of Appellant's use of leave and the language used in the letters and notices was intended to give proper notice to Appellant and demonstrate that Appellant had not returned to work within 30 calendar days of exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal reason. The Board further finds that the County gave Appellant the benefit of all available leave options including soliciting leave donations on Appellant's behalf. In short, the Board does not find that the County attempted to take a disciplinary action against Appellant in the guise of a nondisciplinary termination.

Appellant also attempted to establish through cross-examination of the Department's witnesses that the County failed to fulfill the requirements for a nondisciplinary termination under Sections 29-2(a)(9) and 29-3(c) of the Personnel Regulations because the County did not make an effort to provide a reasonable accommodation for Appellant's known disability before terminating Appellant's employment. *See* H.T. at 27-32, 54-55, 69-71; A. Ex. 1. The Board finds, however, that the County did not terminate Appellant's employment under Section 29-2(a)(9), nor was the termination conducted under Section 29-2(a)(7) as a subterfuge to avoid providing Appellant with a reasonable accommodation for an impairment. Rather, the County had already given Appellant notice and the grounds for Appellant's termination were already fully established under Section 29-2(a)(7) when Appellant belatedly raised the issue of reasonable accommodation. In short, the Board finds no indication that the County chose to terminate Appellant on the basis of failing to return to work after exhausting Appellant's leave in order to avoid providing Appellant a reasonable accommodation for Appellant's impairment.

Finally, Appellant attempted to establish through cross-examination of the Department's witnesses that Appellant actually had accrued an incremental amount of leave by the effective date of Appellant's termination, June 26, 2013. *See* H.T. at 40-44, 72-77; A. Ex. 5. The Board finds, however, that any *de minimis* amount of leave that may have accrued while Appellant was

still “on the books” does not affect the determination that Appellant had exhausted all available leave as of April 24, 2013 and failed to return to work within 30 days thereafter.

The Director testified that Appellant’s absenteeism had been a long journey; Appellant had not worked for many hours over a period of almost two years despite on-going efforts with Appellant to talk, to mediate, to persuade, to resolve issues, and to have Appellant return to work. H.T. at 20-21. The Director further testified that the only basis on which Appellant was issued the termination was that Appellant had not returned to work within 30 days of exhausting all of Appellant’s leave, including Appellant’s FMLA leave and Appellant’s sick leave donation. H.T. at 21, 28-29.

Moreover, Appellant did not submit any evidence demonstrating Appellant’s intent or ability to return to work on a full-time, consistent basis by May 24, 2013. *See* H.T. at 177 and Appellant’s Exs. 1-5. Instead, Appellant testified that upon receiving the Notice of Intent to Terminate, Appellant applied for disability retirement. H.T. at 177-83. Appellant further testified that Appellant had not previously applied for disability retirement because Appellant had leave. H.T. at 187. Appellant’s testimony further confirmed Appellant’s ongoing medical condition and Appellant’s intent not to return to work.

Based on the above, the Board finds that the County proved its grounds for its nondisciplinary termination of Appellant pursuant to MCPR, 2001, Section 29-2(a)(7), based on Appellant’s failure to return to work after having exhausted all available leave. The evidence shows that the County fully respected Appellant’s due process and statutory rights. Indeed, the County went “above and beyond” the legal requirements, exhausted all possibilities other than termination, and gave Appellant every available opportunity to return to work. It was abundantly clear that Appellant was not going to return to work, and so the County rightfully terminated Appellant’s employment.

Therefore, the Board concludes that the County complied with Section 29-2(a)(7) of the Personnel Regulations in connection with Appellant’s termination.

**ORDER**

Based on the above, the Board denies Appellant’s appeal.

# **DEMOTION AND SUSPENSION**

## **CASE NO. 13-02**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of Montgomery County's Chief of Police to demote Appellant from a Security Officer II to Security Officer I with a 5% salary reduction and a 160-hour suspension. The appeal was considered and decided by the Board.<sup>1</sup>

### **FINDINGS OF FACT**

Appellant was a Security Officer II (Corporal) with the Security Services Division of the Department of Police at the time of the events which form the basis of this case. Hearing Transcript for June 10, 2013 (H.T.) at 232. Appellant has worked as a Corporal since 2002. *Id.* Appellant worked on the second shift, from 7:00 a.m. until 3:00 p.m. H.T. at 48, 236. Appellant's first-line supervisor is Lieutenant A. *Id.* at 102, 105. The Director of Security Services is Appellant's second-line supervisor. *Id.* at 157, 159-60.

On July 19, 2011, a Security Officer I (hereinafter Security Officer B) with the Security Services Division was working the third shift.<sup>2</sup> H.T. at 27. Security Officer B had gone to the Germantown Recreation Center to ensure it had been properly locked up and was returning to the Executive Office Building in Rockville. *Id.* Security Officer B was in a County security vehicle traveling south on Interstate 270 when Security Officer B saw a police car on the right shoulder. *Id.* at 27-28. As Security Officer B passed the police car, the Security Officer B saw that a Police Officer (hereinafter Police Officer C) was in a physical confrontation with the driver of a vehicle that had been stopped. *Id.* at 28. Concerned that Police Officer C was having problems with the driver, Security Officer B pulled over and ran back to see if Security Officer B could be of assistance to Police Officer C. *Id.*

By the time Security Officer B arrived at the scene, the driver of the vehicle was outside of the vehicle struggling with Police Officer C. H.T. at 28. Security Officer B informed Police

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<sup>1</sup> The Associate Member was not present for part of the hearing held in this matter on June 10, 2013. Pursuant to the Administrative Procedures Act, Montgomery County Code Section 2A-10(c), the Associate Member has certified in writing that the Associate Member has read the transcript for the portion of the hearing missed and reviewed the record of evidence in this matter. Therefore, the Associate Member was able to participate in the vote on this matter. The Associate Member's Certification has been made part of the official record in this matter.

<sup>2</sup> The third shift runs from 3:00 p.m. until 11:00 p.m. H.T. at 37.

Officer C about working as a security officer for the County and asked if Police Officer C needed assistance. *Id.* Police Officer C requested that Security Officer B hold on to the legs of the individual with whom Police Officer C was struggling. *Id.* Soon thereafter, three or four other Police Officers arrived at the scene. *Id.* at 29. Police Officer C, who continued to struggle with the driver of the vehicle then asked for a Taser but no one at the scene had one. *Id.* Police Officer C then asked for pepper spray which Security Officer B provided. *Id.* Once the pepper spray was deployed, the driver<sup>3</sup> became cooperative and the police were able to bring the driver under control and arrest the driver. *Id.* at 28, 34-35.

Security Officer B contacted Security Officer B's supervisor to inform the supervisor that Security Officer B had been involved with this incident with the police. H.T. at 30. The supervisor asked Security Officer B to draft an incident report which the Security Officer B did upon arriving back at the security office at the Executive Office Building. *Id.*

The next morning, while Security Officer B was at home, Security Officer B received a phone call from Appellant around 10:30 a.m. H.T. at 32. Appellant was upset and told Security Officer B that what Security Officer B had done the night before – assisting Police Officer C – was wrong and beyond Security Officer B's authority. *Id.* Appellant insisted to Security Officer B that Security Officer B had operated out of bounds, was going to get sued and should be concerned about Security Officer B's job. *Id.*

Security Officer B became very concerned, as Appellant was a Corporal and had been with the County for a long time. H.T. at 33. Therefore, if Appellant was telling Security Officer B that Security Officer B had done something wrong, then it carried a lot of weight with Security Officer B. *Id.* Because Security Officer B was upset by the conversation with Appellant, Security Officer B called the Sergeant, to report Security Officer B's conversation with Appellant. *Id.* at 33-34. The Sergeant instructed Security Officer B to draft an incident report regarding the phone call from Appellant. *Id.* Subsequently, over the course of a week, Security Officer B received between three to five additional phone calls from Appellant. *Id.* at 35, 64. Each time Appellant insisted to Security Officer B that Security Officer B had no authority to assist the police. *Id.* at 35. Accordingly, Security Officer B spoke with Security Officer B's supervisor, who assured Security Officer B that it was within Security Officer B's authority to assist the police. *Id.* at 37.

Appellant contacted the Director to express Appellant's displeasure with Security Officer B assisting Police Officer C. H.T. at 162. The Director informed Appellant that Security Officer B had a right to assist Police Officer C. *Id.* Eventually, the Director sent an email to everyone in the Division indicating that what Security Officer B had done to assist the police was appropriate. *Id.* at 35.

Subsequently, other officers began reporting to Security Officer B that they were receiving texts, voice messages or emails from Appellant telling them that what Security Officer B had done was wrong and Security Officer B didn't have any authority to assist the police.

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<sup>3</sup> The driver who was subsequently arrested was Appellant's nephew. H.T. at 34-35; County's Exhibit (C. Ex.) 7 at 2.

H.T. at 40. Security Officer B testified that these co-workers were distraught over this and were sharing the information with Security Officer B because they thought it was important that Security Officer B be aware of what was being said about Security Officer B. *Id.*

In October 2011, the Chief of Police issued Security Officer B a memorandum of recognition for Security Officer B's assistance to Police Officer C. H.T. at 38-39. Security Officer B's supervisor sent an email to Security Services Division staff indicating that Security Officer B had received the memorandum. *Id.* at 41. Appellant then commenced another flurry of activity, texting or emailing officers that Security Officer B's involvement with the police was wrong and that Security Officer B shouldn't have received the memorandum of recognition from the Chief of Police. *Id.* at 46. Subsequently, a voice message was left on the Security Officer B's supervisor's telephone line from someone believed to be a relative of Appellant,<sup>4</sup> indicating that it was wrong for Security Officer B to receive the memorandum of recognition and words to the effect that Security Officer B should be careful where Security Officer B went. *Id.* at 47. Security Officer B was left with the impression that Security Officer B was being threatened with bodily harm because of what had happened. *Id.*

Accordingly, Security Officer B took steps to ensure Security Officer B's safety. *Id.* at 50. Security Officer B purchased a video recording system with numerous cameras to be able to have surveillance on Security Officer B's house. *Id.* Security Officer B also was issued a handgun permit by the State Police.<sup>5</sup> *Id.* When off-duty, Security Officer B now carries a handgun. *Id.* These actions were all taken by Security Officer B because of Security Officer B's fear of Appellant.<sup>6</sup> *Id.*

At some point around the time Security Officer B received the memorandum of recognition, another officer, Security Officer D, purportedly received a text message from Appellant indicating that if Security Officer B ever needed backup at a post, Security Officer B better hope the person who was responding to back Security Officer B up wasn't Appellant as Appellant would not offer Security Officer B any assistance. H.T. at 40, 55, 66. Security Officer D allegedly informed Security Officer B about the text message. *Id.* Based on this text message, Security Officer B testified that Security Officer B would feel very uncomfortable if Security Officer B needed Appellant to back Security Officer B up. *Id.* at 55.

Sometime in February 2012, several Sergeants brought Appellant's behavior to the attention of Lieutenant A, who is the shift supervisor for the day shift. H.T. at 105, 133.

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<sup>4</sup> Security Officer B testified that Security Officer B believed the person who left the message was Appellant's sister because Security Officer B was told this. H.T. at 47.

<sup>5</sup> According to Security Officer B, when Security Officer B applied for the permit Security Officer B indicated that Security Officer B wanted it because of threats from Security Officer B's co-worker. H.T. at 86.

<sup>6</sup> Security Officer B testified Security Officer B was fearful about even testifying at Appellant's hearing. H.T. at 57. Security Officer B also testified that Security Officer B considered getting a restraining order against Appellant. *Id.* at 96-98.

Specifically, the Sergeant from the day shift and the Sergeant from the evening shift approached Lieutenant A concerning workplace harassment towards Security Officer B by Appellant. *Id.* at 107-08. Lieutenant A notified the Director about the problem. *Id.* at 109-10. After conferring with the Director, Lieutenant A prepared a MCP 30, Supervisor's Documentation Form, to document Appellant's conduct towards Security Officer B.<sup>7</sup> *Id.* at 110; C. Ex. 1. On February 22, 2012, Lieutenant A met with Appellant to give Appellant the MCP 30. H.T. at 113-14. Lieutenant A informed Appellant that Appellant was acting very unprofessionally and indicated how disappointed Lieutenant A was in Appellant. *Id.* at 116. According to Lieutenant A, Appellant was very upset at Police Officer C who had arrested Appellant's nephew and stated that the arrest was not legal. *Id.* at 115-16.

Subsequently, a determination was made to have Internal Affairs look into Appellant's conduct towards Security Officer B. H.T. at 52, 135, 170. Internal Affairs conducted an investigation and issued a report.<sup>8</sup> *Id.* at 198-99. Then, the Director made a recommendation for discipline to the Chief of Police. *Id.*

Appellant was issued a Statement of Charges (SOC) for a Demotion and 160-Hour Suspension by the Chief of Police, dated August 7, 2012. C. Ex. 4. The SOC indicated discipline was being proposed based on two charges: 1) Unsatisfactory Performance – Rule 16(b); and 2) Conduct Unbecoming – Rule 14. *Id.* The SOC indicated that the penalty for the violation of Rule 16(b) was Appellant's demotion with a 5% salary reduction. *Id.* at 2. The SOC indicated that the violation of Rule 14 warranted a one hundred and sixty hour suspension. *Id.*

On December 3, 2012, the Chief of Police issued Appellant a Notice of Disciplinary Action – Demotion and Suspension (NODA). The NODA indicated Appellant was being demoted from a Security Officer II to a Security Officer I with a 5% salary reduction and 160-hour suspension. *Id.*

This appeal followed.

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<sup>7</sup> The MCP stated: "During the past several days numerous complaints have been received by supervisors and security officers of 'work place harassment' which was perpetrated by you (Appellant). The harassment is the result of a co-worker receiving a Letter of Commendation from the Chief of Police, Montgomery County, Maryland for the assistance rendered by the co-worker to a Montgomery County Police Officer while the Police Officer was placing an individual under arrest. The harassment has reached the point of you making the accusation that the Montgomery County Police Officer involved is a 'dirty Police Officer' and your co-worker is covering up for the Police Officer. Several co-workers have reported to their supervisor that you are continually engaging them in conversations which are accusatory toward the same co-worker. Your accusations toward the Police Officer and the co-worker involved have also reached the point that several feel you are initiating threats against the co-worker and have become seriously concerned for the co-worker's welfare." C. Ex. 1.

<sup>8</sup> The Board would note that the County failed to submit the Internal Affairs Report as part of its Prehearing Submission. *See* H.T. at 204-05.

## POSITIONS OF THE PARTIES

### County:

- Appellant displayed threatening and harassing behavior toward Security Officer B. This constitutes conduct unbecoming.
- Appellant created a hostile work environment in Security Services Division by encouraging Appellant's colleagues to side with Appellant against Security Officer B.
- Several Security Officers have indicated they will resign if Appellant is not disciplined.
- Security Officers are held to a higher standard and are expected to conduct themselves in accordance with police department directives.
- Appellant stated Appellant would not be willing to perform an assigned task – i.e., coming to the aid of Security Officer B. This constitutes unsatisfactory performance.
- A MCP 30 is a nondisciplinary corrective counseling. Nothing in the union contract precludes the Department from formally investigating events documented in a MCP 30 and then issuing disciplinary action based on the results of the investigation.
- Appellant's testimony is simply not credible.
- Due to the gravity of Appellant's behavior, the punishment of 160 hours of suspension and a demotion to Security Officer I is warranted.

### Appellant:

- The County failed to meet its burden of proving by a preponderance of evidence the two charges brought against Appellant.
- The County did not introduce any credible evidence to establish that Appellant failed to demonstrate an ability or willingness to perform assigned tasks.
- In support of its charge of unsatisfactory performance, the County claimed that Security Officer B saw a text message stating that Appellant would not back Security Officer B up as needed. However, the County never produced the text message or the employee who allegedly received the text message to establish that it was Appellant who sent the text.
- The record of evidence establishes that Appellant was an excellent officer.
- Having received a MCP 30, Appellant should not have been disciplined for the same behavior documented in the MCP 30.

## APPLICABLE REGULATIONS

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, *Disciplinary Actions***, which states in applicable part:

...

**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 an established policy or procedure;

...

(e) fails to perform duties in a competent or acceptable manner; . . .

**Montgomery County Department of Police, Department Rules, dated 12/26/01,**  
which states in applicable part:

...

Rule 14 – Conduct Unbecoming

No employee will commit any act which constitutes conduct unbecoming an employee of the department. Conduct unbecoming includes, but is not limited to, any criminal, dishonest or improper conduct.

...

Rule 16 – Neglect of Duty/Unsatisfactory Performance

B. Unsatisfactory Performance

Employees will demonstrate an ability or willingness to perform assigned tasks, take appropriate action in a situation deserving police attention, and conform to work standards established for the employee's rank, grade, or position.

ISSUES

1. Has the County proven its charges by a preponderance of the evidence?
2. Was harmful procedural error committed by the Chief of Police when the Chief of Police issued to Appellant the SOC after Appellant received a MCP 30?
3. Based on the charge(s) sustained, is the penalty of a demotion and a 160-hour suspension excessive?

ANALYSIS AND CONCLUSIONS

**The County Failed To Prove The First Charge By A Preponderance Of The Evidence.**

Charge 1 against Appellant is Unsatisfactory Performance. C. Ex. 4. The charge is based on Appellant's alleged text message indicating that Appellant would not come to the assistance of Security Officer B. H.T. at 213-15, 217-18. Significantly, however, the County never produced a copy of the text. Appellant denied ever having sent such a text. *Id.* at 242.

Moreover, while Security Officer B credibly testified that Security Officer B saw the text message on Security Officer D's phone, Security Officer B also indicated that the only indication Security Officer B had that the text originated from Appellant was Security Officer D's word. H.T. at 68. Because the alleged text message was sent to Security Officer D's phone, Security Officer D was in the best position to verify from whom Security Officer D received the text message. However, the County did not call Security Officer D as a witness. The Director testified that the Director never saw anything that confirmed that Appellant in fact sent a text message indicating Appellant would not back up Security Officer B. H.T. at 196-97. Accordingly, based on the lack of evidence that such a text message was in fact sent by Appellant, the Board finds the County did not prove this charge.

### **The County Proved The Second Charge By A Preponderance Of The Evidence.**

Charge 2 against Appellant is Conduct Unbecoming. This charge is based on Appellant's harassing actions with regard to Security Officer B. H.T. at 215. There was ample evidence that Appellant did in fact target Security Officer B after Security Officer B came to the assistance of Police Officer C who arrested Appellant's nephew. The harassment began the day after Appellant's nephew was apprehended when Appellant called Security Officer B to chastise Security Officer B for helping the police and continued for months. H.T. at 32, 40, 46. Appellant even called the Director to express Appellant's displeasure with Security Officer B assisting a Police Officer. H.T. at 162. Appellant's behavior was so negative to the workplace morale that finally in February 2012 several Sergeants brought Appellant's behavior to the attention of Lieutenant A. H.T. at 105, 133. Several of the officers were so concerned about Appellant's behavior they told the Director that they would resign if Appellant was not disciplined. H.T. at 194. Appellant's negative behavior has led to tension in the workplace. H.T. at 187.

Accordingly, the Board finds that the County proved this charge by a preponderance of the evidence.<sup>9</sup>

### **No Harmful Error Occurred When Appellant Was Issued A Disciplinary Action After Receiving A MCP 30.**

Appellant argues that Appellant was disciplined when Appellant received the MCP 30 and should not receive any additional discipline as Appellant was told the MCP 30 was the end of the matter. H.T. at 248. Appellant responded to the SOC by claiming that when Appellant

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<sup>9</sup> The NODA contained references to two matters not contained in the SOC. One was a Last Chance Agreement, which expired in May 2011 (in paragraph 6). The other was Appellant's arrest on July 6, 2012 on criminal assault charges (in paragraph 7). During the hearing, the County's counsel indicated counsel was not prepared to present evidence to prove the July 6, 2012 arrest. H.T. at 179. In counsel's closing argument, counsel conceded that counsel had presented no evidence to support paragraphs 6 and 7 of the NODA. County's Closing Argument at 4. Accordingly, in reaching its decision in this matter, the Board has disregarded those two paragraphs of the NODA.

met with Appellant's supervisor and received the MCP Appellant was disciplined, consistent with Article 28 of the union contract. *See* C. Ex. 7 at 1.

As the County correctly points out, the MCP 30 on its face indicates that it is nondisciplinary in nature. H.T. at 111, 144, 168-69. The Board finds that based on the totality of the evidence there was no harmful error when the County proceeded to discipline Appellant based on the circumstances described in the MCP 30.

**Based On The Charge Sustained By The Board, An Eighty-Hour Suspension Is A Reasonable Penalty.**

The Board is particularly concerned about Appellant's creation of a hostile work environment. There is clear evidence that Appellant, through Appellant's conduct, has created what the Director described as tension in the workplace. H.T. at 187. The Board is also concerned that, as the Director testified, Appellant has failed to acknowledge that Appellant has done something wrong and accept responsibility for Appellant's actions. H.T. at 195.

The Board has also considered the testimony by Lieutenant A that Appellant was a very good Security Officer up until the arrest of Appellant's nephew. H.T. at 116, 146. Indeed, Lieutenant A testified that Appellant was very professional 99% of the time. H.T. at 116. Appellant also provided the Board with evidence of Appellant's past good work performance. *See* Appellant's Ex. 6, Exs. 7-17.

Having considered both aggravating and mitigating circumstances, the Board finds that the penalty of demotion is not warranted. The SOC tied the penalty of demotion to the first charge – unsatisfactory performance – which the County failed to prove. *See* C. Ex. 4, SOC at 2; *see also* H.T. at 215.

The SOC tied the penalty of a 160-hour suspension to the second charge – conduct unbecoming. *See* County's Ex. 4, SOC at 2; *see also* H.T. at 215. The Board found that the County did prove the second charge by a preponderance of the evidence. However, where, as here, the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty. *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); MSPB Case No. 13-04 (2013). The Board, in reaching its determination on what constitutes an appropriate penalty in this manner, considered the fact that the Director testified that the Director had never imposed a 160-hour suspension before as it is a penalty rarely given. H.T. at 221. Therefore, despite the seriousness of Appellant's negative behavior, the Board is of the opinion that based on the totality of circumstances, mitigation of the penalty to an eighty-hour suspension is warranted.<sup>10</sup>

The Board also urges the County to provide training to Appellant as it is evident Appellant did not exhibit professional conduct in the workplace. Rather, by Appellant's actions, Appellant has created tension in Appellant's workplace. Accordingly, some management

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<sup>10</sup> The Board would be remiss if it did not indicate to the County that it believes the County should have acted sooner than it did to correct Appellant's negative behavior.

training for Appellant, particularly focused on creating a positive workforce environment, is clearly warranted.

**ORDER**

Based on the above, the Board hereby orders the following:

1. The Board orders the Director to revoke the demotion of Appellant and the one hundred and sixty-hour suspension and, instead, issue an eighty-hour suspension based solely on Charge 2, dealing with Appellant's unbecoming conduct.

2. Appellant shall be made whole for lost wages and benefits.

3. Having mitigated the penalty,<sup>11</sup> the Department must pay reasonable attorney fees and costs. Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have 10 days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code Section 33-14(c)(9).

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<sup>11</sup> See, e.g., *Shelton v. OPM*, 42 M.S.P.R. 214, 224 (1989) (mitigation of penalty makes the appellant a prevailing party).

# **APPEALS PROCESS DENIAL OF EMPLOYMENT**

Montgomery County Code Section 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 Section 6-11 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), 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 the employee or applicant has ten (10) working days to file an appeal with the Board in writing after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position. The employee or applicant need only file a simple written statement of intent to file an appeal. Upon receipt of the notice of intent, the Board's staff will provide the employee or applicant with an Appeal Form which must be completed within 10 working days. Alternatively, the employee may complete the Appeal Form on-line. The Appeal Form is available at: <http://www2.montgomerycountymd.gov/MSPBAppealForm/>.

Upon receipt of the completed Appeal Form, the Board's staff notifies the County of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of 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 oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the denial of employment or promotion.

During fiscal year 2014, the Board issued the following decisions on appeals concerning the denial of employment.

# **EMPLOYMENT DECISIONS**

## **CASE NO. 13-11**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for the position of Program Manager I (Operations Equipment and Systems Manager)<sup>1</sup> in Transit Services, Department of Transportation (DOT). The County filed its response (County's Response) to the appeal, which included six attachments.<sup>2</sup> Appellant filed a reply (Appellant's Reply) to the County's Response, which included five attachments.<sup>3</sup> The appeal was considered and decided by the Board Chair, and Vice Chairperson. The Associate Member issued a separate dissenting opinion.

### **FINDINGS OF FACT**

Appellant is a Transit Information Systems Technician (Transit Technician), Grade 19. County's Response at 1. On March 31, 2013, Appellant submitted Appellant's application for the Program Manager I, Grade 23 position. *Id.* According to the County, eleven individuals

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<sup>1</sup> The incumbent of the Program Manager I position performs professional level work for the Division of Transit Services. County's Response, Attachment (Attach.) 1. The incumbent is charged with the command, control and accountability of transit electronic systems and revenue collection and transfer at three separate locations. *Id.* The incumbent manages, plans and supervises the day-to-day operations of the Division. *Id.*

<sup>2</sup> The County's attachments were: Attach. 1 – Job Vacancy Announcement for Program Manager I position; Attach. 2 – Affidavit of OHR Staffing Specialist; Attach. 3 – Email from OHR Director to Appellant, dated 04/22/13; Attach. 4 – Appellant's Resume; Attach. 5 – Class Specification for Transportation Systems Technician III, Grade 20; and Attach. 6 – OHR Equivalencies for Education and Experience.

<sup>3</sup> Appellant did not label Appellant's attachments. For ease of reference, the Board has done so. Appellant's attachments consist of: Attach. 1 – Email to Appellant, dated 04/15/13, informing Appellant that Appellant did not meet the screening criteria for the Program Manager I position; Attach. 2 – Email from Appellant to OHR, dated 04/19/13; Attach. 3 – Email from OHR to Appellant, dated 04/22/13; Attach. 4 – Appellant's application for the Program Manager I position; and Attach. 5 – Class Specification for Transit Information Systems Technician, Grade 19. With regard to this last attachment, Appellant asserts that the Class Specification for Transportation Systems Technician III, Grade 20, Attach. 5 to the County's Response, does not apply to Appellant. Appellant's Reply at 3. The Board agrees with this assertion, as Appellant's grade level is 19 not 20. *See* Appellant's Appeal.

applied for the position. *Id.* A member of the Recruitment and Selection team in OHR (hereinafter OHR Staffing Specialist), reviewed all of the applications to determine whether the candidates met the minimum qualifications listed in the vacancy announcement.<sup>4</sup> County's Response, Attach. 2. Based on OHR Staffing Specialist's review of Appellant's resume, OHR Staffing Specialist determined that Appellant lacked a bachelor's degree and did not have three years of professional experience.<sup>5</sup> *Id.* On April 15, 2013, Appellant received an email, informing Appellant of OHR's determination that Appellant did not meet the minimum qualifications for the Program Manager I position. Appellant's Reply at 1; Appellant's Reply, Attach. 1.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant has for the last twenty-seven years been responsible for performing the duties of this newly created position.
- Appellant's current position as a Transit Technician is considered technical by OHR and disqualifies Appellant for the Program Manager I position. This is unreasonable.
- OHR has made it virtually impossible with the "professional experience" barrier for County workers who have dedicated their lives to the County to be promoted and move up in the managerial ranks. This is unfair.<sup>6</sup>

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<sup>4</sup> The minimum qualifications for the position were graduation from an accredited college or university with a bachelor's degree. County's Response, Attach. 1. In addition, the position required three years of experience in the installation, maintenance or repair of electronics or electro-mechanical systems. *Id.* An equivalent combination of education and experience could be substituted. *Id.*

<sup>5</sup> The County originally submitted a document labeled "Affidavit of OHR Staffing Specialist", but the document did not meet the requirements of Maryland Rule 1-304. Specifically, under the rule, an affiant must make his/her statement before an officer authorized to administer an oath or affirmation and must affirm under penalties of perjury that the contents of his/her statement are true. Md. R. 1-304. The Board notes that in lieu of a notarized affidavit, it will accept as evidence a declaration under penalty of perjury as authorized by 28 U.S.C. § 1746. As the "Affidavit of OHR Staffing Specialist" was neither notarized nor made under penalty of perjury, the Board finds that the document does not constitute acceptable evidence in this matter. However, by motion dated 07/02/13, the County moved to substitute an affidavit from the OHR Staffing Specialist affirmed under penalty of perjury. The Board grants the County's motion and the affirmed affidavit is substituted for County Attach. 2.

<sup>6</sup> The Board notes that in its response the County indicated that OHR is aware that the perceived absence of promotional opportunities has created a morale issue among the Technicians in Transit Services. County's Response at 4 n.2. The County indicates it may do a

- There have been individuals in Appellant's division who have applied for jobs and been granted interviews and awarded jobs even though their job classes were not professional.<sup>7</sup>
- Appellant was interviewed for a Program Manager II position in 2006.<sup>8</sup> If Appellant met the qualifications then, Appellant should meet the qualifications for a Program Manager I position now.

County:

- Appellant's class specification indicates that Appellant's position is technical not professional. The determination to deem Appellant's position as technical was made by OHR Classification Specialists who apply universal classification standards in making the determination.
- Appellant does not have a bachelor's degree from an accredited college or university, which was one of the minimum qualifications for the position of Program Manager I.
- Appellant's resume did not demonstrate any work experience that could be deemed professional. The minimum qualification for the Program Manager I position was three years of professional experience.<sup>9</sup>
- Pursuant to OHR's guidance on what constitute an education or experience equivalency, only related professional level experience will be credited for professional positions.
- Appellant cannot meet Appellant's burden of proof under the Personnel Regulations and County Code to show that the County's decision on Appellant's application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- While Appellant alleges in Appellant's appeal that there were others who applied for jobs as managers and were granted interviews even though their job classes

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classification study that could result in the creation of new higher level positions for long-time Technicians such as Appellant. *Id.*

<sup>7</sup> The Board is charged with deciding the instant appeal based on the facts before it. While Appellant has alleged that others have been granted interviews and awarded jobs even though their positions were not professional, Appellant has provided no additional evidence to demonstrate that Appellant's allegations are true. Accordingly, this decision will not address any of these allegations further.

<sup>8</sup> Again, Appellant has provided only an allegation instead of any evidence to support this statement. Accordingly, the Board will not further address this allegation.

<sup>9</sup> The County alleges that the job vacancy announcement inadvertently omitted from the minimum qualifications listed the word "managing". County's Response at 3 n.1. According to the County, the position in question involves managing day-to-day operations and other employees. *Id.*

were not professional, assuming this occurred, it might have been based on the education of these individuals, the prior professional experience these individuals gained before their employment with the County, the unique requirements for the specific position, or a change in the class specifications for some positions over the years.

### **APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

. . .

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

### **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

The County asserts that the reason that Appellant was found not to meet the minimum qualifications for the position of Program Manager I is because of Appellant's lack of professional experience and lack of a bachelor's degree. County's Response, Attach. 2. The job announcement for the Program Manager I makes clear that the incumbent of the position performs professional level work. County's Response, Attach. 1. Moreover, as the Program Manager I position is clearly a management position, *see* County's Response, Attach. 1, the Board finds that it was appropriately deemed a professional position.

As the County explained, professional level work involves work that is directly related to the management or general business operations of the County. County's Response at 2; County's Response, Attach. 3; Appellant's Reply, Attach. 3. Professional experience is gained in jobs that require bachelor degrees or higher because the work requires advanced knowledge in a field of science or learning. *Id.* Moreover, OHR's guidance on equivalencies for education and experience clearly states that only related professional level experience will be credited for professional positions; non-professional level experience may not be substituted for the required professional level experience. County's Response, Attach. 6; *see also* County's Response, Attach. 2.

It is clear from Appellant's resume that the positions Appellant has held have been technical in nature. *See* County's Response, Attach. 4; Appellant's Reply, Attach. 4. Specifically, Appellant's resume reflects three jobs – Transit Information System Technician,<sup>10</sup> Liquor Control Technician<sup>11</sup> and Coordinator of Ground Maintenance for the May Company. *Id.* The first two positions, which were positions held by Appellant while a County employee, are clearly Technician positions. *Id.* As the County has indicated, OHR Classification Specialists, using universal classification standards, have determined that technician work is not professional work; rather it is non-professional. County's Response at 2; County's Response, Attach. 3; Appellant's Reply, Attach. 3. The third position listed on Appellant's resume involved Appellant's coordination of all ground maintenance. County's Response, Attach. 3; Appellant's Reply, Attach. 3. Based on the description of the work Appellant performed in this position, *id.*, it is clear that the work of this position also does not constitute professional work as it does not require advanced knowledge in a field of science or learning.

As the County has correctly noted, the burden of proof is on Appellant to demonstrate

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<sup>10</sup> The class specification for this position indicates that the incumbent performs skilled work in two roles: internal consultant and hands-on technician. Appellant's Reply, Attach. 5. In the internal consultant role, the employee provides technical and practical input for development of specifications for new/improved bus-based information and communications systems. *Id.* In the technician role, the employee tests, installs, maintains and repairs complex information/communication systems. *Id.*

<sup>11</sup> According to Appellant's resume, as a Liquor Control Technician, Appellant coordinated the order process of spirits to County vendors through inventory management. Appellant's Reply, Attach. 4; County's Response, Attach. 4.

that the County's action with regard to Appellant's application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed. Montgomery County Code Section 33-9(c). This Appellant has failed to do. There is nothing in the record that demonstrates that OHR acted wrongfully in finding Appellant did not meet the minimum qualifications for the position. OHR fairly applied neutral, job-related, screening criteria.<sup>12</sup>

**ORDER**

Based on the above analysis, the Board denies Appellant's appeal from Appellant's nonselection for the position of Program Manager I in the Department of Transportation.

**DISSENTING OPINION OF BOARD MEMBER**

For the reasons given below, I do not agree with my colleagues that the County acted appropriately when it failed to qualify Appellant for the position of Program Manager I.

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<sup>12</sup> It is also clear to the Board from both the Appellant's and the County's submissions that there are many similarly situated employees with many years of technical experience who simply cannot make the leap from technical to professional positions. The Board is pleased that OHR recognizes this creates a morale problem and is attempting to address it. *See* County's Response at 4 n.2.

## BACKGROUND

Appellant was serving in the position of Transit Information Systems Technician (Transit Technician)<sup>1</sup>, Grade 19, in the Transit Services Division of the Department of Transportation, (DOT), when Appellant applied for the position of Program Manager I, Grade 23, in the same Division. Appellant's Reply, Attach. 4. The position of Program Manager I supervises Transit Information Systems Technicians. County's Response, Attach. 1. Appellant has served twenty-seven years as a Transit Information Systems Technician. Appellant's Reply, Attach. 4; County's Response, Attach. 4. Moreover, Appellant has supervised Transit Information Systems Technicians. *Id.*

Much to Appellant's surprise, Appellant was notified by OHR that Appellant did not meet the minimum qualifications for the position as Appellant lacked professional experience.<sup>2</sup> Appellant's Reply at 1. Appellant emailed the OHR Director, in an effort to understand why Appellant's highly skilled work as a Transit Information Systems Technician did not equate to professional level experience. *Id.*; County's Response, Attach. 3; Appellant's Reply, Attach. 3. Appellant was told that Appellant's twenty-seven years of experience as a Transit Information Systems Technician did not provide Appellant with the necessary professional experience. *Id.*

This appeal followed.

## ANALYSIS

In reviewing the description of the Program Manager I position, it is clearly evident that it requires quite a bit of technical experience, as opposed to the "professional experience" the County claims.<sup>3</sup> For example, all of the preferred criteria involve skills not necessarily requiring a bachelor's degree or higher. The first of the preferred criteria requires experience interpreting

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<sup>1</sup> As noted in the majority decision, the class specification for this position indicates that the incumbent performs skilled work in two roles: internal consultant and hands-on technician. Appellant's Reply, Attachment (Attach.) 5. In the internal consultant role, the employee provides technical and practical input for development of specifications for new/improved bus-based information and communications systems. *Id.* In the technician role, the employee tests, installs, maintains and repairs complex information/communication systems. *Id.* I would also note that according to Appellant's resume, Appellant managed, supervised and trained other Transit Information Technicians and Pace Trainees, reviewed employees' work performance and approved leave requests. Appellant's Reply, Attach. 4; County's Response, Attach. 4.

<sup>2</sup> The minimum qualifications for the position were graduation from an accredited college or university with a Bachelor's degree. County's Response, Attach. 1. In addition, the position required three years of experience in the installation, maintenance or repair of electronics or electro-mechanical systems. *Id.* An equivalent combination of education and experience could be substituted. *Id.*

<sup>3</sup> I, like Appellant, am particularly troubled with the fact that OHR could not point to a single regulation or standard that set forth what "professional experience" meant. Rather, the

and applying schematics, wiring diagrams, operating manuals, manufacturing maintenance instructions and troubleshooting. County's Response, Attach. 1. Clearly, Appellant had this experience. *See* County's Response, Attach. 4 at 1; Appellant's Reply, Attach. 4 at 1, 3. This requirement was obviously technical, not professional, in nature.

The second of the preferred criteria, experience managing employees, County's Response, Attach. 1, Appellant also met. Appellant has managed other Transit Information System Technicians and Pace Trainees, training them, reviewing their work for technical accuracy, and approving their leave. County's Response, Attach. 4; Appellant's Reply, Attach. 4 at 1. Appellant also managed and supervised the day-to-day activities of two employees while a Liquor Control Technician. *Id.* Finally, at Appellant's private sector position with May Company, Appellant managed and supervised the day-to-day activities and payroll for two employees. *Id.* Clearly, it does not matter whether one would "classify" Appellant's positions as technical or professional, Appellant met this requirement.

The third of the preferred criteria, i.e., experience independently solving technical problems concerning electronic systems and equipment, County's Response, Attach. 1, clearly indicates technical, not professional skills are required. Appellant obviously met this requirement, based on the class specification for Appellant's current position, Appellant's Reply, Attach. 5 at 1-2, and Appellant's resume. County's Response, Attach. 4 at 1.

The fourth of the preferred criteria, experience with server administration and network equipment, County's Response, Attach. 1, also clearly does not require professional experience. Rather, it requires the very specialized technical experience Appellant has. Appellant's Reply, Attach. 4 at 2.

The fifth of the preferred criteria, experience providing oral communication such as presentation, briefings, etc., and written communication such as reports, proposals, etc., County's Response, Attach. 1, does not require a Bachelor's degree. As Appellant's application amply demonstrates, Appellant can readily meet this requirement. Appellant's Reply, Attach. 4 at 2.

Having found Appellant easily met the preferred criteria, I must return to Appellant's main argument – that the Professional Experience and Education criteria – were simply not fair. I agree. There is nothing in the job duties for the Program Manager I position that demonstrates the need for a bachelor's degree.<sup>4</sup> Having reviewed the record in this case, I agree with Appellant that the requirement for "professional experience" is simply a barrier erected to screen out well qualified Transit Information Systems Technicians, such as Appellant,

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Board, like Appellant, has been called upon to accept OHR's nebulous definition, without any support for it.

<sup>4</sup> I would note, however, that Appellant has quite a bit of education – 45 credit hours at TESST College of Technology, 14 credit hours at Montgomery College, and credit hours at Ben Franklin University. County's Response, Attach. 4 at 3.

One must question why the first-line supervisor of a Transit Information Systems Technician needs a college degree when what the supervisor really needs is technical smarts. Significantly, as the County has acknowledged, there is a huge morale problem because of this totally unsubstantiated requirement for “professional experience”.

Based on the foregoing analysis, I find the County has simply not been able to demonstrate that its decision on Appellant’s application was not arbitrary or capricious. Accordingly, I would vote to overturn the County’s decision that Appellant’s resume did not demonstrate the minimum qualifications for this position. As I have also found that Appellant amply met the preferred criteria for this position, I would order the County to grant Appellant an interview.

## **CASE NO. 13-14**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant’s appeal challenging Appellant’s nonselection for the temporary position of Acting Program Manager II, with the Aging and Disability Services, Community Support Services Unit (CSS Unit) in the Department of Health and Human Services (HHS). The County filed its response (County’s Response) to the appeal, which included several attachments.<sup>1</sup> Appellant was provided the opportunity to file a reply to the County’s Response but did not do so. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant, a Program Manager I, Grade 23 in HHS, made a verbal request to the Unit Administrator to be placed as a Grade 25 Acting Program Manager II. *See* Appellant’s Appeal, County’s Response at 1. At the time, Appellant had been on the Program Manager II eligible list since November 2012. Appellant’s Appeal.

At its discretion, HHS elected to fill the Program Manager II position by means of a noncompetitive temporary promotion. County’s Response at 1. In accordance with Section 27-2(c)(1)(A) of the Personnel Regulations, *Temporary Promotions*, the HHS Director had the discretion to select any employee who meets the minimum qualifications for the new position. *Id.* Thus, there was no Job Vacancy Announcement, no application process, no examination or rating of resumes, no scoring procedures that had to be followed, and no interviews. *Id.* The Office of Human Resources (OHR) approved the instant noncompetitive temporary promotion after performing purported due diligence and determining that the Selectee met the minimum qualifications for the position. *Id.* Based on the approval from OHR, the HHS’ Director noncompetitively temporarily promoted the Selectee to the position. *Id.*

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<sup>1</sup> The County’s attachments were: Attachment (Attach.) 1 – Memorandum on Guidance on Noncompetitive Temporary Promotions from the Board to Office of Human Resources Director dated March 18, 2009; and Attach. 2 – E-mail from OHR Staffing Specialist to OHR Staffing Team Manager, dated June 4, 2013.

Appellant found out about the promotion and this appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant was denied the opportunity to be a Program Manager II with the CSS unit.
- Appellant has been on the Program Manager II eligible list since November 2012 and has been employed with the County for close to 30 years.
- Appellant made a verbal request to CSS Unit Administrator to be placed as an Acting Program Manager II, but was told that it was a temporary position and did not offer job security.
- On June 3, 2013, Appellant was voluntarily transferred to another unit within DHHS.
- Following Appellant's transfer, the CSS Unit immediately appointed the Selectee to the Acting Program Manager II position without a selection process.
- The Selectee, a Program Manager I, is currently on probation and has been employed with the County for less than a year, but was appointed to an Acting Program Manager II position.
- Appellant was denied the same opportunity to become an Acting Program Manager II with job security rights.

#### **County:**

- The Board lacks jurisdiction over this appeal because Appellant does not have a right to file an appeal directly with the Board over a non-selection of a noncompetitive temporary promotion.
- A noncompetitive temporary promotion is the prerogative of management and not a right or entitlement of an employee.
- The Personnel Regulations provide that an employee may not file a grievance or appeal over the denial of a noncompetitive promotion. Further, the Personnel Regulations provide that a department manager may approve a noncompetitive promotion of an employee for up to 12 consecutive calendar months. Approval by the Board, however, is required for a temporary promotion longer than 12 months.
- A department director may fill a vacant position by means of a temporary promotion and may elect to do so either competitively or noncompetitively. Per the Board's March 18, 2009 Memorandum, if this done competitively the temporary promotion may exceed 12 consecutive months without the need for Board approval.
- In the instant case, however, the Department Director elected to fill the Program Manager II position by means of a noncompetitively temporary promotion. Since it is noncompetitive, the Department Director has the discretion to select any employee who meets the minimum qualifications for the new position.
- Since this position was a noncompetitive temporary promotion, there are no

- scoring procedures that need to be followed, and no interviews that need to be conducted. There is no full and open competition.
- It is clear that the Personnel Regulations pertaining to all appeals provide for a direct appeal by applicants to the Board when there has been a competitive process for filling a merit system position.
  - In addition, the Personnel Regulations contain no prohibition on appointing an employee who is serving a probationary period and has not yet attained merit status to a noncompetitive temporary promotion.
  - Moreover, OHR approved the instant noncompetitive temporary promotion after performing due diligence and determining that the Selectee, a Program Manager I with over 20 years of work experience providing case management and administration in programs focused on providing services for the developmentally disabled population, met the minimum qualifications for the position.
  - The Board should deny Appellant’s appeal.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 27-1, Policy on promotion**, which states in applicable part:

...

- (d) A department director must not give temporary promotion to an employee unless the employee:
  - (1) assumes all the duties and responsibilities of a higher-graded encumbered or vacant position; and
  - (2) meets the minimum qualifications for the vacant position.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 27-2(b)(2), Noncompetitive promotion**, which states in applicable part:

...

- (D) Noncompetitive promotion is the prerogative of management and not a right or entitlement of an employee. An employee may not file a grievance or appeal over the denial of a noncompetitive promotion.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 27-2(c),**  
*Temporary promotion*, which states in applicable part:

- (1) A department director:
  - (A) may approve a noncompetitive temporary promotion of an employee for up to 12 consecutive calendar month;
  - (B) must obtain the approval of the MSPB for a temporary promotion longer than 12 calendar months; . . .

### 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

The MCPR provides that a noncompetitive promotion is the prerogative of management and not a right or entitlement of an employee. MCPR, 2001, § 27-2(b)(2)(D). The department director may approve a noncompetitive temporary promotion of an employee for up to 12 consecutive calendar months. MCPR, 2001, § 27-2(c)(1). The department director must obtain the approval of the MSPB for a temporary promotion that last longer than 12 calendar months. MCPR, 2001, § 27-2(c)(2). The department director must not give a temporary promotion to an employee unless the employee meets the minimum qualification for the vacant position. MCPR, 2001, § 27-1(d)(2). Thus, management was free to select any employee, including Appellant, as long as the selectee met the minimum qualifications and the temporary promotion did not last longer than 12 calendar months.

Appellant alleges that the process for the appointment of the Acting Program Manager II position was not properly conducted. To support Appellant's position, Appellant notes that HHS failed to conduct a proper selection process and utilize the Program Manager II eligible list of qualified applicants.

The Board has carefully reviewed the MCPR. In the instant case, HHS elected to fill the Acting Program Manager II position by means of a noncompetitive temporary promotion. Since it is a noncompetitive temporary promotion, the Department Director has the discretion to select any employee who meets the minimum qualifications for the new position. In a noncompetitive temporary promotion, there is no Job Vacancy Announcement, no application process, no

examinations or rating of resumes, no scoring procedures that need to be followed, and no interviews that need to be conducted. There is no provision for a full and open competition. The MCPR provides for a direct appeal by applicants to the Board only in cases where there has been a competitive process for filling merit system positions. The Board therefore concludes that there was no requirement that HHS had to conduct a formal selection process in order to select a candidate for the Acting Program Manager II position, and that the Board does not have jurisdiction to review this noncompetitive temporary promotion that does not exceed 12 months.

Appellant also challenges the qualifications of the Selectee for the Acting Program Manager II position. To support Appellant's position, Appellant notes that the Selectee is currently on probation and has been employed by the County for less than a year. The Board notes that the MCPR does not contain any prohibitions on appointing an employee who is serving a probationary period and has not yet attained merit status to a noncompetitive temporary promotion.

The MCPR does prevent department directors from giving a temporary promotion to an employee unless the employee meets the minimum qualifications for the vacant position. In the instant case, OHR approved the noncompetitive temporary promotion after performing due diligence and determining that the Selectee met the minimum qualifications for the position. County's Response at 1. It is clear from the evidence submitted by the County that the Selectee met the minimum qualifications for the position.

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

### **ORDER**

Based on the above, the Board denies Appellant's appeal of Appellant's nonselection for the position of Acting Program Manager II in HHS.

## **CASE NO. 14-02**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal from the determination of the Montgomery County Office of Human Resources' (OHR's) Director to rescind a conditional offer of employment made to the Appellant based upon Appellant not being able to obtain an Instructional Permit for a Class "B" Commercial Driver's License. The County filed its response to the appeal (County's Response), which included several attachments.<sup>1</sup> Appellant filed a response (Appellant's Reply).

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Withdrawal of Conditional Offer of Employment Letter from Office of Human Resource's Director dated June 28, 2013;

The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant applied for a position of Bus Operator with the Montgomery County Department of Transportation, Division of Transit Services (“DOT” or “Department”) on September 17, 2012. *See* Appeal. The job posting for the Bus Operator position (IRC9353) requires as a minimum qualification two years of experience as a motor vehicle operator with a Maryland State Class “C” driver’s license or having had a driver’s license for two years. *See* County’s Response, Attach. 2. An applicant must also have a valid current Class “C” motor vehicle operator’s license from the applicant’s state of residence at the time the employment application is submitted, and must possess either a Class “B” Commercial Driver’s License or an Instructional Permit for a Class “B” Commercial Driver’s License on the first day of County employment. *Id.*

OHR received seven hundred and forty-one applications for this position. County’s Response at 1. OHR reviewed the applications and Appellant was invited to the Video/Written Exam on October 10, 2012. *Id.* Appellant passed the Exam and was invited to a formal interview on November 15, 2012. *Id.* Appellant passed the formal interview. *Id.* On March 18, 2013, based upon the information received by the County, Appellant was issued a conditional offer of employment. *Id.* The job offer was contingent on a background investigation, a medical examination and Appellant obtaining an Instructional Permit for a Class “B” Commercial Driver’s License (“CDL Learner’s Permit”). *Id.*

On June 28, 2013, the OHR Director notified Appellant that the OHR Director was withdrawing Appellant’s conditional offer of employment as a Bus Operator because of Appellant’s inability to obtain a CDL Learner’s Permit.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant acknowledges that Appellant currently possesses a Provisional Driver’s License.
- Appellant acknowledges that Appellant only possessed a Provisional Driver’s License at the time of application for employment as a Bus Operator.
- The County was fully aware of Appellant’s license status at the time the conditional offer of employment was issued.

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Attach. 2 – Copy of Vacancy for Bus Operator Position; Attach. 3 – Copy of Appellant’s Bus Operator Application Assessment Responses; Attach. 4 – Affidavit of Administrative Specialist III in the Transit Services Division of DOT; Attach. 5 – Copy of April 2, 2013 Letter from Administrative Specialist III to Appellant; and Attach. 6 – Affidavit from OHR Staffing Specialist.

- Appellant explained that Appellant's license would not be a full license until September 1, 2013.
- Appellant was assured that Appellant did not have to worry and could take the training class in September, but would have to submit to another drug screening.
- Appellant did not lie on Appellant's application.
- The application asked if Appellant had two years of driving experience, not if Appellant had a license for two years.
- Appellant has two years of driving experience.
- Appellant has had Appellant's permit for a year and a half.
- Appellant has completed a driver's education program and obtained a provisional driver's license with no restrictions.
- Appellant would like to be given the chance to move forward with the hiring process based on promises made by the County.

County:

- Appellant has been unable to obtain a CDL Learner's Permit, which is required to operate a bus, because Appellant has a provisional rather than a regular Full Class "C" driver's license.
- The Maryland Motor Vehicle Administration will not issue a CDL Learner's Permit to any person with a provisional driver's license.
- The job posting for the Bus Operator position (IRC9353) requires as a minimum qualification two years of experience as a motor vehicle operator with a Maryland Class "C" driver's license or having had a driver's license for two years.
- When asked in the employment application whether Appellant had been driving for at least two years and whether Appellant had a valid driver's license, Appellant answered "Yes" to both questions.
- While the question regarding the license does not distinguish between a regular and a provisional driver's license, the Motor Vehicle Administration ("MVA") issues a provisional license for 18 months to all new license holders.
- If Appellant had in fact been driving for at least two years as Appellant indicated in Appellant's application, Appellant would have a regular rather than a provisional driver's license.
- Appellant was issued Appellant's first driver's license on March 12, 2012.
- Appellant license will remain provisional until September 13, 2013.
- Due to the provisional nature of the license, Appellant will not satisfy the minimum qualification for a Bus Operator of two years of experience as a motor vehicle operator with a Maryland Class "C" driver's license until March 12, 2014. Thus, Appellant could not obtain a CDL Learner's Permit with Appellant's provisional driver's license. In addition, Appellant did not meet the minimum qualification of two years of experience as a motor vehicle operator with a Maryland State Class "C" driver's license.
- Appellant was not promised a Bus Operator job despite the provisional license and was not told Appellant could attend the September training class.
- The conditional offer of employment was withdrawn because of Appellant's

- inability to obtain a CDL Learner's Permit, which is required to operate or to be trained to operate a bus.
- If Appellant's offer of employment was held in abeyance until September 2013, when Appellant's provisional license status is scheduled to end, it would reward Appellant for providing false information on Appellant's application, namely that Appellant had been driving for at least two years.
- The Board should deny Appellant's appeal.

**APPLICABLE LAWS AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board**, which states in applicable part,

...

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

**6.4. Reference and background investigation requirements; Review of applications.**

...

- (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:

- (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification;
- (2) the applicant submits inaccurate or false information in the application or associated forms;...

### ISSUE

Was the County justified in rescinding the conditional offer of employment made to Appellant?

### ANALYSIS AND CONCLUSIONS

It is undisputed that Appellant currently holds a provisional driver's license. While it may be true that Appellant's provisional license status will cease being provisional in September 2013, at the time the offer of employment was rescinded, Appellant's license was still provisional. As a Bus Operator, Appellant is required to have an Instructional Permit for a Class "B" Commercial Driver's License ("CDL Learner's Permit"). This Appellant cannot obtain with a provisional driver's license.

The County contends that it withdrew its conditional job offer because Appellant did not meet the minimum job qualifications. The Board finds this was proper.

However, the County further asserts that Appellant misrepresented Appellant's driving history and license in Appellant's application. The Board finds these assertions to be unfounded. Appellant applied for the Bus Operator using the County's online application form, which asked the following questions to which Appellant gave the following responses:

1. Are you at least 21 years old? Yes
2. Date of Birth: XX-XX-XX<sup>2</sup>
3. Have you been driving for at least two years? Yes
4. Do you have a current valid driver's license? Yes

Appellant's answers to the application questions were completely truthful. Appellant had been driving for over two years, and Appellant did have a current valid driver's license. Appellant had been driving for over two years on a Class "C" Learner's Permit and then an 18-month provisional driver's license. Appellant did not have two years of driving experience with a regular Full Class "C" License, but did have two years of driving experience.

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<sup>2</sup> Information was redacted to protect Appellant's confidential birth data.

The County's application asked the wrong questions. The application did not ask: "Have you been driving on a regular Full Class "C" License for two years?" Instead, the County assumed that anyone who answered Questions 3 and 4 with a "Yes" would have had a regular Full Class "C" license for two years and not a provisional license, because OHR never encountered this situation before. *See* OHR Staffing Specialist Affidavit ¶ 6. That assumption was unwarranted.<sup>3</sup>

Although the Board cannot give Appellant the position in this instance because Appellant is not qualified, should Appellant ever apply for another County position, Appellant must be given full and fair consideration. The Board urges the County to also consider modifying the application form so that questions are properly phrased to elicit the information needed.

Based on the record of evidence before the Board, the Board finds that Appellant did not meet the minimum motor vehicle licensing requirements to perform the duties of a Bus Operator. Accordingly, the Board finds that the OHR Director was justified in rescinding Appellant's conditional offer of employment.

### **ORDER**

Based on the above, the Board denies Appellant's appeal of OHR's rescission of Appellant's conditional offer of employment as a Bus Operator.

## **CASE NO. 14-03**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal<sup>1</sup> challenging Appellant's nonselection for the position of Information Technology Specialist III (Cable Engineer), with the Department of Technology Services ("DTS" or "the Department"). The County filed its response (County's Response) to the appeal, which included seven attachments.<sup>2</sup> Appellant filed an initial response and

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<sup>3</sup> To accuse Appellant of lying on Appellant's application when the County asked the wrong questions and made unwarranted assumptions shocks the conscience of the Board. *See Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4<sup>th</sup> Cir. 1991). The County should understand that this is unacceptable and should never occur again before this Board.

<sup>1</sup> The Board notes that Appellant may have misunderstood the nature of this appeal. Appellant appears to have requested the Board to conduct an "audit, investigation, and inquiry" under Montgomery County Code § 33-13A and MCPR, 2001, § 35-20. However, Appellant has filed an appeal under the Board's appeal procedures as set forth in Montgomery County Code § 33-14 and MCPR, 2001, § 35-2 *et seq.*

<sup>2</sup> The County's attachments were: Attachment (Attach.) 1 – Job Vacancy Announcement for the Information Technology Specialist III position (IRC8506); Attach. 2 – Job Vacancy Announcement for the Information Technology Specialist III position (IRC10248); Attach. 3 – Email from OHR dated January 14, 2013 to Appellant; Attach. 4 – Appellant's

supplemental response<sup>3</sup> (Appellant's Reply) on September 12, 2013. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant submitted Appellant's application for the Cable Engineer position, IRC8506, on June 23, 2012. County's Response at 1. The Office of Human Resources (OHR) rated three applicants, including Appellant, as "Well Qualified" for the position, and all three were interviewed by DTS. *Id.* Appellant was interviewed in person on October 16, 2012. *Id.*; Appellant's Appeal. For different reasons, none of the three applicants interviewed were deemed acceptable by DTS. County's Response at 1. DTS restructured some of the job duties and preferred criteria for the position to attract more applicants and the job was reposted as Cable Engineer, IRC10248. *Id.* On January 28, 2013, Appellant reapplied for the Cable Engineer position. *Id.* at 2. Six applicants, including Appellant, were rated "Well Qualified" and all six were interviewed. *Id.*

Appellant was verbally notified of Appellant's nonselection for the position and this appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant is the best qualified applicant for the Information Technology Specialist III position as Appellant has over 30 years of experience in highly responsible positions.
- Appellant's skill sets exceed the requirements posted in each of the job descriptions.
- Appellant believes that the interview was deceptive and unprofessional.

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Appeal; Attach. 5 – Appellant's Response Letter; Attach. 6 – Email from Manager to OHR dated October 16, 2013; and Attach. 7 – Affidavit of Manager.

<sup>3</sup> The County makes reference to the Board neglecting to forward Appellant's supplementary documentation. County's Response at 2 n.2. As the Board has previously informed the County, the Board is not responsible for forwarding copies of filings to the County or the Appellant. *See* Montgomery County Code Section 35-5, *Merit System Protection Board Appeals, Hearings and Investigations*, which states as follows:

- (a) Each party to an appeal must send to every other party a copy of every paper filed with the MSPB.
- (b) A party to an appeal must indicate on every paper filed with the MSPB that a copy was sent to the other party to the appeal.

The Board should be notified if a party has failed to adhere to this section.

- Appellant believes that questionable tactics were used and there was a lack of acceptable procedures, guidelines and principles.
- Appellant believes that the interview should have included Montgomery Government Television staff.
- Appellant believes that the entire process should be disqualified due to the hiring organization's failure to assert its needs and values.
- Appellant feels that the interview was contentious on a vital issue.
- Appellant believes that it is highly doubtful that the best interests of the hiring organization were a deciding factor, that the decision was fair and balanced, and that a meritocracy prevailed.
- Appellant was pleased and optimistic about both of Appellant's interviews.
- Appellant believes that additional guidelines are needed to ensure fair, balanced and equitable evaluation and selection in the County's recruitment process.
- Appellant was disappointed that Appellant's application was rejected.

County:

- Appellant failed to state which interview Appellant is complaining of – *i.e.*, the in-person interview on October 16, 2012 or the telephone interview on May 13, 2013.
- Appellant's complaint about the manner in which Appellant's October 16, 2012 interview was conducted is untimely.
- Appellant had 10 working days to bring an appeal to the Board and Appellant failed to submit Appellant's appeal within the statutorily prescribed timelines.
- Appellant clearly knew that Appellant was not selected for the initial position and should have filed an appeal upon notice or within 10 working days from the date Appellant admittedly knew of the Department's final decision.
- The interview processes for the two positions (IRC10248 and IRC8506) were totally separate and apart.
- The County conducted a fair interview process that did not violate the law or personnel regulations.
- All of the interviewees were given time to review a copy of the questions prior to their interview and all were asked the same questions.
- Appellant cannot meet Appellant's burden of proof under the Personnel Regulations to show that the County's decision on Appellant's application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,**

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, *Recruitment and Application Rating Procedures*, which states in applicable part:**

...

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, and March 9, 2010), Section 7, *Appointments, Probationary Period, and Promotional Probationary Period*, which states in applicable part:**

**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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35, *Merit System Protection Board Appeals, Hearings and Investigations*, which states in applicable part:**

...

**35-3. Appeal period.**

...

- (b) An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position.

...

**35-7. Dismissal of an appeal.**

- (a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.

**ISSUES**

1. Is Appellant’s appeal concerning Appellant’s nonselection for the Information Technology Specialist III, IRC8506, position timely?

2. 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**

It is unclear which nonselection Appellant is contesting in Appellant’s appeal. Appellant raises two potential claims. As discussed in greater detail *infra*, the Board does not find that Appellant prevails on either claim.

The MCPR provides that a selecting official may choose any individual from the highest rating category. Thus, management was free to select anyone in the “Well Qualified” category, including Appellant, as long as the selection process is consistent with law or regulation and not otherwise improper. *See* MSPB Case No. 06-02 (2006); MSPB Case No. 09-01 (2009); MSPB Case No. 10-11 (2010).

**Appellant’s Appeal Of Appellant’s Nonselection For The Information Technology Specialist III, IRC8506, Is Untimely.**

Appellant appears to challenge Appellant’s failure to be selected for the Information Technology Specialist III, IRC8506, position and the manner in which Appellant’s October 16, 2012 interview was conducted. Appellant’s Reply. As the County correctly points out, Appellant had ten working days to file an appeal with the Board regarding Appellant’s failure to be selected or regarding any flawed procedures and unprofessional conduct during the interview process. Appellant knew as of January 14, 2013 that Appellant was not selected because Appellant was informed by the County that no selection was made, the job had been restructured, and a new vacancy announcement was posted for which Appellant was invited to reply. Appellant’s appeal was filed on June 15, 2013, over five months after Appellant knew of

Appellant's nonselection. Appellant's appeal concerning this nonselection is therefore untimely.

**Appellant Has Failed to Meet Appellant's Burden Of Proving Appellant's Nonselection For The Information Technology Specialist III, IRC10248, Was Arbitrary, Capricious Or Otherwise Improper.**

With regard to the second position, that of Information Technology Specialist III, IRC10248, Appellant has not shown wrongful action by the County. Appellant was interviewed by an appropriate panel, and received the second lowest score of the six applicants interviewed. The Board does not find any evidence in the record to substantiate Appellant's belief that the interview process was "dysfunctional" or "flawed," nor to substantiate Appellant's belief that Appellant was the best qualified candidate.

There is no doubt that Appellant has considerable experience and expertise, but so does the Selectee. Both individuals have college degrees and years of experience. The courts have consistently held that where there are equally desirable candidates, absent a prohibited reason, a trier of the fact should not substitute its judgment for the legitimate exercise of managerial discretion. *Bauer v. Bailar*, 647 F.2d 1037, 1048 (10th Cir. 1981). An employer has the discretion to choose among equally qualified candidates. *See Canham v. Oberlin College*, 666 F.2d 1057, 1061 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982).

In assessing a challenge to a selection decision as arbitrary and capricious, the Board will not substitute its judgment for that of the selecting official unless Appellant demonstrates that Appellant's qualifications were plainly superior to those of the Selectee. MSPB Case No. 06-02 (2006); MSPB Case No. 09-01; MSPB Case No. 10-11; *see also Bauer v. Bailar*, 647 F.2d at 1048. This Appellant has not done. Accordingly, having reviewed the record of evidence in this case, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

**ORDER**

Based on the above, the Board dismisses Appellant's appeal regarding Appellant's nonselection for the Information Technology Specialist III position, IRC8506, as untimely. The Board denies Appellant's appeal regarding Appellant's nonselection for the Information Technology Specialist III position, IRC10248, as Appellant failed to meet Appellant's burden of proving that the County's action was arbitrary, capricious or otherwise improper.

**CASE NO. 14-04**

**FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for the position of Transit Information Systems Technician in Transit Services, Department of Transportation

(DOT). The County filed its response (County's Response) to the appeal, which included six attachments.<sup>1</sup> Appellant filed a reply (Appellant's Reply) to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant, while serving as a Transit Coordinator, with the Department of Transportation, Division of Transit Services – Ride On (“DOT” or Department) applied for a PACE<sup>2</sup> assignment as a Transit Information Systems Technician in November 2010. County's Response, Attach. 4; Appellant's Appeal. Appellant was not selected for the PACE position.

In March 2013, Appellant applied for the merit position of Transit Information Systems Technician. *See* County's Response at 2. Based on the information provided in Appellant's resume, it was determined that Appellant did not meet the minimum qualifications listed in the Job Vacancy Announcement. *Id.* The minimum qualifications for the Transit Information Systems Technician were an Associate of Arts Degree in Electronics Technology with coursework in computer networking, database management and communication systems or a related field. *See* County's Response, Attach. 3. In addition, an applicant is also required to have three (3) years of journey-level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment and communication systems. *Id.* An equivalent combination of education and experience may be substituted for this position. *Id.*

In June 2013, OHR made some changes to the minimum qualifications to the Transit Information Systems Class. *See* County's Response, Attach. 4 at 2. The minimum qualifications for the Transit Information System Technician changed to an Associate of Arts Degree in Electronics or related field, as well as three (3) years of journey-level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment or communication systems. *Id.* In July 2013, the position was readvertised and Appellant reapplied. *See* County Response at 3. Based on the information provided in Appellant's resume, it was determined by OHR that Appellant did not meet the minimum qualifications listed in the updated Job Vacancy Announcement. *Id.* On July 29, 2013, Appellant received an email from OHR, informing Appellant that based on a review of Appellant's application, Appellant did not meet the minimum qualifications for the position.

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – description of the PACE program and the PACE contract that appear on the OHR website; Attach. 2 – Job Vacancy Announcement for the Transit Information Systems Technician position; Attach. 3 – Appellant's March 2013 Resume which was submitted for the Transit Information Systems Technician position; Attach. 4 – Affidavit of OHR Staffing Specialist; Attach. 5 – Job Vacancy Announcement for the July 2013 readvertised Transit Information Systems Technician position; and Attach. 6 – Appellant's July 2013 Resume which was submitted for the readvertised Transit Information Systems Technician position.

<sup>2</sup> PACE stands for Position and Career Education System. *See* PACE Contract on OHR's website available at <http://www.montgomerycountymd.gov/ohr/staffing/staffing.html>.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant applied for a PACE position as a Transit Technician in November 2010.
- Appellant interviewed for the PACE position and was designated as the top candidate by the interview committee.
- The Chief of Operations for Appellant's unit overrode the committee's decision because the Chief did not want to give the position to a Transit Coordinator since the Ride On Program was short of Transit Coordinators at that time. Appellant therefore was not selected for the PACE position.
- Appellant reapplied for the position in March 2013 but was denied an opportunity for an interview because Appellant did not meet the minimum qualification, even though Appellant had met the minimum qualifications in the past, been given an interview and selected as the top choice of the interview committee.
- The qualifications for the position have basically remained the same.
- It would be fair to allow Appellant to interview because Appellant qualified in the past and was denied the position for the good of the Ride On Program.
- Appellant should have had an opportunity to participate in the hiring process for the position regardless of whether this opportunity would have increased or decreased the shortage of Transit Coordinators back in 2010 and at the beginning of 2011.
- This is a form of "class discrimination."

#### **County:**

- Appellant is confusing applying for the PACE program with applying for a merit position.
- In November 2010, Appellant applied for a PACE position, that of Transit Information Systems Technician.
- Because a PACE assignment may either be instead of or in addition to the employee's regular job duties, a department may consider its operational needs in selecting or approving PACE assignments.
- Because PACE is a career development program and does not involve appointments to merit system positions, merit principles do not apply to the selection/approval process. The Board therefore lacks jurisdiction over the PACE program.
- In March 2013 and July 2013, Appellant applied for the merit position of Transit Information Systems Technician.
- Based on applications received from Appellant in both instances, Appellant did not meet the minimum qualifications for the position of Transit Information Systems Technician.
- That Appellant was interviewed and selected as the top candidate for the PACE

position is irrelevant since there are no minimum qualifications for a PACE assignment.

**APPLICABLE LAWS AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board**, which states in applicable part,

...

- (d) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 2, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2012, and December 11, 2012), Section 1, Definitions**, which states in applicable part,

...

- 1-39. Merit system position: A career position in the executive or legislative branch of the County government, the Office of the County Sheriff, or another position designated by County or State statute, except those excluded by Section 2-2 of these Regulations.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part,

...

**6.4. Reference and background investigation requirements; Review of applications.**

...

- (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:
  - (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification; . . . .

**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**

It is unclear which non-selection Appellant is contesting in Appellant’s appeal. Appellant raises at least three potential claims. As discussed in greater detail *infra*, the Board does not find that Appellant prevails on any of the claims.

**The Board Lacks Jurisdiction Over PACE Program Positions Because, Pursuant To Statute, PACE Positions Are Not Merit System Positions.**

The Board’s jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., 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 were 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 jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Montgomery County Code provides applicants for employment or promotion to a merit system position with the right to appeal a non-selection decision. Montgomery County Code § 33.9. Moreover, pursuant to Section 33.9 of the Code, applicants have the right to appeal directly to the Board.

The County defined a merit system position as a career position in the executive or legislative branch of the County government, the Office of the County Sheriff, or another position designated by County or State statute. MCPR, 2001, Section 1-39. Clearly, a position in a career development program is not a permanent career position in the merit system.

Accordingly, the Board concludes the PACE position lacks merit system status and Appellant therefore lacks appeal rights to the Board regarding any PACE decisions.<sup>3</sup>

**Appellant Failed To Meet The Minimum Qualifications For The March 2013 And July 2013 Transit Information Systems Technician Positions.**

The County has the right to establish the qualifications for a position and determining if an applicant is eligible for the announced vacancy. MCPR, 2001, § 6-4(b). In addition, the OHR Director may disqualify an applicant at any point in the hiring process if the applicant lacks required minimum qualifications such as education, experience, a license, or a certification. MCPR, 2001, § 6-4(b)(1). In the instant case, Appellant did not provide sufficient information in Appellant's March 2013 or July 2013 applications about Appellant's education and experience to demonstrate that Appellant met the minimum qualifications for the Transit Information Systems Technician positions.

The March 2013 Transit Information Systems Technician position required the applicant to have an Associate of Arts Degree in Electronics Technology with coursework in computer networking, database management and communications systems or a related field. Appellant's resume indicates Appellant has 50 college credits toward an associate degree from Montgomery College. County's Response, Attach. 3. Appellant failed to provide sufficient information that could be credited for educational equivalency or to satisfy the experience requirement of three years of journey-level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue equipment and communication systems. Simply submitting a resume and stating that one has 50 credits towards an associate degree does not establish education equivalency and coursework experience.

In June 2013, OHR made some changes to the minimum qualifications to the Transit Information Systems Class. The new minimum qualification required the applicant to have an Associate of Arts Degree in Electronics Technology or a related field and three (3) years of experience of journey-level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment or communication systems. County's Response, Attach 3. The position was readvertised in July 2013. Appellant reapplied for the position and added qualifications to Appellant's resume, but failed to provide the specifics of Appellant's experience. *Id.* at 2. Due to insufficient information and for the same reasons that Appellant's March 2013 application was rejected, OHR determined that Appellant did not meet the minimum qualifications for this position. *Id.*

It is apparent from a review of Appellant's resumes submitted in response to the March

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<sup>3</sup> The Board further notes that, even assuming the Board had jurisdiction over Appellant's nonselection for the PACE position, the appeal would still be denied as untimely. MCPR, 2001, § 35-3(a)(5) gives an applicant 10 working days to file an appeal after the applicant knows or should have known the applicant was not selected for position. Appellant was not selected for the PACE position in November 2010. This appeal was filed on July 30, 2013, over two years after the PACE position nonselection, and is therefore untimely as to that particular nonselection.

2013 and June 2013 job announcements that Appellant did not meet the experience requirements. As the Board has previously held, applicants are responsible for assuring that their applications are complete. *See* MSPB Case No. 12-02; MSPB Case No. 10-13. OHR was only required to assess the applications Appellant submitted for the permanent Transit Information Systems Technician position. Both applications, as discussed above, were deficient. Therefore, the process OHR used to screen Appellant out was fair.

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

### **ORDER**

Based on the above, the Board denies Appellant's appeal from Appellant's nonselection for the position of Transit Information Systems Technician.

## **CASE NO. 14-09**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging regarding Appellant's nonselection for a Public Safety Communication Specialist I (PSCS I) position with the Montgomery County Police Department (MCPD or Department) based on the County's failure to reschedule a written examination to accommodate Appellant's schedule. The County filed its response (County's Response) to the appeal, which included four attachments.<sup>1</sup> Appellant submitted a reply to the County's Response, but because the reply was not properly filed with the Board and not properly served on the County, the Board is precluded from considering it. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

On August 6, 2013, Appellant applied for the position of PSCS I, IRC11935, with MCPD. *See* County's Response at 1. This position was open for applications from August 5, 2013 to August 19, 2013. *Id.* A total of two hundred and forty-one (241) individuals applied for the position. *Id.* at 2. The vacancy announcement stated that "Applicants will be notified of a test date, time and venue via email prior to test date." *Id.* On August 21, 2013, Appellant (along with all eligible applicants) was informed by the Department by email that the written test for PSCS positions would take place on August 28, 2013. *Id.* Ninety-seven (97) applicants reported for the written test. *Id.* The day after the test, Appellant contacted the Department and requested that Appellant be rescheduled to take the test. *Id.*; Appellant's Appeal at 1. A Department

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Public Safety Communications Specialist I Vacancy Announcement; Attach. 2 – Delegation of Authority Memorandum; Attach. 3 – Affidavit of Administrative Specialist in the Personnel Division for MCPD; and Attach. 4 – Computer printout of positions for which Appellant recently applied.

representative assigned to handle the PSCS recruitment informed Appellant that the test could not be rescheduled. County's Response at 2; Appellant's Appeal at 1.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant applied for a PSCS position in MCPD.
- Appellant was informed via e-mail of a scheduled test for the PSCS I position.
- Appellant only received notice one week prior to the test date.
- The Department failed to confirm the exam date and time with Appellant prior to scheduling the exam.
- Appellant requested a reasonable accommodation from MCPD and the Office of Human Resources (OHR) to allow another testing date or a rescheduled time with more notice.
- The Department and OHR refused to accommodate Appellant's request regarding the rescheduling of the test date and advised Appellant to reapply for the position at a later date.
- It was unreasonable to schedule a written exam with only one week of notice to Appellant.
- Section 6-3(a) of the Montgomery County Personnel Regulations (MCPR) states in part that OHR may establish a reasonable deadline of not less than two (2) weeks for receipt of applications for announced vacancies.
- Based on Section 6-3(a) of MCPR being silent on establishing periods for notification of written examinations, the Board must infer a two-week notice period prior to the Department unilaterally scheduling an exam.
- The exam process was conducted in bad faith and the test results from August 28, 2013 should be invalidated.

#### **County:**

- Appellant was one of 241 applicants for the PSCS I position.
- 97 applicants reported for the written exam and were tested on August 28, 2013.
- No exams were rescheduled for any of the applicants.
- Because of the volume of applications and time constraints it is simply not possible to grant requests by individual applicants to reschedule examinations.
- The position closed on August 19, 2013 and the exam notice was communicated to all eligible applicants on the morning of August 21, 2013.
- Appellant was treated the same as the other applicants for the position.
- Appellant's reliance on Section 6-3 of MCPR is misplaced.
- The OHR Director has the discretion to shorten application periods when necessary.
- There is simply no basis for inferring that the same two-week period for receiving applications also applies to the scheduling of exams or interviews.

- The MCPR does not require any minimum notice period for the scheduling of exams or interviews.
- The one-week notice of the written exam that all applicants, including Appellant, received is reasonable.
- Appellant has failed to show that the Department's actions were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.
- The Department's notice of when the written exam was scheduled to be held was fair and reasonable and did not violate the law or the Personnel Regulations.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

**6-3. Employment application deadline.**

- (a) The OHR Director may establish a reasonable deadline of not less than two weeks for receipt of applications for announced vacancies. The OHR Director may shorten the two-week announcement period.
- (b) The OHR Director may designate certain positions for open continuous or open until filled recruitment.
- (c) The OHR Director must not accept an application submitted after an announced application deadline.

...

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.
- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.
  - (1) The competitive rating process may include:
    - (A) a written or oral examination;
    - (B) a demonstration of a job-related physical ability or skill;
    - (C) an evaluation of an applicant's training, experience, and education; or
    - (D) another professionally acceptable assessment technique that fairly evaluates an applicant's qualifications, fitness, and ability.
  - (2) The competitive rating process must:
    - (A) result from a job analysis that documents the knowledges, skills, and abilities required to perform essential functions of the job;
    - (B) assess the employee's ability to perform important aspects of the job;
    - (C) be administered in good faith and without discrimination; and
    - (D) be properly and accurately conducted.

### **ISSUE**

Was the County's nonselection of Appellant arbitrary and capricious, illegal, or based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors?

## ANALYSIS AND CONCLUSIONS

The County asserts that examinations are not rescheduled based on request by applicants. It notes that two hundred and forty-one applicants applied for the PSCS I position and ninety-seven applicants reported for the written examination. All candidates were treated the same as Appellant by receiving the same August 21, 2013 notification for the August 28, 2013 examination. County Response at 2. No exams were rescheduled for any of the applicants. *Id.* OHR notes that it received over fifty-two thousand job applications in FY2013. OHR states that due to the volume of applicants and time constraints it is simply not possible to grant requests by individual applicants to reschedule examinations.

MCPD clearly informed all PSCS I applicants that they would be notified of a test date, time and venue via email prior to test date. The job announcement for the PSCS I states under the heading of "NOTIFICATIONS":

Applicants will be notified of a test date, time and venue via email prior to test date. Please check your SPAM folders regularly. They will be notified via email or telephone for all other steps in the testing and selection phases.

*See* County Response, Attach. 1 at 4 (emphasis added). On August 21, 2013, Appellant (along with all eligible applicants) was informed by the Department by email that the written test for the PSCS I position would take place on August 28, 2013. County's Response at 1; Appellant's Appeal at 1.

While Appellant argues that Appellant is entitled to at least a two-week notification for scheduled examinations, there is nothing in the applicable Personnel Regulations that supports Appellant's claim. Although Appellant objects to the notification period, this was the same notification provided to all applicants. Therefore, Appellant was treated the same as all applicants

Accordingly, based on the totality of the evidence presented to the Board, the Board finds that the County's nonselection of Appellant was not arbitrary and capricious, illegal, or based on political affiliation, failure to follow announced examination and scoring procedures, or other non-merit factors.

## ORDER

Based on the foregoing, the Board hereby denies Appellant's appeal regarding Appellant's nonselection for the PSCS I position in MCPD.

## CASE NO. 14-12

### FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the September 2013 determination by the

Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for a Code Enforcement Inspector I (CEI) position with the Montgomery County Department of Environmental Protection (DEP or Department). The County filed its response (County's Response) to the appeal, which included five attachments.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

On August 6, 2013, Appellant applied for the position of CEI, IRC12060, with DEP. *See* County's Response at 1. A total of one hundred and twenty-eight applications for the position were reviewed by the OHR Staffing Specialist in OHR, with respect to satisfying the minimum qualifications listed in the Job Vacancy Announcement. *Id.* The OHR Staffing Specialist determined that ninety-one applicants, including Appellant, did not meet the minimum qualifications<sup>2</sup> for the position. *Id.* Appellant was notified on September 19, 2013 by OHR that Appellant did not meet the minimum qualifications for the CEI position. *Id.*

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant applied for a Code Enforcement Inspector I position.
- Appellant does meet the minimum qualifications for the position.
- Appellant's rater reviews on Appellant's applications for employment with the County are being unfairly suppressed.
- Appellant's applications are being rejected for arbitrary and capricious reasons.

#### **County:**

- Appellant's application did not meet the minimum qualifications for the Code Enforcement I position.
- Appellant cannot meet Appellant's burden of proof under the Personnel Regulations and County Code to show that the County's decision on Appellant's application was arbitrary

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Code Enforcement Inspector I Vacancy Announcement; Attach. 2 – Affidavit of OHR Staffing Specialist; Attach. 3 – Affidavit of Manager of the Business Operations, Classification and Compensation Team in OHR; Attach. 4 – Copy of Appellant's Resume; and Attach. 5 – Class Specification for Public Safety Communications Specialist I.

<sup>2</sup> The minimum qualifications for the position were two (2) years in code enforcement and/or law enforcement work, or in work directly related to solid waste or recycling field. County's Response, Attach. 1 at 3. In addition, the position required a High School Certificate of completion recognized in the State of Maryland. *Id.* An equivalent combination of education and experience could be substituted. *Id.*

and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001(as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.
- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.
  - (1) The competitive rating process may include:
    - (A) a written or oral examination;
    - (B) a demonstration of a job-related physical ability or skill;

- (C) an evaluation of an applicant's training, experience, and education; or
  - (D) another professionally acceptable assessment technique that fairly evaluates an applicant's qualifications, fitness, and ability.
- (2) The competitive rating process must:
- (A) result from a job analysis that documents the knowledge, skills, and abilities required to perform essential functions of the job;
  - (B) assess the employee's ability to perform important aspects of the job;
  - (C) be administered in good faith and without discrimination; and
  - (D) be properly and accurately conducted.

### **ISSUE**

Was the County's decision to deny Appellant employment 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**

As the County correctly notes, Appellant bears the burden of proving to the Board that the County's action with regard to Appellant's application was arbitrary and capricious. Montgomery County Code Section 33-9(c). Appellant failed to meet this burden.

It is clear from a review of Appellant's resume submitted for the CEI position that Appellant satisfied the minimum qualifications for education by having a high school diploma and valid driver's license, but did not meet the experience requirement. County's Response, Attach. 5. The position requires relevant code enforcement and/or law enforcement work. County Response, Attach. 1. Appellant previously worked as a 911 Operator. County's Response, Attach. 5. This experience does not constitute work in enforcing the law. Appellant has not shown that Appellant was in fact qualified for the CEI position.

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

## ORDER

Based on the above, the Board hereby denies Appellant's appeal from Appellant's denial of employment based on OHR's determination that Appellant did not meet the minimum qualifications for the position of Code Enforcement Inspector I, DEP.

## CASE NO. 14-15

### FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the October 18, 2013 determination by the County not to select Appellant for the position of Principal Administrative Assistant (PAA) with the Montgomery County Police Department (PD or Department). The County filed its response (County's Response) to the appeal, which included three attachments.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

### FINDINGS OF FACT

On June 23, 2013, Appellant applied for the position of PAA, IRC11083, with the PD. *See* County's Response at 1. A total of four hundred and eight applications for the position were reviewed by the Office of Human Resources' Staffing Specialist (OHR Staffing Specialist), with respect to satisfying the minimum qualifications listed in the Job Vacancy Announcement. *Id.* Three hundred and eighty of the applicants, including Appellant, met the minimum qualifications. *Id.* The applications were then rated by two subject matter experts chosen by the PD using the preferred criteria in the Job Vacancy Announcement. *Id.* Thirty-two applicants were rated "Well Qualified" for the position. *Id.* Appellant was only rated "Qualified", and not selected for the position. *Id.*

This appeal followed.

### POSITIONS OF THE PARTIES

#### Appellant:

- Appellant applied for a Principal Administrative Aide position.
- Appellant does meet the minimum qualifications for the position.
- Appellant's rater reviews on Appellant's applications for employment with the County are being unfairly suppressed.
- Appellant's applications are being rejected for arbitrary and capricious reasons.

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Principal Administrative Aide Vacancy Announcement; Attach. 2 – Copy of Appellant's Resume; and Attach. 3 – Affidavit of OHR Staffing Specialist.

County:

- When Appellant's application was reviewed using the preferred criteria listed in the Job Vacancy Announcement, Appellant was rated "Qualified" rather than "Well Qualified".
- Appellant was instructed in the Job Vacancy Announcement that Appellant's resume must include information specific to the preferred criteria listed.
- Although Appellant addressed the preferred criteria in Appellant's appeal, Appellant failed to address the preferred criteria in Appellant's resume/application.
- Appellant had the responsibility to read and follow the instructions of the on-line application system and ensure that all information and documentation is included in Appellant's submission.
- Appellant cannot meet Appellant's burden of proof under the Personnel Regulations and County Code to show that the County's decision on Appellant's application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.
  - (1) The competitive rating process may include:
    - (A) a written or oral examination;
    - (B) a demonstration of a job-related physical ability or skill;
    - (C) an evaluation of an applicant's training, experience, and education; or
    - (D) another professionally acceptable assessment technique that fairly evaluates an applicant's qualifications, fitness, and ability.
  - (2) The competitive rating process must:
    - (A) result from a job analysis that documents the knowledge, skills, and abilities required to perform essential functions of the job;
    - (B) assess the employee's ability to perform important aspects of the job;
    - (C) be administered in good faith and without discrimination; and
    - (D) be properly and accurately conducted.

### **ISSUE**

Was the County's decision to deny Appellant employment 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**

As the County correctly notes, Appellant bears the burden of proving to the Board that the County's action with regard to Appellant's application was arbitrary and capricious. Montgomery County Code Section 33-9(c). Appellant failed to meet this burden.

It is clear from a review of Appellant's resume submitted for the PAA position that Appellant meets the minimum qualifications for education by having an Associate's Degree in Business Studies, but did not meet the preferred criteria experience requirement. County's Response, Attach. 3. The preferred criteria for this position requires experience "working with animals". County's Response at 2. Appellant's application did not reflect any experience "working with animals" so Appellant was only rated "Qualified" instead of "Well Qualified", and was not selected for the position.

Appellant argues that Appellant worked with mules as part of the C&O Canal re-enactment of canal boat and lock operations; however, this information was not provided in Appellant's application for the PAA position. *See* Appellant's Appeal at 2.

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision to deny Appellant employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

### **ORDER**

Based on the above, the Board hereby denies Appellant's appeal from Appellant's nonselection for the position of Principal Administrative Aide.

## **CASE NO. 14-18**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) Director to rescind a conditional offer of employment made to Appellant based on the results of a pre-employment medical examination, which included a drug test. The County filed its response (County's Response) to the appeal, which included five attachments.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant applied for the position of Equipment Operator Apprentice (EOA) in the Department of Transportation (DOT or Department), Division of Highway Services and was

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Copy of Appellant's October 15, 2013 Contingent Job Offer; Attach. 2 – Copy of OHR's October 31, 2013 Letter to Appellant Withdrawing Contingent Job Offer; Attach. 3 – Copy of the October 29, 2013 Notification of Positive Drug/Alcohol Screen Memorandum; Attach. 4 – Copy of Occupational Medical Services' Medical Review Officer's Drug Screen Correspondence & Checklist signed by the Doctor; and Attach. 5 – Affidavit of the Doctor.

given a conditional offer of employment on October 15, 2013. *See* County's Response at 1. The offer of employment was contingent upon Appellant's successful completion of a medical examination. *Id.*

On October 18, 2013, a specimen was collected from Appellant for a drug screen and the result of the screen was positive for the presence of drugs. County's Response at 2. The Doctor, based on the Doctor's capacity as the Medical Review Officer (MRO), determined the results to be a verified positive test. *Id.*

On October 24, 2013, the same day that Occupational Medical Services (OMS) received the lab test result for Appellant, the Doctor contacted Appellant to discuss the test results. County's Response at 2. On October 31, 2013, the OHR Director, notified Appellant that Appellant had been found medically not acceptable to perform the duties of EOA. *Id.*

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant was given a conditional offer of employment for the Equipment Operator Apprentice position.
- Appellant does not use drugs.
- Appellant does not know how the test came back positive for drugs in Appellant's system.
- Appellant was not aware of Appellant's opportunity to receive a split specimen test until Appellant received the denial letter for the Equipment Operator Apprentice position.
- Appellant believes that Appellant should be provided with an opportunity to retest since Appellant did not have illegal substances in Appellant's body.

#### **County:**

- The County justifiably withdrew the conditional job offer to Appellant because of Appellant's positive drug test.
- The procedures followed by OMS were consistent with Section 32-3(a)(1) of the Personnel Regulations which provides in part, that an applicant for a Safety-Sensitive or Safety-Sensitive Transit position must not 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.
- The Equipment Operator Apprentice position that Appellant applied for is a safety-sensitive position under the Federal Motor Carrier Safety Administration Regulations as stated in Section 32-4 of the Personnel Regulations.
- Appellant was advised Appellant could make arrangements for a split specimen test within 72 hours of Appellant's conversation with the Doctor. Appellant did not take advantage of this opportunity to retest.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, December 11, 2007, October 21, 2008 and July 24, 2012), Section 8, Medical Examinations and Reasonable Accommodation**, which states in applicable part:

...

**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; action 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.

**ISSUE**

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

**ANALYSIS AND CONCLUSIONS**

In its response, the County cites to Section 32-3(a)(1) of the Personnel Regulations,

which provides that an applicant for Safety-Sensitive or Safety-Sensitive Transit position must not 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. Further the County points out that the Equipment Operator job that the Appellant applied for is a safety-sensitive position under the Federal Motor Carrier Safety Administration Regulations as stated in Section 32-4(b) of the Personnel Regulations.

It is undisputed that the record contains the results of the Appellant's October 18, 2013 drug screening which reflect a positive result for the presence of illegal drugs. Appellant's only reference to the positive test results is in Appellant's November 6, 2013 appeal, where Appellant contends that Appellant did not use any drugs and does not know how Appellant's test came back positive for marijuana. Appellant's Appeal. Appellant further claims that Appellant did not know Appellant could ask for a retest within 72 hours. *Id.* However, the County's documentation amply proves that Appellant tested positive and Appellant was informed of how to ask for a retest but Appellant failed to do so.

The Board finds the County was reasonable in its actions when it rescinded its conditional offer of employment to Appellant based on the positive drug screening results. Given the County guidelines set forth above, coupled with the fact that the position in question requires the safe operation of a motor vehicle, the County must be allowed to make employment decisions that are in the best interest of public safety. Based on the foregoing, the Appellant's appeal is denied.

### **ORDER**

Based on the foregoing, the Board hereby denies Appellant's appeal from OHR's determination to rescind Appellant's conditional offer of employment as an Equipment Operator Apprentice.

## **CASE NO. 14-34**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal from the determination of the Montgomery County Department of Fire and Rescue Service (FRS) not to select Appellant for the position of Firefighter/Rescuer I (Recruit), IRC10912, based on the results of a background investigation. The County filed its response (County's Response) to the appeal, which included five attachments.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Copy of Appellant's November 26, 2013 notification letter stating that Appellant's application was no longer being considered; Attach. 2 – Affidavit of Manager of Investigations, Department of Fire and Rescue Service, Office of Internal Affairs; Attach. 3 – Copy of the Montgomery County Fire and Rescue Service Accuracy Certification; Attach. 4 – Copy of Appellant's Drug Usage Information Sheet;

## FINDINGS OF FACT

Appellant applied for the position of Recruit with FRS. *See* County's Response at 1. As part of the screening process for candidates for the position of Recruit, Appellant was required to complete a background booklet questionnaire (Booklet) which asked, *inter alia*, about Appellant's drug experimentation and history. County's Response, Attach. 4. On June 6, 2013, Appellant completed the Booklet and certified that the information provided therein was true, complete and correct. County's Response at 2; Attach. 3. Appellant acknowledged in response to Appellant's Drug Usage Information Sheet that Appellant had used marijuana and hashish 10 to 15 times and the date of Appellant's last use was August 2008. *Id.* Appellant confirmed the use of prescription medication prescribed to another person. *Id.*

Appellant was also asked about Appellant's drug usage during an interview with an investigator from the FRS' Office of Internal Affairs. County's Response at 2. In response, Appellant indicated to the investigator and confirmed by initialing the bottom of pages 20 of Appellant's Drug Usage Information Sheet (Information Sheet) that Appellant had used marijuana and hashish 10 to 15 times and that the date of Appellant's last use was in August 2008. *Id.* Appellant also confirmed that Appellant had not used any other illegal drugs not specifically listed on information sheet. *Id.*

Appellant did not pass the background investigation performed by FRS' Office of Internal Affairs and was dropped from consideration for the Recruit position. County's Response at 2. This was primarily due to a polygraph interview that Appellant had for a firefighter position with the Loudoun County Fire and Rescue Department (Loudoun) on March 14, 2013. *Id.* at 3. During the polygraph interview, it appears that Appellant's use of marijuana exceeded the maximum acceptable usage of 20 times or 5 times since becoming 21 years old. *Id.*; County's Response, Attach. 2. In addition, during Appellant's March 14, 2013 polygraph examination with Loudoun, Appellant told the examiner that Appellant used marijuana 40 to 50 times and the date of the last use was in 2003 or 2004. *Id.* Appellant also admitted during the polygraph examination and contrary to Appellant's answer in the Booklet that Appellant had once smoked Methamphetamine (Meth) in 2004 and had tried Lysergic Acid Diethylamide (LSD) once in 2005. *Id.*

The employment selection standards for Montgomery County Fire and Rescue Service's Recruit positions are set by the Maryland Police Training Commission Standards for Police Officers. County's Response at 3; Attach. 5. Appellant's statement during a polygraph interview on March 14, 2013 that Appellant had used marijuana 40 to 50 times and that the last date of last use was 2003 or 2004, far exceed the maximum acceptable usage standards. *Id.* Also, the illegal use of a controlled dangerous substance is not experimentation if the applicant ever used LSD. *Id.*

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and Attach. 5 – Copy of the Maryland Police Training Commission Standards for Police Officers.

By letter dated November 26, 2013, FRS notified Appellant that Appellant's application for employment was no longer being considered as a result of not passing the background investigation. County's Response, Attach. 1.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant applied for the position of Firefighter/Rescuer I position.
- Appellant had not been provided a reason for being denied employment with the County.
- Appellant misrepresented himself/herself on one of the application questions.
- Appellant does not know if Appellant's misrepresentation on the application is the reason for the County denying Appellant's application.
- The County should provide Appellant specific details regarding the denial of Appellant's application.
- The County should allow Appellant an opportunity to clarify any challenges regarding Appellant's application questionnaire.
- After the Appellant has provided the clarification on Appellant's application questionnaire, Appellant should be reinstated in the hiring process.

#### **County:**

- An offer of employment to any applicant for the Firefight/Rescuer position is contingent upon an applicant passing a background investigation.
- Appellant acknowledged during Appellant's interview that Appellant did experiment with drugs.
- Appellant signed a certification verifying the accuracy of Appellant's answers to the background investigation questions.
- The County follows the employment selection standards established by the Maryland Police Training Commission.
- The County had the right to not select Appellant for the position based on inconsistent statements Appellant provided during the background investigation process and during Appellant's polygraph with the Loudoun County Fire and Rescue Department regarding Appellant's drug use.

### **APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,**

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Code of Maryland Regulations (COMAR), Title 12, Department of Public Safety and Correctional Services, Subtitle 04 Police Training Commission, Chapter 01 General Regulation, which provides in applicable part:**

...

**.16 Prior Substance Abuse by Applicants for Certification.**

...

C. Prohibitions – Initial Certification. An individual is ineligible for initial certification as a police officer in Maryland if the individual has:

...

(4) Ever illegally used a controlled dangerous substance, narcotic drug, or marijuana for any purpose within the 3 years before application for certification;...

D. Presumption of Experimentation. The illegal use of a controlled dangerous substance, narcotic drug, or marijuana is not experimentation if the applicant:

(1) Ever used:

...

(c) Lysergic acid diethylamide (LSD); or...

...

(3) Used marijuana:

(a) More than 20 times; or

(b) Five times since becoming 21 years old.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012,**

December 11, 2012, and June 25, 2013), Section 6, *Recruitment and Application Rating Procedures*, which states in applicable part,

...

**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.

**ISSUE**

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

**ANALYSIS AND CONCLUSIONS**

The County has the right to establish the qualifications for a position and conduct a background investigation before selecting an applicant for a position. MCPR, 2001, § 6-4(a)(1). In the instant case, the employment selection standards for Recruit positions are set by the State of Maryland, and the County follows these selection standards. COMAR 12.04.01(16).

Significantly, when the County learned through Appellant's own admission that Appellant had experimented with marijuana and hashish on multiple occasions, prior to disqualifying Appellant for selection, the County continued its investigation by reviewing Appellant's polygraph interviews with Loudon County Fire and Rescue Department. It is undisputed that the polygraphs contained information regarding Appellant's increased drug usage. Appellant's only response to the denial of employment is contained in Appellant's December 16, 2013 appeal, where Appellant admits to misrepresenting the information on one of Appellant's application questions. Appellant's Appeal. Appellant further claims that Appellant was not provided a reason for being denied employment. *Id.* However, the County's documentation amply proves that Appellant misrepresented Appellant's drug usage during the background investigation and was instructed in the County's November 26, 2013 letter, informing Appellant that Appellant's application for employment was no longer being considered as a result of the background check, that if Appellant had any questions Appellant could contact the number provided in the letter. Appellant failed to do so. Based on the standards used to evaluate Recruit positions, it was determined that Appellant's drug usage exceeded the maximum acceptable usage and that Appellant had used LSD. County Response, Attach. 2.

Accordingly, based on the record of evidence before it, the Board concludes that Appellant failed to meet Appellant's burden of showing that the County's decision was arbitrary,

capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

### **ORDER**

Based on the above, the Board denies Appellant's appeal from FRS' decision not to select Appellant for the position of Recruit.

## **CASE NO. 14-36**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal from the determination of the Montgomery County Department of Fire and Rescue Service (FRS) not to select Appellant for the position of Firefighter/Rescuer I (Recruit), IRC10912, based on the results of a background investigation. The County filed its response (County's Response) to the appeal, which included five attachments.<sup>1</sup> Appellant replied to the County's Response (Appellant's Reply) with five attachments.<sup>2</sup> The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant applied for the position of Recruit with FRS. *See* County's Response at 1. As part of the screening process for candidates for the position of Recruit, Appellant was required to complete a background booklet questionnaire (Booklet) which asked, *inter alia*, about Appellant's drug experimentation and history. County's Response, Attach. 4. On May 31, 2013, Appellant completed the Booklet and certified that the information provided therein was true, complete and correct. County's Response at 2; Attach. 3. Appellant acknowledged in response to Appellant's Drug Usage Information Sheet that Appellant had used marijuana and hashish 7 to 10 times and the date of Appellant's last use was August 2010. *Id.* Appellant denied the use of prescription medication prescribed to another person. *Id.*

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Copy of Appellant's December 31, 2013 notification letter stating that Appellant's application was no longer being considered; Attach. 2 – Affidavit of Manager of Investigations, Department of Fire and Rescue Service, Office of Internal Affairs; Attach. 3 – Copy of the Montgomery County Fire and Rescue Service Accuracy Certification; Attach. 4 – Copy of Appellant's Drug Usage Information Sheet; and Attach. 5 – Copy of the Maryland Police Training Commission Standards for Police Officers.

<sup>2</sup> The Appellant's attachments were: Attach. 1 – Copy of County's submission; Attach. 2 – Copy of Drug Usage Information Sheet; Attach. 3 – American Psychological Association's Finding on Polygraph Test; Attach. 4 – Appellant's Letters of Reference; and Attach. 5 – Copy of Appellant's Application along with supporting documentation.

Appellant was also asked about Appellant's drug usage during an interview with an investigator from the FRS' Office of Internal Affairs. County's Response at 2. In response, Appellant indicated to the investigator and confirmed by initialing the bottom of pages 20 and 24 of Appellant's Drug Usage Information Sheet that Appellant had used marijuana and hashish 7 to 10 times and that the date of Appellant's last use was in August 2010. *Id.* Appellant also confirmed that Appellant has never used prescription medication prescribed to another person. *Id.*

Appellant did not pass the background investigation performed by FRS' Office of Internal Affairs and was dropped from consideration for the Recruit position. County's Response at 2. This was primarily due to a polygraph interview that Appellant had for a firefighter position with the Loudoun County Fire and Rescue Department (Loudoun) on March 13, 2013. *Id.* During the polygraph interview, it appears that Appellant's use of marijuana exceeded the maximum acceptable usage of 20 times or 5 times since becoming 21 years old. *Id. at 2; Attach. 2.* In addition, during a March 20, 2013 follow-up polygraph examination, Appellant told the examiner that Appellant wanted to increase the number of times Appellant had used marijuana from 25 times to no more than 35 times. *Id.*; Appellant's Response at 1. During the March 13, 2013 polygraph interview, Appellant also admitted, contrary to Appellant's answer in the Booklet, that in 2010 Appellant had used Adderall 3 to 4 times that had been prescribed for a friend and not for Appellant. *Id.*; Appellant's Response at 2.

The employment selection standards for Montgomery County Fire and Rescue Service' Recruit positions are set by the Maryland Police Training Commission Standards for Police Officers. County's Response at 3; Attach. 5. Appellant's statement during a polygraph interview on March 20, 2013 that Appellant had used marijuana no more than 25 times, and which changed on March 20, 2013 to no more than 35 times, far exceed the maximum acceptable usage standards.

By letter dated December 31, 2014, FRS notified Appellant that Appellant's application for employment was no longer being considered as a result of not passing the background investigation. County's Response, Attach. 1.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant applied for the position of Firefighter/Rescuer I position.
- The County was wrong in making the decision to give Appellant a "did not pass" status on Appellant's background investigation.
- Appellant did not knowingly misrepresent any information in the background investigation booklet.
- Appellant did not knowingly exclude information from the background investigation booklet.

- Appellant filled out the background investigation booklet to the best of Appellant's ability and knowledge.
- Appellant missed putting down a piece of information that was honestly not remembered at the time Appellant completed the background investigation booklet.
- Appellant contacted the investigator several times to inquire about any additional information that was needed.
- The County never provided Appellant with an opportunity to explain the discrepancy found in the background investigation booklet.

County:

- An offer of employment to any applicant for the Firefight/Rescuer position is contingent upon an applicant passing a background investigation.
- Appellant acknowledged during Appellant's interview that Appellant did experiment with drugs.
- Appellant signed a certification verifying the accuracy of Appellant's answers to the background investigation questions.
- The County follows the employment selection standards established by the Maryland Police Training Commission.
- The County had the right to not select Appellant for the position based on inconsistent statements Appellant provided during the background investigation process and during Appellant's polygraph with the Loudoun County Fire and Rescue Department regarding Appellant's drug use.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Code of Maryland Regulations (COMAR), Title 12, Department of Public Safety and Correctional Services, Subtitle 04 Police Training Commission, Chapter 01 General Regulation**, which provides in applicable part:

...

**.16 Prior Substance Abuse by Applicants for Certification.**

...

C. Prohibitions- - Initial Certification. An individual is ineligible for initial certification as a police officer in Maryland if the individual has:

...

(4) Ever illegally used a controlled dangerous substance, narcotic drug, or marijuana for any purpose within the 3 years before application for certification;...

D. Presumption of Experimentation. The illegal use of a controlled dangerous substance, narcotic drug, or marijuana is not experimentation if the applicant:

...

(4) Used marijuana:

...

(c) More than 20 times; or

(d) Five times since becoming 21 years old.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part,

...

**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.

**ISSUE**

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

## **ANALYSIS AND CONCLUSIONS**

The County has the right to establish the qualifications for a position and conduct a background investigation before selecting an applicant for a position. MCPR, 2001, § 6-4(a)(1). In the instant case, the employment selection standards for Recruit positions are set by the State of Maryland, and the County follows these selection standards. COMAR 12.04.01(16).

Significantly, when the County learned through Appellant's own admission that Appellant had experimented with marijuana and hashish on multiple occasions, prior to disqualifying Appellant for selection, the County continued its investigation by reviewing Appellant's polygraph interviews with Loudon County Fire and Rescue Department. It is undisputed that the polygraphs contained information regarding Appellant's increased drug usage. Appellant's explanations regarding Appellant's increased drug usage and inconsistent statements are contained in Appellant's Appeal and Appellant's Reply, where Appellant contends that the polygraph examiner told Appellant to increase the number of drug usage stated and that Appellant missed putting down a piece of information that was honestly not remembered at the time. Appellant's Appeal and Appellant's Reply. Appellant further claims that Appellant did not get an opportunity to address these issues. *Id.* However, the County's documentation amply proves that Appellant misrepresented Appellant's drug usage during the background investigation and Appellant was provided an interview with the managing investigator to address the discrepancies found in the background check. Based on the standards used to evaluate Recruit positions, it was determined that Appellant's drug usage exceeded the maximum acceptable usage. County Response, Attach. 2.

Accordingly, based on the record of evidence before it, the Board concludes that Appellant failed to meet Appellant's burden of showing that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

## **ORDER**

Based on the above, the Board denies Appellant's appeal of Appellant's nonselection for the position of Recruit.

## **CASE NO. 14-37**

## **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal from the determination of Montgomery County, Office of Human Resources (OHR) Director, to deny Appellant employment based on Appellant not passing a basic proficiency French/English language examination. The County filed its response

(County's Response) to the appeal, which included four attachments.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant began working as a temporary Principal Administrative Aide (PAA) with the Department of Health and Human Services (HHS or Department) Refugee Health Program (RHP) as an employee of First Choice Temporary since January 2013. *See* County's Response at 2.

Appellant applied for the position of PAA in RHP at HHS on September 4, 2013. *See* Appeal. The job posting for the PAA position (IRC12126) requires proficiency in either French or Amharic. County's Response Attachment 3 at 2. "The successful candidate will be required to pass a basic proficiency French/English OR Amharic/English language examination assessing the following skills: oral communication, reading comprehension, and interpreting." (Examination) *Id.*

On November 7, 2013, Appellant received a conditional offer of employment from OHR. County's Response Attachment 1. The job offer was contingent on Appellant passing the Examination. *Id.* at 2.

Appellant completed the Examination on November 29, 2013, but did not pass. County's Response at 2. Appellant retook the translation from English to French part of the Examination on December 12, 2013, but again failed. *Id.*

On December 31, 2013, the OHR Director notified Appellant that OHR was withdrawing Appellant's conditional offer of employment as a PAA because Appellant did not receive a passing score on the examination. County's Response, Attach. 2.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant applied for the PAA position in HHS.
- Appellant has been performing this job for a year.
- Appellant has been using conversational French with HHS's clients without issue.
- Appellant meets the qualifications for the PAA position including having basic French skills.

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Conditional Offer of Employment Letter from OHR Staffing Specialist, dated November 7, 2013; Attach. 2 - Letter Rescinding Conditional Offer of Employment from OHR Director, dated December 31, 2013; Attach. 3 – Copy of Vacancy Announcement for Principal Administrative Aide; and Attach. 4 – Affidavit of OHR Staffing Specialist.

- Since Appellant has been working as the PAA with RHP, Appellant knows that the job does not require a person to translate documents from English to French.
- Appellant knows that the State of Maryland requires all documents that may require translation and or interpretation be forwarded directly to the State.
- Appellant should be reinstated in the PAA position.

County:

- Appellant has not passed the basic proficiency French/English language examination, which is required for the PAA position.
- The job posting for the PAA position (IRC12126) requires as a minimum qualification that an applicant pass the basic proficiency French/English language examination.
- Appellant was provided with at least two opportunities to pass the language examination.
- The conditional offer of employment was withdrawn because of Appellant's inability to pass the basic proficiency French/English language examination.
- The Board should deny Appellant's appeal.

**APPLICABLE LAWS AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board**, which states in applicable part,

...

- (e) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012,**

**December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:**

...

**6.4. Reference and background investigation requirements; Review of applications.**

...

- (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:
  - (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification;...

**ISSUE**

Has Appellant shown that the County's decision to rescind its conditional offer of employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors?

**ANALYSIS AND CONCLUSIONS**

The County has the right to establish the qualifications for a position. MCPR, 2001, § 6-4(a)(1). In the instant case, Appellant worked for a year as a temporary in a position that requires Appellant to speak French. While it may be true that Appellant speaks French, at the time the Director of OHR rescinded the employment offer, Appellant still had not passed the basic proficiency French/English language examination. As a PAA, Appellant is required to pass a basic proficiency French/English or Amharic/English language examination assessing the following skills: oral communication, reading comprehension, and interpreting. Appellant failed to obtain a passing score.

The County contends that it withdrew its conditional job offer because Appellant did not meet the minimum job qualifications. Based on the record of evidence before the Board, the Board finds that the Appellant has failed to show that the County's action was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

**ORDER**

Based on the above, the Board denies Appellant's appeal of OHR's denial of permanent appointment to the position of Principal Administrative Aide.

## **CASE NO. 14-40**

### **FINAL DECISION AND ORDER**

On March 7, 2014, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination of the County not to select Appellant for the position of Principal Administrative Aide (PAA) with the Department of Environmental Protection (DEP). The County filed its response (County's Response) to the appeal on March 27, 2014 with several attachments.<sup>1</sup> Appellant was provided the opportunity to file a reply to the County's response but did not do so. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

On December 19, 2013, Appellant applied for the position of PAA, IRC13034, with DEP. *See* County's Response at 1. Two hundred and ten (210) individuals applied for the Grade 13 position. *Id.* At the outset the applications were reviewed by a member of the Recruitment and Selection Team in the Office of Human Resources (OHR), with respect to satisfying the minimum qualifications listed in the Vacancy Announcement. *Id.* One hundred and eighty-six (186) applicants, including Appellant, met the minimum qualifications. *Id.* The minimally qualified applicants were then rated by two subject matter experts using the preferred criteria listed in the job vacancy announcement. *Id.* Sixteen applicants were rated "Well Qualified" for the position and placed on the Eligible List. *Id.* One hundred and seventy applicants, including Appellant, were rated "Qualified After Review" and placed on the Eligible List. *Id.*

On March 7, 2014, Appellant filed this appeal with the Board.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant applied for a Principal Administrative Aide position.
- Appellant meets the minimum qualifications for the position.
- Appellant's rater reviews on Appellant's applications for employment with the County are being unfairly suppressed.
- Appellant's applications are being rejected for arbitrary and capricious reasons.

#### **County:**

- Appellant's application did meet the minimum qualifications listed in the Job Vacancy Announcement for the Principal Administrative Aide position.
- When Appellant's application was reviewed using the preferred criteria listed in the job

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 - Copy of Vacancy Announcement for Principal Administrative Aide; Attach. 2 – Affidavit of Office of Human Resources (OHR) Staffing Specialist; and Attach. 3 – Copy of Appellant's resume.

- vacancy announcement, Appellant was rated “Qualified” rather than “Well Qualified”.
- Although Appellant addresses Appellant’s experience in Appellant’s appeal, Appellant does not address the fact that Appellant was in direct competition with over 200 other applicants.
- The experience of the applicants rated “Well Qualified” far exceeded that of the Appellant.
- There were twenty-nine other applicants that received scores higher than Appellant.
- Appellant cannot meet Appellant’s burden of proof under the Personnel Regulations and County Code to show that the County’s decision on Appellant’s application was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

- (c) The OHR Director, or designee, may order applications to be re-rated or take other remedial action to remedy an oversight or error in the rating process.
  - (1) The competitive rating process may include:
    - (A) a written or oral examination;
    - (B) a demonstration of a job-related physical ability or skill;
    - (C) an evaluation of an applicant's training, experience, and education; or
    - (D) another professionally acceptable assessment technique that fairly evaluates an applicant's qualifications, fitness, and ability.
  - (2) The competitive rating process must:
    - (A) result from a job analysis that documents the knowledges, skills, and abilities required to perform essential functions of the job;
    - (B) assess the employee's ability to perform important aspects of the job;
    - (C) be administered in good faith and without discrimination; and
    - (D) be properly and accurately conducted.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 20, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

...

**35-5. Right of appeal to MSPB.**

...

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination

prohibited by Chapter 27 of the county Code with the Human Relations Commission<sup>2</sup> but must not file an appeal with the MSPB.

### ISSUE

Has Appellant shown that the County's decision to not select Appellant was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors?

### ANALYSIS AND CONCLUSIONS

As the County correctly notes, Appellant bears the burden of proving to the Board that the County's action with regard to Appellant's application was arbitrary and capricious. Montgomery County Code Section 33-9(c). Appellant failed to meet this burden.

It is clear from a review of Appellant's resume submitted for PAA that Appellant satisfied the minimum qualifications, but so did 186 other applicants. The County contends that while Appellant addressed the preferred criteria in Appellant's resume, the experience of the applicants rated "Well Qualified" far exceeded those of the Appellant for this position. County's Response, Attach. 3. There was a maximum point score for each of the five preferred criteria by each subject matter expert for a total possible score of 200 points. County's Response, Attach. 2. The cut-off for "Well Qualified" was 140 points or higher (70 percent or better). *Id.* Appellant received a score of 90 points, so Appellant was only rated "Qualified" instead of "Well Qualified", and was not selected for the position. *Id.* The applicant selected for the PAA position received a score of 165 points and was rated "Well Qualified".

Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision to not select Appellant for the PAA position was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.<sup>3</sup>

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<sup>2</sup> Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

<sup>3</sup> Appellant principally claims that Appellant was not selected for this position as retaliation for Appellant's having filed prior claims of discrimination against the County. As the Board held in an earlier appeal filed by this Appellant, the Board lacks jurisdiction to consider claims of discrimination and retaliation for filing discrimination claims. MSPB Case No. 14-13 (2014) (citing Montgomery County Code Sec. 33-9(c)); *see* MCPR, 2001, § 35-2 (d); MSPB Case No. 12-01 (2013); MSPB Case No. 10-16 (2010); MSPB Case No. 10-06 (2010); MSPB Case No. 10-04 (2010). Accordingly, this contention and any similar contentions Appellant might make in future appeals must be summarily dismissed.

**ORDER**

Based on the above, the Board denies Appellant's appeal from Appellant's nonselection for the position of Principal Administrative Aide.

# **APPEAL PROCESS**

## **GRIEVANCES**

In accordance with Section 34-10(a) of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011), 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. As with all appeals, the employee need only initially file a notice of intent to appeal.

Upon receipt of the notice of intent, the Board's staff will provide the employee with an Appeal Form which must be completed within ten (10) working days. Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. The County must also provide the employee with a copy of all information provided to the Board. After receipt of 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 oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the CAO's grievance decision.

During fiscal year 2014, the Board issued the following decisions on appeals concerning grievance decisions.

# **OVERPAYMENT OF RETIREMENT BENEFITS**

## **CASE NO. 14-05**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination<sup>1</sup> of the Chief Administrative Officer (CAO) that Appellant must reimburse the County for pension overpayments resulting from an error in the annual cost-of-living adjustment to Appellant's monthly retirement benefit that resulted in an overpayment of Appellant's retirement benefits from January 1, 1999 through April 30, 2013. The County filed a response to the appeal which included ten (10) attachments.<sup>2</sup> Appellant filed an initial response and supplemental documentation. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant began employment and participating in the Employees' Retirement System (ERS) on February 27, 1983. County's Response at 1. Appellant retired from the County as a Benefits Specialist in the Office of Human Resources (OHR), effective January 1, 1999. *Id.* Appellant began receiving Appellant's retirement benefits on that date. *Id.* Each year, Appellant received a cost-of-living adjustment (COLA) to Appellant's retirement benefit. *Id.* At the time of Appellant's retirement, Section 33-44(c)(3)(B) of the County Code provided for an annual COLA of 60% of any change in the consumer price index up to a total adjustment of 5 percent in any year, except at age 65 at which point the annual limit does not apply. *Id.*

An administrative error by the County resulted in Appellant receiving the wrong COLA. Appellant received a COLA of 100% with no cap. County's Response at 2. This type of COLA, which is provided for in County Code Section 33-44(c)(3)(A), only applies to participants hired before 1978. *Id.* This error resulted in Appellant being overpaid Appellant's retirement benefit

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<sup>1</sup> As set forth *infra*, Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue interpretations of the County's retirement statute, subject to appeal to and final decision by the Board.

<sup>2</sup> The County's attachments were: Attachment (Attach.) A – CAO's July 22, 2013 decision letter; Attach. B – Copy of Montgomery County Code Section 33-44; Attach. C – County Council Emergency Bill No: 25-01 highlighting legislative history; Attach. D – Overpayment Spreadsheet for Appellant; Attach. E – March 18, 2013 letter notifying Appellant of County Error; Attach. F – Copy of Appellant's March 27, 2013 Response Letter; Attach. G – Copy of Montgomery County Code Section 33-53; Attach. H – Copy of Surrounding Jurisdictions Retirement Systems Overpayment Laws; Attach. I – Copy of Correction Procedures for Administrative Error; and Attach. J – Copy of Internal Revenue Corrective Procedures.

from July 1, 1999 through April 1, 2013. *Id.* The total amount of the overpayment to Appellant is \$20,002.12. *Id.* When the error was discovered, the Montgomery County Employee Retirement Plans' (MCERP's) staff promptly notified Appellant of the error. *Id.*

The County has established a general policy in which reimbursements from participants are only collected partially, rather than the full amount to which ERS is entitled to be reimbursed under its governing provisions. County's Response at 2. Under the procedures, amounts not collected are paid by the County (or vendor, if applicable) to the affected retirement plan. *Id.* Therefore, the County on behalf of the ERS is seeking a repayment from Appellant of \$7,368.40. *Id.* MCERP's staff offered Appellant the choice of payment method (i.e., one lump sum payment or deductions from Appellant's monthly retirement benefit over a period of time). *Id.* at 3.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The County made a coding error when Appellant's retirement papers were prepared, audited and approved by the County.
- This County error occurred over fourteen years ago.
- Appellant did not do anything wrong.
- The County's March 18, 2013 letter implies that Appellant's overpayment resulted from fraud; there was no fraud involved.
- While the County Code does say that overpayment of payments from the Retirement System must be refunded, seeking a refund fourteen years after the error was made is unreasonable.
- Appellant is sure that overpayments have occurred in the past and decisions were made by the County to forgive the reimbursement. The same reasoning should apply here.
- Repayment of the overpayment would cause financial hardship for the Appellant.
- The County is responsible for ensuring the calculations are correct.
- The Federal and State income taxes Appellant paid should be considered in the County's decision to resolve this issue.
- In neighboring jurisdictions, when benefits are overpaid due to the government's error, the government either declines to recoup the overpayment or allows the beneficiary to file for a waiver of repayment.
- The CAO's decision to deny Appellant's request to waive reimbursement of the overpayment is arbitrary and capricious.

#### **County:**

- An administrative error resulted in Appellant receiving the wrong COLA.
- Appellant received a COLA of 100% with no cap.
- This COLA, found in County Code Section 33-44(c)(3)(A), only applies to

- participants hired before 1978.
- The error resulted in Appellant being overpaid Appellant’s retirement benefit from July 1, 1999 through April 1, 2013.
- When the error was discovered, MCERP’s staff promptly notified Appellant of the error.
- Under County Code Section 33-53, a participant paid in error must repay the ERS.
- The County, in its administration of its retirement plans, established a general policy in which reimbursements from participants are only collected for three years, rather than the full amount to which the ERS is entitled to be reimbursed under its governing provisions.
- MCERP’s staff offered Appellant the choice of repayment methods (i.e., one lump sum payment or deductions of from Appellant’s monthly retirement benefit over a period of time).
- An ERS member may only receive benefits he/she is entitled to under the County Code.
- Appellant was not entitled to certain benefits Appellant received due to the incorrect COLA application.
- Under the terms of ERS, Appellant must repay amounts Appellant was not entitled to have received.

#### APPLICABLE LAWS

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article III, Employees’ Retirement System, Division 4, Administration, Section 33-53, Protection against fraud,** provides in applicable part:

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be charged with a misdemeanor, and may be punishable under the laws of the county and the state. Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will be paid. Any member or beneficiary who has received payment from the retirement system of any monies to which [sic] not entitled under the provisions of this act, shall be required to refund such monies to the system.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-56, Interpretations,** which states in applicable part:

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under

this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.

- (b) The Chief Administrative Officer's decision on a disability application under Section 33-43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

### ISSUE

Did the County err in denying Appellant's request to waive reimbursement of the overpayment of Appellant's pension payments due to an administrative error made by the County in 1998?

### ANALYSIS AND CONCLUSIONS

#### **The CAO's Interpretation Of The Retirement Statute Is Not Entitled To Deference.**

The County Council has by law vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. *See, e.g., Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO's interpretation is predicated on an error of law, no deference is appropriate. *See Dep't of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602, 657 A.2d 372, 376 (1995); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

In the instant case, the County asserts that its legal authority for recoupment of the overpayments is County Code Section 33-53. County's Response at 2. Therefore, pursuant to the statute, Appellant is required to repay amounts Appellant should not have received. *Id.* The Board agrees that this is the only provision in Chapter 33, Article III, "Employee's Retirement System" that addresses overpayments. However, Section 33-53 specifically concerns "Protection against fraud." The County does not even allege fraud was committed in this case. Rather, the County admits that it made an error, and Appellant is the innocent victim of the fourteen-year error.

Moreover, assuming that Section 33-53 did apply, there would be no exception to allow the County to recoup only three (3) years of overpayments. Section 33-53 specifically requires that "any monies" to which the member or beneficiary was not entitled "shall be" refunded. Here, that would mean the full fourteen years of overpayments in the total amount of \$20,002.12. The legislature cannot have intended this harsh result, however, with respect to an innocent victim of a County clerical error. The only reasonable interpretation of the overpayment provision is therefore that it only applies in cases of fraud.

In addition, in the instant case, even if the County could recoup overpayments, the County's written "policy" only allows the County to recoup two (2) years of overpayments, not three. County's Response at 2; *id.* Attach. I.<sup>3</sup> The County asserts that its policy has changed, but admits that the "formal policy document has not been updated." *Id.* As the Board has previously reminded the County, statements made by an attorney in a filing are not evidence. MSPB Case No. 08-13 (2008); *see, e.g., Joos v. Dep't of the Treasury*, 79 M.S.P.R. 342, 348 (1998); *Leaton v. Dep't of the Interior*, 65 M.S.P.R. 331, 337 (1994); *Perez v. R.R. Ret. Bd.*, 65 M.S.P.R. 287, 289 (1994); *Rickels v. Dep't of the Treasury*, 42 M.S.P.R. 596, 603 (1989); *Vincent v. Dep't of Justice*, 32 M.S.P.R. 263, 268-69 (1987); *Enos v. USPS*, 8 M.S.P.R. 59, 63 (1981). The Board notes that the County has provided no evidence of a policy that would permit recoupment of three years of overpayments.

Based on the foregoing analysis, the Board finds that the CAO's reliance on County Code Section 33-53 to authorize the County's efforts to recoup overpayments in cases where fraud does not exist is misplaced. To the extent that the CAO's determination that Appellant should be denied a waiver for repayment of overpayment of pension benefits relies on this statutory provision, it is not entitled to deference.

**The Board Finds That Appellant Is Eligible For A Waiver Of Overpayment Of Pension Benefits Due To County Error.**

As Appellant correctly points out, several local retirement systems do permit the government to waive overpayments where the overpayments were the result of the government's mistake and the person who received the overpayment would suffer hardship as a result. *See, e.g.,* 5 U.S.C. § 8346(b) and 5 U.S.C. § 8470(b) (overpayments under CSRS and FERS may not be recovered when, in the judgment of the Office of Personnel Management, "the individual is without fault and recovery would be against equity and good conscience"); *see also Godbout v. OPM*, 466 F.3d 1375 (Fed. Cir. 2006); U.S. Office of Personnel Management, Retirement and Insurance Service, "Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and the Federal Employees' Retirement System" (May 1995).

Appellant bears the burden of proving by substantial evidence that Appellant is eligible for a waiver of collection of the overpayment. *See Russell v. OPM*, 69 M.S.P.R. 125, 127 (1995). Here the County admits that Appellant is without fault. County's Response at 2. Appellant has notified the County that the repayment of the overpayment would create a financial hardship due to Appellant's sole responsibility of providing financial and medical care for a disabled relative.<sup>4</sup> Appellant's Reply. The Board finds that Appellant has provided

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<sup>3</sup> The Board notes that Attach. I, a document entitled "Correction Procedures for Administrative Errors," gives no indication that notice of this so-called "policy" has been given to or is available to County employees and retirees. Rather, the document appears to be internal procedural guidance for Benefits Specialists.

<sup>4</sup> In the future, the County must consider allowing hardship waivers on a case-by-case basis. It is up to the County to consider each person's individual circumstances to determine if in fact a hardship exists.

substantial evidence that Appellant is eligible for a waiver of collection of overpayment. *Id.* Accordingly, having reviewed the record of evidence in this case, the Board concludes that Appellant is eligible for a waiver of an overpayment and entitled to a complete waiver of recoupment of past overpayment of Appellant's pension benefits.<sup>5</sup> Further, the Board finds that the CAO erred in denying Appellant's request for a waiver.

### **ORDER**

Based on the above, the Board grants Appellant's appeal from the determination of the CAO that Appellant was not eligible for a waiver of overpayment pension benefits that was caused by County error. The County is hereby ordered to reimburse Appellant for any monies already deducted to recoup the overpayments and to waive recoupment of past overpayment of Appellant's pension benefits.

## **CASE NO. 14-06**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination<sup>1</sup> of the Chief Administrative Officer (CAO) that Appellant must reimburse the County for pension overpayments resulting from an error in the annual cost-of-living adjustment to Appellant's monthly retirement benefit that resulted in an overpayment of Appellant's retirement benefits from March 1, 1998 through December 1, 2012. The County filed a response to the appeal which included eleven (11) attachments.<sup>2</sup> Appellant filed an initial response and supplemental documentation. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant began participating in the Employees' Retirement System (ERS) on December

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<sup>5</sup> The County must establish guidelines to permit waivers in cases where the overpayment was generated by County error.

<sup>1</sup> As set forth *infra*, Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue interpretations of the County's retirement statute, subject to appeal to and final decision by the Board.

<sup>2</sup> The County's attachments were: Attachment (Attach.) A – CAO's July 22, 2013 decision letter; Attach. B – Copy of Montgomery County Code Section 33-44(c)(3); Attach. C – County Council Emergency Bill No: 25-01 highlighting legislative history; Attach. D – Overpayment Spreadsheet for Appellant; Attach. E – March 18, 2013 letter notifying Appellant of County Error; Attach. F – Copy of Montgomery County Code Section 33-53; Attach. G – Copy of Surrounding Jurisdictions Retirement Systems Overpayment Laws; Attach. H – Copy of Correction Procedures for Administrative Error; Attach. I – Copy of Internal Revenue Corrective Procedures; and Attach. J – Copy of Bill 25-13 for Anne Arundel County.

28, 1981. County's Response at 1. Appellant retired from the County as a Benefits Specialist in the Office of Human Resources (OHR), effective March 1, 1998. *Id.* Appellant began receiving Appellant's retirement benefits on that date. *Id.* Each year, Appellant received a cost-of-living adjustment (COLA) to Appellant's retirement benefit. *Id.* At the time of Appellant's retirement, Section 33-44(c)(3)(B) of the County Code provided for an annual COLA of 60% of any change in the consumer price index up to a total adjustment of 5 percent in any year, except at age 65 at which point the annual limit does not apply. *Id.*

An administrative error by the County resulted in Appellant receiving the wrong COLA. Appellant received a COLA of 100% with no cap. County's Response at 2. This type of COLA, which is provided for in County Code Section 33-44(c)(3)(A), only applies to participants hired before 1978. *Id.* This error resulted in Appellant being overpaid Appellant's retirement benefit from March 1, 1998 through December 1, 2012. *Id.* The total amount of the overpayment to Appellant is \$7,636.62. *Id.* When the error was discovered, the Montgomery County Employee Retirement Plans' (MCERP's) staff promptly notified Appellant of the error. *Id.*

The County has established a general policy in which reimbursements from participants are only collected partially, rather than the full amount to which ERS is entitled to be reimbursed under its governing provisions. County's Response at 2. Under the procedures, amounts not collected are paid by the County (or vendor, if applicable) to the affected retirement plan. *Id.* Therefore, the County on behalf of the ERS is seeking a repayment from Appellant of \$3,077.76. *Id.* MCERP's staff offered Appellant the choice of payment method (i.e., one lump sum payment or deductions from Appellant's monthly retirement benefit over a period of time). *Id.* at 3.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The County made a coding error when Appellant's retirement papers were prepared, audited and approved by the County.
- This County error occurred fifteen years ago.
- Appellant did not do anything wrong.
- The County's March 13, 2013 letter implies that Appellant's overpayment resulted from fraud; there was no fraud involved.
- While the County Code does say that overpayment of payments from the retirement system must be refunded, seeking a refund fifteen years after the error was made is unreasonable.
- Appellant is sure that overpayments have occurred in the past and decisions were made by the County to forgive the reimbursement. The same reasoning should apply here.
- The CAO's denial letter implies that retirees should check the calculation of the annual COLA amounts to make sure they were properly applied. Retirees do not have the necessary information to do these calculations.

- The County is responsible for ensuring the calculations are correct.
- The Federal and State income taxes Appellant paid should be considered in the County's decision to resolve this issue.
- The CAO's decision to deny Appellant's request to waive reimbursement of the overpayment is arbitrary and capricious.

County:

- An administrative error resulted in Appellant receiving the wrong COLA.
- Appellant received a COLA of 100% with no cap.
- This COLA, provided for in County Code Section 33-44(c)(3)(A), only applies to participants hired before 1978.
- The error resulted in Appellant being overpaid Appellant's retirement benefit from March 1, 1998 through December 1, 2012.
- When the error was discovered, MCERP's staff promptly notified Appellant of the error.
- Under County Code Section 33-53, a participant paid in error must repay the ERS.
- The County in its administration of its retirement plans established a general policy in which reimbursements from participants are only collected for three years, rather than the full amount to which the ERS is entitled to be reimbursed under its governing provisions.
- MCERP's staff offered Appellant the choice of repayment methods (i.e., one lump sum payment or deductions from Appellant's monthly retirement benefit over a period of time).
- An ERS member may only receive benefits he/she is entitled to under the County Code.
- Appellant was not entitled to certain benefits Appellant received due to the incorrect COLA application.
- Under the terms of ERS, Appellant must repay amounts Appellant was not entitled to have received.

**APPLICABLE LAWS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article III, Employees' Retirement System, Division 4, Administration, Section 33-53, Protection against fraud, provides in applicable part:**

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be charged with a misdemeanor, and may be punishable under the laws of the county and the state. Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will

be paid. Any member or beneficiary who has received payment from the retirement system of any monies to which [sic] not entitled under the provisions of this act, shall be required to refund such monies to the system.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-56, Interpretations, which states in applicable part:**

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.
- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

**ISSUE**

Did the County err in denying Appellant's request to waive reimbursement of the overpayment of Appellant's pension payments due to an administrative error made by the County in 1998?

**ANALYSIS AND CONCLUSIONS**

**The CAO's Interpretation Of The Retirement Statute Is Not Entitled To Deference.**

The County Council has by law vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. *See, e.g., Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO's interpretation is predicated on an error of law, no deference is appropriate. *See Dep't of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602, 657 A.2d 372, 376 (1995); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

In the instant case, the County asserts that its legal authority for recoupment of the overpayments is County Code Section 33-53. County's Response at 2. Therefore, pursuant to the statute, Appellant is required to repay amounts Appellant should not have received. *Id.* The Board agrees that this is the only provision in Chapter 33, Article III, "Employee's Retirement System", which addresses overpayments. However, Section. 33-53 specifically concerns "Protection against fraud." The County does not even allege fraud was committed in this case.

Rather, the County admits that it made an error, and Appellant is the innocent victim of the fifteen-year error.

Moreover, assuming that Section 33-53 did apply, there would be no exception to allow the County to recoup only three years of overpayments. Section 33-53 specifically requires that “any monies” to which the member or beneficiary was not entitled “shall be” refunded. Here, that would mean the full fifteen years of overpayments in the total amount of \$7,636.62. The legislature cannot have intended this harsh result, however, with respect to an innocent victim of a County clerical error. The only reasonable interpretation of the overpayment provision is therefore that it only applies in cases of fraud.

In addition, in the instant case, even if the County could recoup overpayments, the County’s written “policy” only allows the County to recoup two (2) years of overpayments, not three. County’s Response at 2; *id.* Attach. H.<sup>3</sup> The County asserts that its policy has changed, but admits that the “formal policy document has not been updated.” *Id.* As the Board has previously reminded the County, statements made by an attorney in a filing are not evidence. MSPB Case No. 08-13 (2008); *see, e.g., Joos v. Dep’t of the Treasury*, 79 M.S.P.R. 342, 348 (1998); *Leaton v. Dep’t of the Interior*, 65 M.S.P.R. 331, 337 (1994); *Perez v. R.R. Ret. Bd.*, 65 M.S.P.R. 287, 289 (1994); *Rickels v. Dep’t of the Treasury*, 42 M.S.P.R. 596, 603 (1989); *Vincent v. Dep’t of Justice*, 32 M.S.P.R. 263, 268-69 (1987); *Enos v. USPS*, 8 M.S.P.R. 59, 63 (1981). The Board notes that the County has provided no evidence of a policy that would permit recoupment of three years of overpayments.

Based on the foregoing analysis, the Board finds that the CAO’s reliance on County Code Section 33-53 to authorize the County’s efforts to recoup overpayments in cases where fraud does not exist is misplaced. To the extent that the CAO’s determination that Appellant should be denied a waiver for repayment of overpayment pension benefits relies on this statutory provision, it is not entitled to deference.

**The Board Finds That Appellant Is Eligible For A Waiver Of Overpayment Pension Benefits Due To County Error.**

Appellant asserts that DOL Advisory Opinion 77-08 would allow the County to waive the overpayment after considering “the hardship to the participant or beneficiary resulting from such recovery.” *See* DOL Opinion Ltr. 77-08, 1977 WL 5394 (Apr. 4, 1977). The Board further notes that, as Appellant correctly points out, several local retirement systems do permit the government to waive overpayments where the overpayments were the result of the government’s mistake and the person who received the overpayment would suffer hardship as a result. *See, e.g.,* 5 U.S.C. 8346(b) and 5 U.S.C. 8470(b) (overpayments under CSRS and FERS may not be recovered when, in the judgment of the Office of Personnel Management, “the individual is without fault and recovery would be against equity and good conscience”); *see also Godbout v.*

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<sup>3</sup> The Board notes that Attach. H, a document entitled “Correction Procedures for Administrative Errors,” gives no indication that notice of this so-called “policy” has been given to or is available to County employees and retirees. Rather, the document appears to be internal procedural guidance for Benefits Specialists.

*OPM*, 466 F.3d 1375 (Fed. Cir. 2006); U.S. Office of Personnel Management, Retirement and Insurance Service, "Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and the Federal Employees' Retirement System" (May 1995).

Appellant bears the burden of proving by substantial evidence that Appellant is eligible for a waiver of collection of the overpayment. *See Russell v. OPM*, 69 M.S.P.R. 125, 127 (1995). Here the County admits that Appellant is without fault. County's Response at 2. Appellant has notified the County that the repayment of the overpayment would create a financial hardship.<sup>4</sup> Appellant's Reply. However, merely stating that there will be a hardship is not enough. Appellant must provide substantial evidence that Appellant is eligible for a waiver of collection of overpayment.<sup>5</sup> *Id.* Accordingly, having reviewed the record of evidence in this case, the Board concludes that Appellant may be eligible for a waiver of an overpayment.<sup>6</sup> Further, the Board finds that the CAO erred in denying Appellant's request for a waiver.

### **ORDER**

Based on the above, the Board grants Appellant's appeal from the determination of the CAO that Appellant was not eligible for a waiver of overpayment pension benefits that was caused by County error. The County is hereby ordered to reimburse Appellant for any monies already deducted to recoup the overpayments until such time as the County has developed waiver guidelines to determine if Appellant is entitled to an adjustment or complete waiver of overpayment of Appellant's pension benefits.

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<sup>4</sup> In the future, the County must consider allowing hardship waivers on a case-by-case basis. It is up to the County to consider each person's individual circumstances to determine if in fact a hardship exists.

<sup>5</sup> Since the County has not yet established guidelines for waiver requests, the County must give Appellant an opportunity to provide evidence to determine if a waiver is appropriate in this matter after the guidelines are established.

<sup>6</sup> The County must establish guidelines to permit waivers in cases where the overpayment was generated by County error.

## **DISMISSAL OF APPEALS**

The County's Administrative Procedures Act (APA), Montgomery County Code Section 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. Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if the appellant fails to prosecute an appeal, the appellant's appeal is untimely, or the appellant fails to comply with a Board order or rule.

The Board also may dismiss an appeal if it lacks jurisdiction over the appeal, if the case becomes moot, if there is no actual (i.e., justiciable) controversy between the parties, or if the employee fails to exhaust administrative remedies.

During fiscal year 2014, the Board issued the following dismissal decisions.

# **DISMISSAL FOR MOOTNESS**

## **CASE NO. 14-11**

### **FINAL DECISION AND ORDER**

On September 25, 2013, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the September 25, 2013 determination by the Office of Human Resources (OHR) that Appellant did not meet the minimum qualifications for an Office Services Coordinator (OSC) position with the Montgomery County Department of Health and Human Services (HHS or Department). On October 9, 2013, the County notified the Board that although it initially rated the Appellant as “Not Qualified” for the OSC position, after Appellant’s appeal, OHR re-examined Appellant’s application, rated Appellant “Qualified”, and forwarded Appellant’s application for further review. Based on these actions, the County has moved to dismiss the appeal, as the matter is now moot.

An appeal must be dismissed as moot where an agency completely rescinds the action appealed. *Hodge v. Dep’t of Veterans Affairs*, 72 M.S.P.R. 470 (1996). The County has demonstrated to the Board that it has rescinded the action appealed and has moved forward to review Appellant’s application in the pool with all “Qualified” applicants. Accordingly, the Board hereby dismisses the appeal.<sup>1</sup>

### **ORDER**

Based on the above, the Board hereby dismisses Appellant’s appeal based on mootness.

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<sup>1</sup> Since Appellant’s appeal is being dismissed as moot, the Board will not consider the County’s argument that the appeal was untimely.

# **DISMISSAL FOR LACK OF JURISDICTION**

## **CASE NO. 14-07**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging the determination by the Office of Human Resources (OHR) of Appellant's ending date for Appellant's acting status in a Transit Information Systems Technician position in Transit Services, Department of Transportation (DOT). The County filed its response (County's Response) to the appeal, which included one attachment.<sup>1</sup> Appellant filed a reply (Appellant's Reply) to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant, a Bus Operator with DOT, began a one year PACE assignment<sup>2</sup> as Transit Information Systems Technician in January 2011. *See* County's Response at 1. Appellant contends that following the conclusion of Appellant's PACE assignment in January 2012, Appellant remained in the Transit Information Systems Technician position until May 2013, a period of 16 months. *See* Appeal. Appellant returned to Appellant's regular duties as a Bus Operator at the Gaithersburg Depot on May 6, 2013. *Id.* at 2. In May 2012, OHR formally gave Appellant the status of Acting Transit Information Systems Technician, an Office, Professional, and Technical (OPT) bargaining unit position that is represented by the Municipal and County Government Employees Organization Local 1994 (MCGEO or Union), and Appellant received acting pay from May 6, 2012 until May 4, 2013. *See* County's Response at 1. Appellant argues that Appellant's acting status should have begun in January 2012 rather than May 6, 2012. Appellant further contends that OHR violated the Personnel Regulations by exceeding the 12-month maximum on temporary promotions.

This appeal followed.

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<sup>1</sup> The County's attachment was: Attachment 1 – Affidavit of OHR Staffing Specialist.

<sup>2</sup> PACE (Position and Career Education) is a career development program that offers employees an opportunity to voluntarily assume different or additional responsibilities outside of their current class specification. The PACE program gives interested employees a chance to explore or prepare for different career opportunities. At the expiration of the PACE assignment/contract (which may not exceed one year), the employee resumes the duties of their current job classification.

## **POSITIONS OF THE PARTIES**

### **Appellant:**

- Appellant was assigned to a PACE position for a Transit Technician assignment that began in January 2011.
- The PACE assignment was scheduled for a period of six months along with the understanding that the assignment could be extended for an additional six months.
- Appellant remained on the PACE assignment for one year.
- At or around the time the Appellant's PACE assignment concluded, the Training Track had two other PACE appointees who were given acting status and acting pay at the end of their PACE assignment.
- Appellant was under the impression that Appellant would also receive acting status and pay at the end of Appellant's PACE assignment.
- Appellant's PACE assignment ended in January 2012.
- Appellant continued acting in the position from January 2012 to May 2013.
- Appellant acted in the position for a 16-month period.
- OHR officially awarded Appellant acting status in May 2013.
- Appellant's acting status began in January 2012 not in May 2013.
- Appellant was returned to Appellant's regular duties as Bus Operator on May 6, 2013 because Appellant was advised that Appellant could not be in an acting capacity for more than one year.
- Appellant had already exceeded the one year rule by acting in the position for 16 months.
- Appellant had to initiate a formal request for acting status and pay, while other PACE assignees have been given acting status immediately after their PACE assignment had concluded.
- Appellant has been treated unfairly.

### **County:**

- The Board lacks jurisdiction over this appeal because the Personnel Regulations do not provide an employee with the right to file an appeal directly with the MSPB in these circumstances.
- Appellant did not file a grievance with respect to the ending of Appellant's temporary promotion in May 2013 or the failure to give Appellant acting pay for the period from January to May 2012.
- Since the position of Transit Information Systems Technician is a MCGEO OPT bargaining unit position, the Appellant does not have access to the County grievance system under Section 34 of the Personnel Regulations.
- Appellant should have requested that MCGEO file a timely grievance on Appellant's behalf.
- Appellant's grievance is untimely.
- The period of 10 working days to file an appeal with the MSPB under the Personnel Regulations started to run on May 4, 2013, the date the Appellant's temporary promotion

- ended.
- Appellant filed Appellant’s appeal in August 2013, more than three (3) months after the required filing period.
- To the extent that the Appellant is seeking acting pay for the period from January to May 2012 as part of this appeal, it is untimely.
- The Board should dismiss the appeal based on lack of jurisdiction.

**APPLICABLE LAWS, REGULATIONS AND CONTRACTUAL PROVISIONS**

**Montgomery County Code, Chapter 1, General Provisions, Article 3. The Meaning of Provisions of This Code, Section 1-301, Rules of interpretation**, which states in applicable part,

The following rules of interpretation apply to resolutions adopted by the Council and to laws enacted by the Council in legislative session:

...

- (3) *How to compute deadlines.* If the Code requires or allows a person to perform an act within a specific time period measured in days, the person must compute the deadline in the following manner:
  - a. Count the day after the event as the first day of the period, if the period follows an event.
  - b. Count the remaining number of days in the period . . . .
  - c. Do not count the last day if it is a Saturday, Sunday, or legal holiday or if the office where the person must file a paper or perform an act is not open during the regular hours of that office.

**Montgomery County Code, Section 33-12(b), Grievances**, which states in applicable part:

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. . . . 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. . . .

**Montgomery County Personnel Regulations (MCPR), 2001, (as amended February 15, 2005, October 21, 2008, and July 12, 2011), Section 34, Grievances**, which states in applicable part:

...

**34-2. Eligibility to file a grievance.**

- (c) A bargaining unit employee may not file a grievance under this section over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.

**Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

...

**35-3. Appeal period.**

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

...

- (3) Receives a written final decision on a grievance; . . .

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016 (MCGEO CBA), Article 10, Grievances**, which states in applicable part:

...

10.2 Definition

A grievance is any complaint by the certified employee organization arising out of a violation or misinterpretation of any provision of the Collective Bargaining Agreement. . . .

...

10.4 Exclusivity of Forum

This procedure shall be the exclusive forum for the hearing of any grievance and the exclusive remedy for any grievance as defined above.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2013 through June 30, 2016, Article 23, Promotion**, which states in applicable part:

...

### 23.3 Temporary Promotions

Employees will not normally be assigned to a higher classified job, unless required by workload as determined by the Employer. However, employees who are assigned to a higher classified job for a period of more than 10 days shall receive the rate of pay of the higher classified job retroactive to the first day of work at the higher level.

#### ISSUE

Does the Board have jurisdiction over the instant appeal and was the appeal timely?

#### ANALYSIS AND CONCLUSIONS

##### The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.

As the County correctly notes, the Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

##### The Board Lacks Jurisdiction Over A Grievance Which Is Covered By A Collective Bargaining Agreement.

The Montgomery County Personnel Regulations clearly indicate that a bargaining unit employee may not file a grievance under the administrative grievance procedure but must instead file a grievance under Appellant's applicable collective bargaining agreement. The record of evidence establishes that Appellant is a member of the bargaining unit represented by MCGEO and that the Appellant failed to seek any remedy from MCGEO in this matter. Pursuant to the MCGEO CBA, its grievance procedure is the exclusive forum for grievances. *See* MCGEO CBA, Section 10.4.

The County is correct that MSPB Case No. 10-16 is dispositive of this matter. In that case, a bargaining unit employee sought to bring an appeal to the Board of an issue that was covered by the MCGEO CBA grievance procedure. The Board found that it did not have jurisdiction over that appeal. The same is true for the instant appeal.

##### Appellant's Appeal To The Board Is Untimely.

The matter at issue occurred from January 2012 to May 2012. In Appellant's appeal, Appellant notes that Appellant's temporary promotion ended on May 4, 2013. However,

Appellant did not file an appeal until August 1, 2013, more than three month later. Appellant had ten working days, pursuant to Section 35-3(a) of the MCPR, to file Appellant's notice of intent to appeal with the Board. Appellant admits that Appellant was untimely because Appellant "was not trying to upset anyone who later may be determining the eventual candidate for the permanent filling of the position." Thus, Appellant's appeal is untimely. Accordingly, the Board will dismiss the appeal also for lack of timeliness.

### **ORDER**

Based on the foregoing, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction and as untimely.

## **CASE NO. 14-13**

### **FINAL DECISION AND ORDER**

On October 15, 2013, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination of the Montgomery County Public Information Office (PIO or Department), not to select Appellant for the position of Customer Service Representative (CSR) in MC 311. The County filed its response (County's Response) to the appeal. Appellant was provided the opportunity to file a reply to the County's Response but did not do so.

### **FINDINGS OF FACT**

On September 4, 2013, Appellant applied for the position of CSR in MC 311, IRC12148, with PIO. *See* County's Response at 2. Five hundred and forty-one (541) individuals applied for the Grade 11 position. *Id.* At the outset the applications were reviewed by a member of the Recruitment and Selection Team in the Office of Human Resources (OHR), with respect to satisfying the minimum qualifications listed in the Vacancy Announcement. *Id.* One hundred and forty-four (144) applicants, including Appellant, met the minimum qualifications. *Id.* The minimally qualified applicants were then rated by two subject matter experts chosen by PIO using the preferred criteria listed in the job vacancy announcement. *Id.* Eleven (11) applicants were rated "Well Qualified" for the position and placed on the Eligible List. *Id.* One hundred and thirty-three (133) applicants, including Appellant, were rated "Qualified After Review" and placed on the Eligible List. *Id.* On October 14, 2013, Appellant requested a non-competitive reappointment to the CSR position directly from the Director for the PIO/MC311. *Id.* at 2.

On October 15, 2013, Appellant filed this appeal with the Board.

### **APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7. Pre-hearing procedures,** which states in applicable part,

...

- (c) **Motions.** Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, motions for continuance, motions to amend a charging document or other submissions to the hearing authority, motions to compel discovery and motions to quash subpoenas shall be made promptly; however, nothing herein shall preclude the hearing authority, on its own motion, from reaching a determination on any preliminary matter as the interests of justice may require without a hearing.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures,** which states in applicable part:

...

- 6-13. 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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, March 9, 2010, and July 23, 2013), Section 7, Appointments, Probationary Period, and Promotional Probationary Period,** which states in applicable part:

- 7-4. Noncompetitive reappointment.**

...

- (c) Noncompetitive reappointment is the prerogative of management and not a right or entitlement of a former employee. A former employee may not file a grievance or appeal the denial of a non-competitive reappointment.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

...

**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**

Does the Board have jurisdiction over the Appellant's appeal?

**ANALYSIS AND CONCLUSIONS**

**The Board's Jurisdiction Over An Appeal Is Limited To The Authority Granted By Statute Or Regulation.**

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

**The Board Lacks Jurisdiction Over Appeals that Allege Human Rights Violations.**

The Code provides that an applicant may challenge the Chief Administrative Officer's (CAO's) decision regarding an application for employment. As the Board's regulations make clear, basically an applicant may challenge any denial of employment. In the instant case, Appellant was deemed "Qualified" for the position and placed on the Eligible List for the CSR position.

Appellant asserts: “I left Montgomery County Government in 2008, having been a victim of workplace harassment, discrimination, and retaliation, subjected to an unnecessary fitness for duty exam, and other abuses. I am an ongoing victim of rating suppression for having revealed these complaints to the EEOC and my applications are being unfairly scrutinized as a result.” *See* Appeal at 1. In other words, Appellant is alleging that Appellant’s nonselection or placement on the Eligible List as a “Qualified” applicant was retaliation for filing discrimination complaints. This complaint is within the exclusive jurisdiction of the Office of Human Rights under Chapter 27 of the Montgomery County Code. *See* MCPR, 2001, App. B, Sec. 33-9(c). Accordingly, the Board concludes that it lacks jurisdiction over the Appellant’s appeal.

### **The Board Lacks Jurisdiction Over Non-Competitive Reappointments.**

The County provides evidence and argues that Appellant was seeking a non-competitive reappointment to Appellant’s prior Customer Service Representative position. County’s Response, Attach. 2. The County correctly points out that, to the extent Appellant is appealing Appellant’s non-reappointment, the Board lacks jurisdiction to address this matter as well. *See* MCPR, 2001, § 7-4(c).

### **ORDER**

On the basis of the above, the Board hereby dismisses Appellant’s appeal based on lack of jurisdiction.

## **CASE NO. 14-14**

### **FINAL DECISION AND ORDER**

On October 16, 2013, Appellant, filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination of the Montgomery County Department of Health and Human Services (HHS or Department) not to select Appellant for the position of Principle Administrative Aide (PAA). On October 24, 2013, the County notified the Board that Appellant was rated “Qualified” for the PAA position and placed on the Eligible List. The County moved to dismiss the appeal for lack of jurisdiction.

### **FINDINGS OF FACT**

On October 5, Appellant applied for the position of PAA, IRC12457, with HHS. *See* County’s Response at 2. Three hundred and sixty-three individuals applied for the Grade 13 position. *Id.* The job vacancy announcement stated that this recruitment would establish an eligible list to fill current and future PAA vacancies in HHS. *Id.* at 2. At the outset the applications were reviewed by a member of the Recruitment and Selection Team in the Office of Human Resources (OHR), with respect to satisfying the minimum qualifications listed in the Vacancy Announcement. *Id.* Three hundred and twenty-four applicants, including Appellant, met the minimum qualifications and were rated “Qualified” after review and moved to the Eligible List. *Id.*

The job posting closed on October 14, 2013. The Eligible List for the PAA position at HHS was established by OHR on October 22, 2013 and made available to HHS. *Id.* On October 16, 2013, Appellant filed this appeal with the Board. Appellant's Appeal at 1. In Appellant's statement of appeal, Appellant indicates that Appellant received the Department's notice of denial on October 16, 2013. *Id.*

### APPLICABLE LAWS AND REGULATIONS

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board . . . .

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7. Pre-hearing procedures**, which states in applicable part,

...

- (d) **Motions.** Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, motions for continuance, motions to amend a charging document or other submissions to the hearing authority, motions to compel discovery and motions to quash subpoenas shall be made promptly; however, nothing herein shall preclude the hearing authority, on its own motion, from reaching a determination on any preliminary matter as the interests of justice may require without a hearing.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

- 6-13. 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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

...

**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**

Does the Board have jurisdiction over the Appellant's appeal?

**ANALYSIS AND CONCLUSIONS**

**The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.**

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

**The Board Has Jurisdiction Over A Denial Of Employment; However, Based On OHR's Notification, Appellant Has Not Yet Been Denied Employment.**

The Code provides that an applicant may challenge the Chief Administrative Officer's (CAO's) decision regarding an application for employment. As the Board's regulations make clear, basically an applicant may challenge any denial of employment. In the instant case, Appellant has been deemed "Qualified" for the position and placed on the Eligible List for the PAA position. OHR has indicated that the position has not been filled yet and interviews for the position would begin in January.

Thus, based on OHR's actions, Appellant cannot be deemed to have been denied

employment in the position of PAA. Accordingly, the Board concludes that it lacks jurisdiction over Appellant's appeal. Therefore, it will dismiss Appellant's appeal.<sup>1</sup>

### **ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction.

## **CASE NO. 14-16**

### **FINAL DECISION AND ORDER**

On October 23, 2013, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board or MSPB) challenging the determination of the Montgomery County Department of Health and Human Services (HHS or Department) not to select Appellant for the position of Principle Administrative Aide (PAA). On October 30, 2013, the County notified the Board that Appellant was rated "Qualified" for the PAA position and placed on the Eligible List. The County moved to dismiss the appeal for lack of jurisdiction.

### **FINDINGS OF FACT**

On October 5, Appellant applied for the position of PAA, IRC12458, with HHS. *See* County's Response at 1. The job vacancy announcement stated that the PAA position may be under-filled at the Administrative Aide (entry) Grade 12 level. *Id.* Three hundred and sixty-three individuals applied for the Grade 13 position. *Id.* The job vacancy announcement stated that this recruitment would establish an eligible list to fill current and future PAA vacancies in HHS. *Id.* at 2. At the outset the applications were reviewed by a member of the Recruitment and Selection Team in the Office of Human Resources (OHR), with respect to satisfying the minimum qualifications listed in the Vacancy Announcement. *Id.* Three hundred and twenty-four applicants, including Appellant, met the minimum qualifications and were rated "Qualified" after review and moved to the Eligible List. *Id.*

The job posting closed on October 14, 2013. The Eligible List for the PAA position at HHS was established by OHR on October 22, 2013 and made available to HHS. *Id.* On October 23, 2013, Appellant filed this appeal with the Board. Appellant's Appeal at 1. In the statement of appeal, Appellant indicates that Appellant received the Department's notice of denial on October 17, 2013. *Id.*

### **APPLICABLE LAWS AND REGULATIONS**

#### **Montgomery County Code, Chapter 33, Personnel and Human Resources, Section**

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<sup>1</sup> Appellant may file a new appeal with the Board should Appellant ultimately not be selected for the Principal Administrative Aide position. To the extent that this disposition may diverge from prior Board decisions, *see, e.g.*, MSPB No. 10-10, we are clarifying our precedent.

**33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board . . . .

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7. Pre-hearing procedures**, which states in applicable part,

...

- (e) **Motions.** Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, motions for continuance, motions to amend a charging document or other submissions to the hearing authority, motions to compel discovery and motions to quash subpoenas shall be made promptly; however, nothing herein shall preclude the hearing authority, on its own motion, from reaching a determination on any preliminary matter as the interests of justice may require without a hearing.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

- 6-13. 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.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, and February 8, 2011), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

...

- 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

Does the Board have jurisdiction over the Appellant's appeal?

### ANALYSIS AND CONCLUSIONS

#### **The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.**

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., 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 were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995); *see also* MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

#### **The Board Has Jurisdiction Over A Denial Of Employment; However, Based On OHR's Notification, Appellant Has Not Yet Been Denied Employment.**

The Code provides that an applicant may challenge the Chief Administrative Officer's (CAO's) decision regarding an application for employment. As the Board's regulations make clear, basically an applicant may challenge any denial of employment. In the instant case, Appellant has been deemed "Qualified" for the position and placed on the Eligible List for the PAA position. OHR has indicated that the position has not been filled yet and interviews for the position have not been scheduled.

Thus, based on OHR's actions to date, Appellant cannot be deemed to have been denied employment in the position of PAA. Accordingly, the Board concludes that it lacks jurisdiction over Appellant's appeal. Therefore, it will dismiss Appellant's appeal.<sup>1</sup>

### ORDER

On the basis of the above, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction.

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<sup>1</sup> Appellant may file a new appeal with the Board should Appellant ultimately not be selected for the Principal Administrative Aide position. To the extent that this disposition may diverge from prior Board decisions, *see, e.g.,* MSPB No. 10-10, we are clarifying our precedent.

# **DISMISSAL FOR LACK OF TIMELINESS**

## **CASE NO. 14-08**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on Appellant's appeal challenging Appellant's nonselection for an Office Service Coordinator (OSC) position with the Montgomery County Police Department (MCPD) based on the results of background investigation. The County filed its response (County's Response) to the appeal, which included two attachments.<sup>1</sup> Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant began working for the County on May 31, 2005 as a Correctional Officer in the Department of Corrections and Rehabilitation, Detention Services (DCRD). *See* County's Response at 1. In 2011, Appellant suffered an on-the-job injury. *Id.* On March 31, 2011, Appellant was examined by the Employee Medical Examiner (EME) as part of a return to work exam. *Id.* The EME determined that because of Appellant's medical condition Appellant would not be able to return to work as a Correctional Officer. *Id.* Appellant subsequently met with the Disability Program Manager (DPM), who assisted Appellant by attempting to place Appellant in a vacant position for which Appellant met the minimum qualifications. *Id.* Under Section 6-10(a)(1) of the Montgomery County Personnel Regulations, Appellant had priority consideration as an employee unable to perform the employee's job because of a disability or injury under the Americans With Disabilities Act of 1990 (ADA). *Id.*

In April 2011, Appellant applied for an Office Service Coordinator (OSC) position, IRC1791, in the MCPD, 5<sup>th</sup> District Station/Germantown. *Id.* In May 2011, Appellant interviewed for the OSC position with MCPD. *Id.* MCPD subsequently conducted a comprehensive background investigation of the Appellant. *Id.* at 2. In early August 2011, the DPM informed Appellant that Appellant had not passed the background investigation and therefore would not be placed in the MCPD 5<sup>th</sup> District OSC position. *Id.*

Subsequently, Appellant was offered and accepted a vacant OSC position in the Office of Human Resources (OHR). The OSC position in OHR is comparable to the OSC position in the MCPD 5<sup>th</sup> District in terms of hours and duties, is at the same grade 16 salary, and has the same benefits. *Id.* Appellant has been working in OHR in the OSC position since August 14, 2011. *Id.* Since Appellant's August 2011 appointment in OHR, Appellant's position has been

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<sup>1</sup> The County's attachments were: Attachment (Attach.) 1 – Affidavit of Disability Program Manager in Occupational Medical Services; and Attach. 2 – Civilian Authorization for Release of Information and Statement of Consent, signed by Appellant on May 27, 2011.

reclassified upward to Administrative Specialist, resulting in a higher salary based on the nature of the work that Appellant has been performing in the OSC position. *Id.*

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant applied and interviewed for an OSC position in MCPD.
- MCPD should not have denied Appellant the OSC position based on something in Appellant’s background investigation.
- MCPD should have notified Appellant regarding its decision regarding the OSC position.
- The DPM was the only person that notified Appellant of MCPD’s employment decision.
- MCPD never had any communications with Appellant regarding its final employment decision.
- Appellant never had any questions or problems in Appellant’s background; otherwise, Appellant could not have been a correctional officer for more than five years.
- Appellant wants to find out what is in Appellant’s background that prevented Appellant from qualifying for the vacant OSC position in MCPD.<sup>2</sup>

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<sup>2</sup> The Board notes that Appellant may have misunderstood the nature of this appeal. Appellant wants the Board to “find out exactly what in the background precluded me from qualifying for the OSC position.” Appellant’s Appeal. Appellant appears to have requested the Board to conduct an “audit, investigation, and inquiry” under Montgomery County Code § 33-13A and Montgomery County Personnel Regulations (MCPR), 2001, § 35-20. However, Appellant has filed an appeal under the Board’s appeal procedures as set forth in Montgomery County Code § 33-14 and MCPR, 2001, § 35-2 *et seq.*

Although the Board is not conducting an “audit, investigation, and inquiry” in this matter, the Board continues to believe (as stated in MSPB Case No. 13-10) that the County’s “Authorization for Release of Information” that the County requires applicants to sign in order to authorize background investigations is overbroad. Here, the County argues that, because of the release, Appellant is not entitled to know why Appellant failed the background investigation. However, the release states only that the “source(s) of confidential information cannot and will not be released to (applicant).” The Board can certainly understand that in some situations, revealing the content of the information showing “why” an applicant failed the background investigation would also necessarily reveal “who” gave the information. But that is not always the case.

Moreover, if applicants are not informed of why they failed the background investigation, then how can they contest and/or correct inaccurate information? It is unclear whether the County is complying with the Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1661 *et*

County:

- Appellant's appeal is extremely untimely.
- Appellant was notified more than two years ago by the DPM that Appellant did not pass the background investigation and would not be placed in the MCPD 5<sup>th</sup> District OSC position.
- Appellant should have filed a timely grievance at the time Appellant was notified of Appellant's nonselection.
- The period of ten (10) working days to file an appeal with the MSPB under the Personnel Regulations begins to run after an applicant receives notice that the applicant will not be appointed to a County position.
- Appellant's 10-day period started to run in early August 2011, when the DPM notified Appellant that Appellant had not passed the background investigation and would not be placed in the position.
- Even if the Appellant's complaint was timely, there is no basis for granting Appellant's appeal.
- Appellant maintains that Appellant did not receive any communication from MCPD either about its findings or Appellant's background investigation or Appellant's employment status.
- Appellant seeks as part of Appellant's appeal to find out exactly what the background investigation found which precluded Appellant from qualifying for the OSC position with MCPD.
- Appellant signed a release and a consent form prior to the background investigation that precludes MCPD from releasing confidential information to the Appellant.
- The DPM's notification to Appellant regarding Appellant's nonselection for the OSC position constitutes notification under Section 35-3(b) of the Personnel Regulations to the same extent that a form letter from MCPD or a computer generated e-mail stating simply that Appellant had not been selected for the position would have done.
- The Personnel Regulations do not require that the task of notification of a nonselection be performed by the department.
- The Board should dismiss the appeal based on it being untimely.

**APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Code, Chapter 1, General Provisions, Article 3. The Meaning of Provisions of This Code, Section 1-301, *Rules of interpretation***, which states in applicable part,

The following rules of interpretation apply to resolutions adopted by the Council and to laws enacted by the Council in legislative session:

...

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*seq.*, and the Maryland Job Applicant Fairness Act, Md., Code, Lab. & Empl. § 3-711 (2011). The Board believes that the County greatly needs to re-evaluate its background investigation policy and procedures.

- (3) *How to compute deadlines.* If the Code requires or allows a person to perform an act within a specific time period measured in days, the person must compute the deadline in the following manner:
- a. Count the day after the event as the first day of the period, if the period follows an event.
  - b. Count the remaining number of days in the period . . . .
  - c. Do not count the last day if it is a Saturday, Sunday, or legal holiday or if the office where the person must file a paper or perform an act is not open during the regular hours of that office.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (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 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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

...

**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.

**ISSUE**

Is Appellant's appeal timely?

## **ANALYSIS AND CONCLUSIONS**

As the County correctly points out, under applicable Personnel Regulations, Appellant had ten working days to file an appeal challenging Appellant's nonselection for the vacant OSC position in MCPD. Appellant was notified of Appellant's nonselection by the DPM in early August 2011. However, it was not until August 22, 2013, two years after Appellant's nonselection, that Appellant filed Appellant's appeal. *See Appellant's Appeal.*

The relevant matters at issue in this appeal occurred from May 2011 to August 2011. Appellant applied for a vacant OSC position in MCPD in May 2011. Appellant was interviewed for this same position in May 2011. Subsequently, MCPD conducted a comprehensive background investigation. In August 2011, Appellant was notified by the DPM that Appellant had not passed the background investigation and therefore would not be placed in the MCPD 5<sup>th</sup> District OSC position. During the same time period, Appellant was offered and accepted a vacant OSC position in the OHR. To date, Appellant has continued in this placement.

Appellant did not file an appeal until August 22, 2013 and has not offered any explanation or evidence to excuse Appellant's untimely filing. Absent evidence justifying the delay in Appellant filing an appeal within ten working days after Appellant became aware of Appellant's nonselection, the Board must conclude that Appellant has failed to file an appeal in a timely manner.

## **ORDER**

Based on the foregoing, the Board hereby dismisses Appellant's appeal regarding Appellant's nonselection for the OSC position in MCPD as untimely.

## **RECONSIDERATION**

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of 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 Section 2A-7(c) of the Administrative Procedures Act (APA). There is no specific time limit for filing such a motion under the APA or the Board's current procedures. Rather, the APA indicates that motions should be filed promptly.

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 from 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 2014, the Board issued the following decision on a Request for Reconsideration of a Final Decision.

# **RECONSIDERATION REQUEST INVOLVING** **FINAL DECISION**

## **CASE NO. 13-12**

### **DECISION ON COUNTY'S REQUEST FOR RECONSIDERATION**

On July 3, 2013, the County filed a Request for Reconsideration (County's Reconsideration Request),<sup>1</sup> with three attachments,<sup>2</sup> seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Final Decision and Order dated June 26, 2013. In its Final Decision and Order, the Board granted Appellant's appeal from the determination of Montgomery County's Office of Human Resources (OHR) that Appellant failed to meet the minimum qualifications for the position of Transit Information Systems Technician (Transit Technician) in Transit Services, Department of Transportation (DOT). This Decision on the County's Request for Reconsideration was considered and decided by the Vice Chairperson and Associate Member. The Board Chair issued a separate dissenting opinion.

### **FINDINGS OF FACT**<sup>3</sup>

Appellant, while serving as an Acting Transit Technician in DOT, submitted Appellant's application<sup>4</sup> for the permanent position of Transit Technician on March 29, 2013. County's

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<sup>1</sup> Pursuant to the Administrative Procedures Act, the Board has ten (10) days following the receipt of a request for reconsideration to issue a decision. If the Board fails to act within ten days from receipt of the request, the request is deemed denied. Montgomery County Code Section 2A-10(f).

<sup>2</sup> County Attachment 4A is the Affidavit of OHR Staffing Specialist made under penalty of perjury, which the County seeks to substitute for County Attachment 4. County Attachment 4, as noted in the Board's Final Decision, was an "Affidavit" of OHR Staffing Specialist which was neither notarized nor made under penalty of perjury. *See* Final Decision at 2-3 n.6. As discussed *infra*, the Board rejects the County's substitution. In addition to Attachment 4A, the County also submitted Attachment 6 which is Appellant's Reply to the County's Response. Finally, the County submitted another Affidavit of OHR Staffing Specialist, labeled Attachment 7. As discussed *infra*, pursuant to Board precedent, the Board will only consider that part of Attachment 7 which contains new and material evidence that was not available when the record closed in this matter.

<sup>3</sup> The Board incorporates by reference its Findings of Fact in the Final Decision in this matter and will only set forth those findings relevant to the Request for Reconsideration.

<sup>4</sup> Appellant conceded that Appellant did not submit the same resume as Appellant did for the temporary promotion opportunity as Appellant already believed it was on file with OHR. Appellant's Reply at 2; County's Reconsideration Request, Attachment (Attach.) 6.

Response at 1. Appellant had been serving in an acting capacity in the Transit Technician position since May 6, 2012. *Id.* at 1-2; Appellant's Appeal. Prior to serving in an acting capacity, Appellant served in a PACE<sup>5</sup> assignment as a Transit Technician. County's Response, Attach. 3; Appellant's Appeal. At the time Appellant was temporarily promoted to the Acting Transit Technician position, Appellant was found to have met the minimum qualifications for the temporary promotion by the OHR Staffing Specialist who handles DOT positions. County's Response at 2.

OHR Staffing Specialist II in OHR reviewed the forty applications received for the permanent Transit Technician position, County's Response at 2, as the OHR Staffing Specialist was allegedly on vacation at the time the job announcement closed. *Id.* at 2 & n.2. Based on OHR Staffing Specialist II's purported review of the resume submitted by Appellant, OHR Staffing Specialist II allegedly determined that Appellant did not meet the minimum qualifications for the position.<sup>6</sup> County's Response at 2. Purportedly, when the OHR Staffing Specialist returned from vacation, the OHR Staffing Specialist reviewed Appellant's resume and agreed with OHR Staffing Specialist II's determination that Appellant failed to meet the minimum qualifications for the permanent Transit Technician position. *Id.* at 2 n.2. Appellant was notified on April 23, 2013 by OHR that Appellant did not meet the minimum qualifications for this position. County's Response at 1.

### **ARGUMENTS OF THE COUNTY**

In its Request for Reconsideration, the County challenges the Board's holding that as Appellant was serving on a temporary promotion to the Transit Technician position for which Appellant had to meet the minimum qualifications, there was no need for any further evaluations of Appellant's resume to determine if Appellant met the minimum qualifications. County's Reconsideration Request at 1. The County argues that this holding is contrary to OHR's "regular and uniform policy" of reviewing the minimum qualifications of all applicants for a position. *Id.* The County also challenges the Board's review of Appellant's resume to determine whether Appellant met the preferred criteria, arguing that instead it should have remanded Appellant's application back to two unnamed subject matter experts for such a determination. *Id.* at 2. In addition, the County argues that pursuant to Section 27-2(c)(1)(D) of the Montgomery County Personnel Regulations,<sup>7</sup> the Board should not have given Appellant a competitive advantage

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<sup>5</sup> PACE stands for Position and Career Education System. See PACE Contract on OHR's website available at <http://www.montgomerycountymd.gov/ohr/staffing/staffing.html>.

<sup>6</sup> The minimum qualifications for the position were three years of journey-level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment and communication systems. County's Response, Attach. 2. In addition, the position required an Associate of Arts Degree in Electronics technology with coursework in computer networking, database management and communication systems or a related field. *Id.* An equivalent combination of education and experience could be substituted. *Id.*

<sup>7</sup> The provision cited by the County specifically indicates that a department director may not give an employee who was temporarily promoted a priority claim or competitive advantage if

because Appellant was on a temporary promotion.

The County also asserts that the Board should not have disregarded a statement signed by the OHR Staffing Specialist simply because it was neither notarized nor made under penalty of perjury. County's Reconsideration Request at 3. While the County concedes that the Board has repeatedly warned the County that statements by a representative in a pleading are not evidence, it argues that nowhere in the Board's rules is there any mention of the need to submit an affidavit.<sup>8</sup> *Id.* The County challenges the fact that the Board accepted Appellant's explanation of why Appellant did not submit the same resume when Appellant applied for the permanent Transit Technician position even though it was not notarized. *Id.* at 3-4.

The County also notes that it never received a copy of the Appellant's Reply to its Response. County's Reconsideration Request at 4. According to the County, Board staff should have noticed that in Appellant's Reply there was no cc: or Certificate of Service and informed Appellant of Appellant's obligation to send a copy to the County Attorney's Office.<sup>9</sup>

Finally, the County states that the permanent position of Transit Technician has not been filled and has been re-advertised. County's Reconsideration Request at 4. Therefore, it argues that Appellant has suffered no harm and accordingly priority consideration is inappropriate as Appellant can reapply for the position. *Id.*

#### **APPLICABLE LAWS AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-5, Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article, which states in applicable part,**

...

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the position is later filled. Montgomery County Personnel Regulations (2001) (as amended) (MCPR or Personnel Regulations), Section 27-2(c)(1)(D). The County argues that by implication the provision also applies to the Board. County's Reconsideration Request at 2. The Board rejects this assertion as Section 2-2(j) of the Personnel Regulations makes clear that the Personnel Regulations do not apply to the Board.

<sup>8</sup> The Board would be remiss if it did not note that the lack of affidavits is generally not an issue when the County submits its Prehearing Submissions in disciplinary matters. Rather, the problem appears to be reserved for nonselection cases where the County's submission is far less formal.

<sup>9</sup> The Board would note that its staff did notice this omission and brought it to the attention of Appellant at the time Appellant hand-carried Appellant's Reply to the Board's office on June 19, 2013. Specifically, Appellant was informed that Appellant had to file a copy of Appellant's Reply with the County Attorney's Office and was told where to go to file Appellant's Reply. The Board has instructed staff to make a record of this conversation which will be included in the case file.

(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; . . .

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action,** which states in applicable part,

...

- (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,<sup>10</sup> "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 non-merit factors, may be filed directly with the Merit System Protection Board.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14, Hearing authority of Board,** which states in applicable part,

...

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

...

- (3) Order priority consideration be given to an employee found qualified before consideration is given to other candidates; . . .

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<sup>10</sup> Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, and June 25, 2013), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:**

...

**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 or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

**ISSUE**

Has the County shown good cause as to why the Board should reconsider its Final Decision and Order in this case?

**ANALYSIS AND CONCLUSIONS**

**The Board Concludes That The County Has Failed To Show Good Cause As To Why The Board Should Reconsider Its Final Decision.**

- A. In Support Of A Request For Reconsideration, The Board Will Only Consider New And Material Evidence That Was Not Available When The Record Closed.

The Board is charged under the Personnel Regulations with making a decision based on the written record before it. MCPR, 2001, Section 35-10(a)(2). The Board did that in this case. Now, somewhat belatedly, the County seeks to supplement the record with the addition of two more exhibits – Attachment 4A and Attachment 7.<sup>11</sup> The Board has previously had the occasion to consider the issue of whether it should accept additional evidence at the reconsideration stage from the County that was not presented to it during the processing of the case up until the issuance of the Final Decision. In its Decision on County’s Motion for Reconsideration, MSPB Case No. 12-11 (2012), the Board held that it would only consider new and material evidence that was not available when the record closed. *See also* Decision on County’s Request for Reconsideration, MSPB Case No. 13-10 (2013).

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<sup>11</sup> Attachment 6 to the County’s Request for Reconsideration is already a part of the record as it is the Appellant’s Reply to the County’s Response.

In so holding, the Board noted that the U.S. Merit System Protection Board will grant a petition for review of an administrative judge's decision when "new and material evidence is available that, despite due diligence, was not available when the record closed." 5 C.F.R. § 1201.115(d)(1). Under the Federal Rules of Civil Procedure, Rule 60(b), a court may grant relief from a "final judgment, order, or proceeding", when a party establishes, *inter alia*, that there exists "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." *See Avansino v. USPS*, 3 M.S.P.R. 211, 214 (1980). In interpreting Rule 60(b), the courts have required the party offering the new evidence to provide a reasonable explanation as to why the additional material could not have been supplied earlier. *Id.* (citing to *United Medical Laboratories, Inc. v. Colombia Broadcasting System, Inc.*, 258 F. Supp. 735, 747 (D. Or. 1966), *aff'd*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969)).

The Board reasoned in MSPB Case No. 12-11 that there is a sound policy rationale for permitting the introduction of only new evidence at the reconsideration stage. The Fourth Circuit in *Springer v. Fairfax County School Board*, 134 F.3d 659, 667 (1998), reviewed the Individuals with Disabilities Education Act, which permitted the district court to hear additional evidence not put before the administrative agency during its processing of the matter. The Fourth Circuit held that such evidence should be limited to that which could not have been presented before the administrative agency. The Fourth Circuit explained its rationale for this rule thusly: "[A] lax interpretation of 'additional evidence' would reduce the proceedings before the state agency to a mere dress rehearsal . . . ." *Id.* (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 997 (1<sup>st</sup> Cir. 1990)). The Board found the Fourth Circuit's rationale persuasive. The Board therefore declined to allow the County to conduct a dress rehearsal before the Board and when that failed, plug the holes in its case by relitigating the case at the reconsideration stage. *See* Decision on County's Motion for Reconsideration, MSPB Case No. 12-11.

In holding in MSPB Case No. 12-11 that the Board would only consider evidence at the reconsideration stage which could not have been presented to the Board during the proceedings leading up to the issuance of a Final Decision, the Board instructed the County that to constitute new and material evidence, the information contained in a document submitted during the reconsideration stage, not just the document itself, must have been unavailable despite due diligence when the record closed. *Conway v. USPS*, 93 M.S.P.R. 6, 14 n.6 (2002); *Salaz v. OPM*, 91 M.S.P.R. 300, 302 (2002). Moreover, to be considered material evidence, the evidence provided must be of sufficient weight to warrant a finding different from the Board's initial decision. *Russo v. VA*, 3 M.S.P.R. 345, 349 (1980); *Fealhaber v. OPM*, 93 M.S.P.R. 143, 146 (2002).

B. The County Has Failed To Provide Any New Evidence To Support Its Position.

We now will examine the additional evidence proffered by the County in its Request for Reconsideration to see if it meets the standard for new and material evidence. Attachment 4A contains the same content as the document provided previously by the County but labeled Attachment 4. The only difference is that Attachment 4A is now made under penalty of perjury. Thus, Attachment 4A does not constitute new evidence; rather, it constitutes relevant evidence that could have been submitted by the County earlier.

In support of its effort to substitute Attachment 4A for Attachment 4, the County argues that the Board's rules of procedures are silent as to any requirement to submit an affidavit. County's Request for Reconsideration at 3. The Board notes that this very same issue – the Board's refusal to credit an unauthenticated document – was addressed in its decision on a County reconsideration request in MSPB Case No. 12-11. In that case, the County also argued that the Board's rules do not even mention affidavits. While that is true, the Board noted that the County had often submitted affidavits to the Board to support its position in cases not involving a hearing. Decision on County's Motion for Reconsideration, MSPB Case No. 12-11 (citing to MSPB Case Nos. 11-27; 11-28; 11-29; 11-30; 11-31; 11-32; 11-33; 11-34; 11-35; and 11-36).<sup>12</sup>

As the Board has previously warned the County, documents submitted that are unauthenticated and unexplained may be deemed by the Board to lack probative value. Decision on County's Motion for Reconsideration, MSPB Case No. 12-11 (citing to *Atkinson v. Dep't of the Air Force*, 18 M.S.P.R. 691, 693 (1984)). Ultimately, it is the responsibility of the County to determine what evidence it should submit to the Board to support its position. Because the County chose to submit an affidavit that was neither notarized nor made under penalty of perjury, the Board reaffirms its determination that it was correct to disregard this document. The Board also rejects the County's belated effort to provide a notarized substitute.

The County complains that the Board, while not accepting the County's affidavit because it was neither notarized nor made under penalty of perjury, seemed to accept the Appellant's explanation that Appellant did not submit the same resume that Appellant had submitted for Appellant's temporary promotion because Appellant believed it was on file. The County argues that this is unfair and that the Board was wrong to do so because Appellant's assertion was neither notarized nor made under penalty of perjury. County's Request for Reconsideration at 4. The Board would note that over the years it has made special efforts to accommodate *pro se* litigants such as Appellant; this policy is in accord with the one followed by the U.S. Merit System Protection Board (U.S. MSPB) and the courts.<sup>13</sup> See U.S. Merit Systems Protection Board Judges' Handbook at 8 available at <http://www.mspb.gov/appeals/appeals.htm>. The Board notes that the U.S. MSPB encourages its administrative judges to allow greater latitude to the *pro se* litigant in questioning witnesses and in giving testimony. *Id.* Moreover, these administrative judges are to interpret *pro se* litigants' arguments in the most favorable light. *Id.* (citing to *Miles v. Dep't of Veteran Affairs*, 84 M.S.P.R. 418, 421 (1999)). Therefore, the Board rejects the County's assertion that the Board was unfair when it accepted Appellant's explanation.

The County has also proffered Attachment 7 in support of its Reconsideration Request. Attachment 7, an affidavit from the OHR Staffing Specialist made under penalty of perjury,

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<sup>12</sup> In each of the cited cases, all involving furloughs, the County submitted an affidavit from the OHR Director and an affidavit from the OHR Division Manager to support the assertions made by the County's representative in its pleadings.

<sup>13</sup> For example, in *Roche v. United States Postal Service*, 828 F.2d 1555, 1558 (Fed. Cir. 1987), the Federal Circuit held that a *pro se* appellant is not required to plead the issues with the precision of an attorney in a judicial proceeding.

contains a description by of OHR's purported "regular and uniform policy" of reviewing the minimum qualifications of all applicants for a position, whether the applicant has been previously temporarily promoted or has previously been found to have met the minimum qualifications of the same position. It also discusses the two-step process for rating applications. The Board finds that none of this information from the OHR Staffing Specialist constitutes new and material evidence, as this information was available to the County at the time it submitted its response to the appeal.

The only new evidence provided in Attachment 7 which was not available at the time the record closed in this case is the statement by the OHR Staffing Specialist that the permanent position of Transit Information Systems Technician has not yet been filled and has been re-advertised with a closing date of July 13. *See* County's Reconsideration Request, Attach. 7 ¶ 3. As this information has no bearing on the merits of Appellant's appeal, the Board finds the County has failed to provide any new evidence to support its reconsideration request.

C. Assuming, Arguendo, The County Had Submitted New Evidence, Its Evidence Does Not Alter The Determination Of The Board That There Was A Flaw In The Rating Process.

The County asserts in its Reconsideration Request that there is a "regular and uniform policy" of reviewing the minimum qualifications of all applicants for a position, whether or not the applicant has been temporarily promoted or has previously met the qualification requirements for the same position. County's Reconsideration Request, Attach. 7. Significantly, however, the County does not point to any provision in the Personnel Regulations that establishes this policy. Moreover, the County argues that OHR's review of the minimum qualifications of all applicants is based **solely** on the materials submitted as part of the application. County's Reconsideration Request at 2 (emphasis added). Again, the County does not cite to any provision of the Personnel Regulations that establish this policy.

The Personnel Regulations make clear that OHR 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. MCPR, 2001, Section 6-5(a). The Personnel Regulations also state that the OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list. MCPR, 2001, Section 6-5(b). The Board has done a comprehensive review of the evidence in this matter and notes that nowhere in the vacancy announcement is it indicated that an applicant is evaluated **solely** on the materials submitted as part of Appellant's application. Moreover, nowhere in the vacancy announcement is a potential candidate informed that said candidate's qualifications will be re-reviewed even if Appellant has previously been found to have met the qualification requirements or been temporarily promoted to the same position.

The Board finds that OHR failed to adhere to the Personnel Regulations when it failed to tell applicants about its "regular and uniform" policy or that an applicant is evaluated solely on the materials submitted as part of his/her application. The merit system law requires the "full

and open consideration of qualified applicants.” Montgomery County Code Section 33-5(b)(2). Therefore, the selection process must be open and known to everyone involved from the beginning and throughout the process. In the instant case, this did not occur. By definition, OHR’s unwritten policies failed to provide proper notice of the selection process. Accordingly, the Board reaffirms its determination that there was a flaw in the rating process when Appellant was found not to have met the minimum qualifications for the permanent Transit Technician position despite the fact that Appellant’s resume established that Appellant was serving on a temporary promotion to the Transit Technician position after being found by OHR to meet the minimum qualifications.<sup>14</sup>

The County also argues that the Board was wrong to evaluate Appellant’s resume to determine if Appellant met the preferred criteria; instead, the County argues the Board should have remanded the matter to the County for a review. County’s Reconsideration Request at 2. The Board is empowered by its statute to order appropriate remedial relief to accomplish the objectives of its statute. One form of relief is priority consideration.<sup>15</sup> Montgomery County Code Section 33-14(c)(3). Before ordering priority consideration, the Board needed to ensure that Appellant was qualified for the position. *Id.* Accordingly, the Board had to determine if Appellant met the preferred criteria in order to ensure that the relief it ordered was appropriate.

### **ORDER**

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<sup>14</sup> Again, the Board reiterates that in this case the County clearly exalted form over substance when it cited to Appellant’s “bare bones” resume as the rationale for its determination that Appellant did not meet the minimum qualifications. *See* County’s Response at 2. Appellant clearly met the qualifications for the permanent Transit Technician position based on a combination of education and appropriate experience. OHR made this determination when it approved Appellant’s temporary promotion, *see* County’s Response at 2. That OHR would have to re-review this determination simply is absurd; particularly as the OHR Staffing Specialist asserted, under penalty of perjury, that Appellant met the minimum qualifications at the time the OHR Staffing Specialist reviewed Appellant’s qualifications for the temporary promotion. County’s Reconsideration Request, Attach. 4A.

<sup>15</sup> The Board finds that priority consideration, contrary to the County’s assertion, is not giving Appellant a “free pass”, County’s Reconsideration Request at 2, as the Board has determined that Appellant clearly met both the minimum qualifications and preferred criteria of the position. The Board is aware that priority consideration does not guarantee the Appellant the position; it simply requires the County to consider Appellant before others are considered. MCPR, 2001, Section 1-56. The Board also rejects the County’s argument that no harm has occurred to Appellant because Appellant may re-apply for the Transit Technician position. County’s Reconsideration Request at 4. As the County noted in its Response to this appeal, Appellant’s temporary promotion to the Transit Technician position ended on May 4, 2013. County’s Response at 2 n.2. Thus, Appellant has not been receiving compensation at the Grade 19 since then. Had OHR correctly handled Appellant’s application, Appellant might have been selected for the permanent Transit Technician position and again begun receiving compensation at the Grade 19.

Based on the above, the Board denies the County's Request for Reconsideration and again orders the County to do the following.

1. Appellant is to be placed on the eligible list for the Transit Information Systems Technician; and
2. Appellant is to be granted priority consideration for the Transit Information Systems Technician vacancy that the County has re-advertised.

### **DISSENTING OPINION OF BOARD CHAIR**

For the reasons given below, I would grant the County's Request for Reconsideration on the merits but not on the procedural grounds cited by the County.

### **BACKGROUND**

Appellant was serving on a temporary promotion to the position of Transit Information Systems Technician (Transit Technician) in the Department of Transportation (DOT), when Appellant applied for the permanent position of Transit Technician. Appellant's Appeal; County's Response at 1. In order to receive the temporary promotion, Appellant had to meet the minimum qualifications of the position. County's Response at 2. To demonstrate Appellant's qualifications for the temporary promotion, Appellant had submitted a resume, a description of Appellant's duties serving in the PACE<sup>1</sup> position of Transit Technician, and an official transcript from the Computer Learning Centers, indicating Appellant's grade point average was 4.00 and that Appellant earned 53 credit hours. Appellant's Reply at 1; County's Response, Attachment (Attach.) 1. While Appellant did not have an Associate of Arts Degree in Electronics,<sup>2</sup> the OHR Staffing Specialist who handled DOT recruitment actions gave Appellant some educational equivalency credit for Appellant's experience as a Repair Technician. County's Response at 3. Appellant also received credit towards the experience requirement of the position based on Appellant's work as Repair Technician from 1999-2003. *Id.* at 4.

In sharp contrast, when Appellant applied for the permanent position of Transit Technician, Appellant submitted a much less detailed resume, *compare* County's Response, Attach. 1 *with* County's Response, Attach. 3. Instead of including a copy of Appellant's official transcript from the Computer Learning Centers, Appellant submitted Appellant's diploma and a Certificate of Distinction Appellant received from the Computer Learning Centers. County's

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<sup>1</sup> PACE stands for Position and Career Education System. See PACE Contract on OHR's website available at <http://www.montgomerycountymd.gov/ohr/staffing/staffing.html>.

<sup>2</sup> The minimum qualifications for the Transit Technician position were three years of journey-level experience in the troubleshooting and installation of microprocessor based electronic systems, revenue handling equipment and communication systems. County's Response, Attach. 2. In addition, the position required an Associate of Arts Degree in Electronics technology with coursework in computer networking, database management and communication systems or a related field. *Id.* An equivalent combination of education and experience could be substituted. *Id.*

Response, Attach. 3. Significantly, Appellant concedes that Appellant submitted less material for the permanent position than Appellant had for the temporary promotion. Appellant's Reply at 1. According to Appellant, Appellant believed that the information already existed in Appellant's file and Appellant did not resubmit it as Appellant did not want to bombard OHR with material which was already in Appellant's file. *Id.*

OHR Staffing Specialist II and the OHR Staffing Specialist both reviewed Appellant's resume and found that Appellant did not meet the minimum qualifications for the permanent Transit Technician position. County's Response at 2 n.2. Accordingly, OHR notified Appellant that Appellant failed to meet the minimum qualifications.

### ANALYSIS

I respectfully disagree with the majority's determination that based on Appellant's resume submitted for the permanent Transit Technician position Appellant met the minimum qualifications for that position. As explained by the County, the selection process is a two-step process. County's Reconsideration Request at 2. The first step is to screen for minimum qualifications. *Id.* It was at this step that Appellant was disqualified. As I previously noted in my Dissenting Opinion to the Board's Final Decision, it is clear from a review of Appellant's resume submitted for the permanent Transit Technician position that Appellant did not meet the education requirement. It is also clear from a review of Appellant's resume submitted for the permanent Transit Technician position that Appellant did not meet the experience requirement. I therefore find that OHR's screening process was fair and fairly applied in this case.

I also find that allowing the majority's Final Decision to stand, which granted Appellant priority consideration, would give a temporarily promoted employee an unwarranted advantage in competition for the permanent Transit Technician position, in violation of Montgomery County Personnel Regulations (2001) (as amended) (MCPR or Personnel Regulations), Section 27-2(c)(1)(D).<sup>3</sup> In fact, giving Appellant priority consideration actually rewards Appellant for having submitted a deficient application in the first place. Therefore, I would grant the County's Reconsideration Request and reverse the Board's Final Decision in this matter based on the merits.

I, however, disagree with the County's criticisms of the Board's process in its Reconsideration Request. The Board is a quasi-judicial administrative agency charged by Article 4 of the County Charter and Chapter 33, Article II of the Montgomery County Code (County Code) with ensuring due process and protecting the merit system in all aspects of County personnel administration. *See* County Charter Section 404;<sup>4</sup> County Code Section 33-

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<sup>3</sup> This provision states: "A department director must not give an employee who was temporarily promoted a priority claim or competitive advantage if the position is later filled on a competitive basis." MCPR, 2001, Section 27-2(c)(1)(D).

<sup>4</sup> Section 404, Duties of the Merit System Protection Board, provides:

7(a);<sup>5</sup> County Code Section 33-14(a)<sup>6</sup>. Although the Board's proceedings may not be subject to the Maryland Rules, I find that Title 1, General Provisions, of the Maryland Rules, sets forth

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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 recommendation. 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 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.

<sup>5</sup> Section 33-7(a) provides:

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.

<sup>6</sup> Section 33-14(a) provides:

**Hearing requirements.** Hearings before the Board are quasi-judicial in nature and shall be conducted in formal session in accordance with the provisions and authority contained in the county administrative procedures act. Board members shall be provided orientation and training as required to properly implement the requirements of the county administrative procedures act and conduct administrative evidentiary proceedings. With respect to hearings which go beyond one (1) session, the Board shall endeavor to schedule such hearings so that a minimum amount of time elapses between sessions. When required for

certain rules of general applicability for judicial proceedings that implement fundamental due process requirements and merit system principles. *See* Md. Rule 1-101 (applicability), 1-201(a) (“These rules shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.”); County Code Section 33-5(b) (merit system principles).

In particular, the Maryland Rules require that affidavits be sworn under penalty of perjury. *See* Md. Rule 1-202(b), 1-304. It should come as no surprise to County attorneys, who are required to be members of the Maryland Bar and to litigate before Maryland courts and administrative agencies, that any paper which purports to be an “Affidavit” must be sworn under penalty of perjury, regardless of the forum where such paper is submitted. Contrary to the County’s suggestion, County’s Reconsideration Request at 3, the Board is not required to amend its rules of procedure to set forth the fundamental due process requirement that testimony must be made under oath.

The Board has considered that requiring that an affidavit be notarized in accordance with Rule 1-304 may impose an undue burden on litigants. The Board has therefore ruled in the Final Decision issued in this case that it will accept a declaration sworn under penalty of perjury in lieu of a notarized affidavit. *See* Final Decision at 2-3 n.6. This requirement is not onerous, but it is important because the Board’s decisions must be supported by substantial evidence in the record.

The County objects that the Board does not hold appellants to the same standard as the County by requiring appellants to submit sworn pleadings to the Board. County’s Reconsideration Request at 3-4. The County’s objection is misplaced. It is well-established that pleadings are not evidence. *See* MSPB Case No. 08-13 (2008); MSPB Case No. 12-11 (2012); MSPB Case No. 13-10 (2013); *see, e.g., Joos v. Department of Treasury*, 79 M.S.P.R. 342, 348 (1998); *Leaton v. Department of Interior*, 65 M.S.P.R. 331, 337 (1994); *Perez v. Railroad Retirement Board*, 65 M.S.P.R. 287, 289 (1994); *Rickels v. Department of Treasury*, 42 M.S.P.R. 596, 603 (1989); *Vincent v. Department of Justice*, 32 M.S.P.R. 263, 268-69 (1987); *Enos v. USPS*, 8 M.S.P.R. 59, 63 (1981).

The Board has consistently required all litigants to submit acceptable evidence to support any factual allegations made in the pleadings where those facts are material to the Board’s decision. In this case, it was undisputed that the Appellant did not submit the same resume Appellant had previously submitted for the temporary promotion. The Appellant’s explanation as to why Appellant failed to re-submit the same resume was an argument, not a factual allegation; and, in any event, the explanation was not material to the Board’s Final Decision.

The Maryland Rules further require that any pleading or other paper requiring service, other than the original pleading, must be accompanied by proof of service. *See* Md. Rule 1-323. If the party being served does not admit or waive service, service must be proved via “a signed certificate showing the date and manner of making service.” *Id.* Again, this requirement should

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continuity and minimum loss of time in concluding a case, the Board shall also endeavor to schedule hearings during daytime, weekday hours. Hearings shall be open to the public with reasonable notice, if requested by the employee.

come as no surprise to County attorneys. Yet, the County's Request for Reconsideration does not contain "a signed certificate showing the date and manner of making service." Rather, the pleading is dated at the top, signed by a County attorney at the "From" line, and notes a "cc" to the Appellant and Appellant's address at the end of the pleading. The County apparently expects the Board to infer proof of service by piecing together these discrete bits of information. The Board further notes that the County consistently follows this practice in its submissions to the Board regarding nonselection cases.<sup>7</sup>

Again, notice is a fundamental due process requirement. The certificate of service provides prima facie proof that the notice requirement has been met. The Board requires all litigants to submit acceptable proof of service. *See* MCPR, 2001, Section 35-5(b).<sup>8</sup>

The County objects that the Appellant failed to serve Appellant's reply pleading upon the County. In this case, the Board's staff noticed at the time Appellant filed Appellant's Reply that there was no indication that it had been served on the County Attorney's Office and notified Appellant of Appellant's responsibility to do so. However, subsequently the Board learned that Appellant failed to abide by this instruction.

Therefore, in order to avoid such problems in the future, I would vote to amend the Board's regulations to require all litigants to include or attach a proper certificate of service substantially complying with Rule 1-323 to all pleadings and papers filed with the Board, other than the appellant's original pleading. If the certificate of service is not provided, the Board and/or the Board's staff could reject the filing.

Based on the foregoing analysis, I would grant the County's Request for Reconsideration and reverse the Final Decision on the merits.

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<sup>7</sup> I agree with the majority's observation that the County's submissions in nonselection cases are far less formal than its submissions in disciplinary matters. *See* Decision on County's Request for Reconsideration at 3 n.8.

<sup>8</sup> This provision states: "A party to an appeal must indicate on every paper filed with the MSPB that a copy was sent to the other party to the appeal." MCPR, 2001, Section 35-5(b).

# **ATTORNEY 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 the chance to respond. The Board then issues a decision based on the written record.

The following case involving a request for attorney fees was decided during fiscal year 2014.

# **ATTORNEY FEES DECISION**

## **CASE NO. 13-02**

### **DECISION ON ATTORNEY FEE REQUEST**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's request for reimbursement of itemized attorney fees and costs related to the above-referenced case. Appellant has submitted a request for \$17,312.50. See Appellant's Request for Attorney Fees<sup>1</sup> (Appellant's Request) at 2, 3. The County responded (County's Response), objecting to the hourly rate sought by Appellant's counsel as well as the total fee calculation, arguing that because the Appellant only partially prevailed, the amount of attorney fees sought by Appellant should be limited to one-half of what was requested, after reducing the hourly rate sought. County's Response at 3. Appellant replied (Appellant's Reply), arguing Appellant's fee request was reasonable based on comparable rates of area attorneys. Appellant's Reply at 3. Appellant's counsel also claimed that Appellant did obtain a full recovery so no reduction in fees is warranted. *Id.* at 2-3.

### **POSITIONS OF THE PARTIES**

The County objects to Appellant's counsel hourly rates of \$450 and \$250. County's Response at 1. The County notes that the Board has repeatedly rejected the application of the *Laffey* Matrix to attorney fee cases before it.<sup>2</sup> *Id.* The County notes that the highest rate awarded to an experienced employment law attorney with a strong reputation in the community was \$300. *Id.* (citing to MSPB Case No. 07-17). The County argues that because Appellant's counsel failed to provide any specific information concerning counsel's personnel and labor law experience \$190 is a reasonable rate for Appellant's counsel. County's Response at 1.

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<sup>1</sup> In addition to Appellant's Request, Appellant submitted the following exhibits: Exhibit A – Affidavit attesting to Appellant's attorney's years of experience and designated hourly rates; Exhibits B & C – Copies of the *Laffey* Matrix, which according to Appellant's counsel would justify the hourly rate counsel charged; Exhibit D – Billing Summary for hours rendered by Appellant's counsel; and Exhibit E – Final Decision and Order in MSPB Case No. 13-02 (Final Decision).

<sup>2</sup> The *Laffey* rate cited by Appellant's counsel is based on the Matrix of hourly rates for attorneys of varying experience levels prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. *See* MSPB Case No. 07-17. Specifically, the Matrix is based on the hourly rates for attorneys allowed by the Federal District Court of the District of Columbia in *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The Matrix's rates for subsequent years are determined by adding the cost of living for the Washington, D.C. area to the applicable rate for the prior year. *See* MSPB Case No. 07-17.

In addition, the County asserts that the Board should reduce Appellant's fee request by fifty percent, based on the degree of success in this case. County's Response at 2. According to the County, Appellant did not completely prevail in Appellant's appeal. *Id.* While the Board did reduce the charges and punishment against Appellant, because Appellant's conduct was found to be unbecoming an employee, Appellant still received an 80-hour suspension. *Id.*

Appellant's lead counsel argues that counsel has practiced law since 1986. Therefore, based on the *Laffey* Matrix, counsel should receive \$771 an hour. In regards to the associate counsel who assisted with Appellant's case, since the associate counsel has practiced law since 2007, Appellant's counsel's firm should receive an hourly rate of \$393 for the associate counsel's work on the case. Appellant's Request for Attorney Fees at 3.

In Appellant's Reply, Appellant's counsel asserts that the County's mathematical calculation is flawed. When the County reduced the billed hours by fifty percent, it also reduced the amount of hours spent preparing Appellant's Request for Attorney Fees by fifty percent. The hours spent preparing Appellant's Request for Attorney Fees are separate and apart from the lodestar calculations of fees earned as a prevailing party. Appellant's Reply at 1.

Finally, Appellant's counsel argues that Appellant should be awarded all of Appellant's attorney's fees and not have the hours reduced by fifty percent, even if the Board determines that the results obtained by Appellant constitute only a partial recovery. Appellant's Reply at 2. Assuming, *arguendo*, that Appellant is not considered to have obtained a full recovery, which Appellant avers Appellant did receive, then the Board should only adjust the lodestar if it deems Appellant's claims are distinct. Appellant's Reply at 2. Appellant's counsel asserts that in determining whether to adjust the lodestar calculation, the Board has held that "where, as here, a prevailing party makes more than one claim for relief, and the claims involve a common core of facts or are based on related legal theories, the fee determination should reflect the significance of the overall relief obtained in relation to the hours reasonably expended." *Id.*

### **APPROPRIATE REIMBURSEMENT FORMULA**

Montgomery County Code Section 33-14, *Hearing Authority of the Board*, in providing the Board with remedial authority, empowers the Board in subsection (c) to "[o]rder the County to reimburse or pay *all or part of the employee's reasonable attorney's fees*" (emphasis added). *See also Montgomery County, Maryland v. Jamsa*, 153 Md. App. 346, 355, 836 A.2d 745, 750 (Ct. Spec. App. 2003) (the court, in discussing Section 33-14(c)(9), which authorizes the Board to pay "all or part" of an employee's reasonable attorney's fees, noted that "[t]he County Council did not mandate that the Board award attorney's fees; it authorized the Board to do so.").

In determining what constitutes a reasonable fee, the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;

- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code § 33-14(c)(9).

In the case of *Manor Country Club v. Betty Flaa*, 387 Md. 297 (2005), the Court of Appeals for Maryland considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The Board notes that the provisions of § 27-7(k)(1) then in effect are identical to § 33-14(c)(9), as set forth *supra*, which is controlling for the Board. The Court of Appeals in *Flaa* noted that the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974),<sup>3</sup> *vacated in part, Blanchard v. Bergeron*, 489 U.S. 87 (1989), were "in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)" for determining an appropriate attorney's fees award."<sup>4</sup> 387 Md. at 313.

In *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242 (2008), the Court of Appeals cited to both *Hensley* and *Flaa* for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney fees. 942 A.2d at 1252. As the County correctly notes, the Board historically has considered the degree of success in making an attorney fee award. County's Response at 2 (citing to MSPB Case No. 05-05). *Friolo* also indicated that the Court of Appeals applied a lodestar type of analysis to calculate a fee award. *Monmouth Meadows v. Hamilton*, 416 Md. 325, 334-35 (2010).

### **ANALYSIS AND CONCLUSIONS**

In determining a reasonable fee award, the Board follows the guidance of its statute and the guidance of the Court of Appeals, which applies lodestar calculations in assessing a reasonable fee.

#### **The Appropriate Hourly Rate**

As the County correctly notes, it is well established that the Board has repeatedly

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<sup>3</sup> *Johnson* dealt with an award of a reasonable attorney's fee pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964. *Johnson* set forth twelve factors to be considered in determining the amount of an attorney's fee award. *See* 488 F.2d at 717-19.

<sup>4</sup> The Maryland Court of Appeals in *Flaa* noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See* 387 Md. at 313.

rejected, with the Circuit Court's approval,<sup>5</sup> the use of the *Laffey* Matrix for determining an appropriate hourly rate. County's Response at 1 (citing to *inter alia* MSPB Case No. 07-17 (2008)). Rather, the Board looks to the District Court of Maryland's Rules and Guidelines for Determining Attorneys' Fees in Certain Cases (hereinafter D. Md. Local Rules)<sup>6</sup> for guidance, as well as considering the nature and complexity of the case. *See* MSPB Case No. 11-03 (2011); 11-04(2011); 10-19 (2010); 07-17; 06-03 (2010). Based on these considerations, the Board finds that the rate of \$350 an hour is reasonable for Appellant's lead counsel given counsel's twenty-seven years of experience,<sup>7</sup> as well as counsel's demonstrated skill and efficiency in counsel's litigation at the hearing in this matter. Based on the same considerations, the Board finds that the rate of \$200 an hour is reasonable for Appellant's associate counsel, given the associate counsel's six years of experience.

### **The Amount Of Hours Billed**

One of the factors the Board must consider in awarding attorney fees is the time and labor required – i.e., the number of hours reasonably expended. Montgomery County Code § 33-14(c)(9)(a). The Board notes that the County did not make any arguments against the reasonableness of the hours sought in this matter. In reviewing the hours billed, the Board finds that the time spent was well documented and reasonably necessary to achieve the outcome sought.

The County did seek to reduce the hours by fifty percent based on the fact that Appellant did not completely prevail in Appellant's appeal. County's Response at 2. The County notes that although the charges against Appellant were reduced, and therefore the punishment given Appellant was reduced, Appellant still received an 80-hour suspension. *Id.* Therefore, the County is seeking to implement the fifty percent deduction by reducing the number of hours by fifty percent and multiplying the remaining hours by the approved hourly rate. *Id.* While it is true that the Board did not rule in favor of Appellant on every count, this consideration is more appropriately addressed under the results obtained/degree of success factor discussed *infra*.

Therefore, the Board declines to reduce the number of billable hours based on sought by Appellant's counsel based upon the above-referenced argument presented by the County. However, as discussed *infra*, a reduction in the number of billable hours sought is appropriate based on the degree of success obtained by Appellant in this matter.

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<sup>5</sup> *See also Friolo v. Frankel*, 373 Md. 501, 819 A.2d 354, 371 (2003) (noting the Maryland Court of Appeals has not endorsed any matrix adopted by the U.S. Attorney in the District of Columbia).

<sup>6</sup> The Board notes that the D. Md. Local Rules, Appendix B are available at <http://www.mdd.uscourts.gov/localrules/localrules.html>.

<sup>7</sup> In accordance with the D. Md. Local Rules, the range of rates for an attorney with fifteen or more years of experience is \$275-\$400. *See* D. Md. Local Rules, Appendix B at 124. Thus, Appellant's counsel's rate of \$350 falls within this range.

## **The Degree Of Success Achieved**

As the County correctly notes, under Board precedent where an appellant only partially prevails, as is the case here, the Board only awards a portion of the fee sought. County's Response at 2 (citing to MSPB Case Nos. 00-13; 02-07; 03-05; 05-05). The Board's practice is in accord with Supreme Court and Maryland Court of Appeals precedent. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the most critical factor in determining the proper amount of an award of attorney's fees is the degree of success obtained); *Marek v. Chesny*, 473 U.S. 1, 11 (1986); *Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242, 1252 (2008)(citing to *Hensley* for the proposition that the degree of success is a crucial factoring determining a fee award); *Manor Club v. Flaa*, 387 Md. 297, 305 (2005)(upholding an award of shifted attorneys' fees where the degree of success in pursuing the claims was a consideration).

The County argues that Appellant did not completely prevail in Appellant's appeal. County's Response at 2. Accordingly, while the Board reduced the charges and punishment against Appellant, because Appellant's conduct was found unbecoming an employee, Appellant still received an 80-hour suspension. Therefore, the Board should reduce Appellant's counsel's fees by fifty percent based on the fact that Appellant did not completely prevail in Appellant's appeal. *Id.* The Board finds there is merit to the County's argument.

Appellant argues that Appellant should be awarded Appellant's full attorney's fees as Appellant's appeal was entirely successful. Appellant's Reply at 2. This is simply not the case. Appellant asserted that Appellant was an excellent officer and all charges against Appellant should be dismissed. *Id.* Contrary to Appellant's position, the Board found through a preponderance of the evidence that the County proved the charge of Conduct Unbecoming. Although the Board refused to grant the County's request for a demotion and 160-hour suspension, the Board did impose a mitigated penalty of an 80-hour suspension. Final Decision at 9. The Board finds that this is a significant penalty, and clearly demonstrates that Appellant did not completely prevail in Appellant's appeal.

Having considered both the County's and Appellant's arguments with regard to the degree of success, the Board finds that the Appellant was not fully successful. The Board is of the opinion that a reduction in the amount of hours billed by twenty-five percent is appropriate in this matter based upon the degree of success. *See, e.g.,* MSPB Case Nos. 13-07; 13-04; 05-05.

## **ORDER**

Based on the above, the Board hereby orders the following:

1. A total of 31.75 hours of Appellant's lead counsel's time shall be reimbursed at an hourly rate of \$350, for a total of \$11,112;
2. A total of 12.10 hours of Appellant's associate counsel's time shall be reimbursed at an hourly rate of \$200, for a total of \$2,410; and

3. A reduction in the total amount of fees paid, in the amount of \$3,372, shall be made to account for the twenty-five percent reduction in hours billed.

Accordingly, the County is ordered to reimburse Appellant for attorney fees in the amount of \$10,150.00