

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

IN THE MATTER OF

████████████████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 19-09

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FINAL DECISION AND ORDER

On October 4, 2018, ██████████ (Appellant) filed an online appeal with the Merit System Protection Board (MSPB or Board), challenging his nonselection for the position of Work Force Leader II with the Department of Liquor Control (Department or DLC). That same day, pursuant to Montgomery County Personnel Regulations (MCPR), §35-4(d)(3), the Board requested that Appellant submit a copy of the notification of his non-selection and any other relevant documents. On October 8, 2018, Appellant provided the Board with a copy of an email notification of non-selection dated May 14, 2018. On November 8, 2018, the County filed a response (County’s Response) to the appeal which included two exhibits. The County’s Response also moved to dismiss the appeal as untimely. Appellant filed a reply (Appellant’s Reply), dated November 15, 2018, but received by the Board on December 3, 2018.

On December 5, 2018, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why the appeal regarding his denial of a promotion should not be dismissed as untimely. Appellant filed a response to the Show Cause Order by electronic mail on December 11, 2018, and by mail on December 17, 2018. The appeal was considered and decided by the Board.

FINDINGS OF FACT

It is undisputed that Appellant received notice of his nonselection by email from the County on May 14, 2018. County Response, Exhibit 1; Notice of Denial submitted by Appellant, October

8, 2018. The Appeal was filed with the MSPB on October 4, 2018, 100 working days after Appellant received notice of the denial from the County. Appellant does not dispute that the Appeal was filed late. Appellant's Reply at p. 1 ("I filed untimely").

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 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 nonmerit factors, may be filed directly with the Merit System Protection Board.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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.

§ 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.

ISSUE

Is the appeal timely?

ANALYSIS AND CONCLUSIONS

Under the applicable personnel regulations Appellant had ten (10) working days to file an appeal challenging a denial of employment. It is undisputed that Appellant was notified on May 14, 2018, of the Department's decision not to select him for the Work Force Leader II position. However, Appellant did not file his appeal until October 4, 2018, 100 working days later. Appellant does not dispute that the appeal was untimely filed. Appellant's Reply at p. 1 ("I filed untimely").

While the Board may waive filing time limits for good cause shown, the Board generally does not waive the 10-day filing limit. *See* MSPB Case No. 14-43 (2014); MSPB Case No. 14-08 (2013). Appellant has provided no evidence or persuasive argument for why the Board should do so in this case.

Appellant argues that he had “good reason” to file his appeal late and that “[t]o err is human.” Appellant’s Reply at p. 1. As justification for the delay in filing his appeal Appellant suggests that he was led to believe that there would be another promotional opportunity in the near future and that he would be selected for that position. There is no indication that Appellant was affirmatively misled as to his appeal rights or that he received any firm assurance of a promotion. Appellant admits that it was only after no promotional opportunity arose during the ensuing months that he decided that it was time to file an appeal. *Id.* Appellant also suggests that while the warehouse manager promised to meet with him to discuss Appellant’s concerns about the May 14, 2018, nonselection, the meeting never took place. Appellant’s Response to Show Cause Order, p.1. We do not find any of these allegations to be sufficient justification to waive the applicable time limits for filing an appeal of a nonselection decision four months late.

Appellant does not explain in what way he was led to believe that there would be another promotional opportunity and that he would be given the job. He provided no documentation of a written promise, does not suggest that he received a specific oral promise, and did not allege that an individual with final authority to make a promotion decision actually made such an assurance. Even had Appellant explicitly asserted that the doctrine of equitable estoppel would bind the County to the alleged promises, Appellant has not sufficiently alleged the elements of equitable estoppel. MSPB Case No. 16-07 (2016). More importantly, even were Appellant able to prove the elements necessary for estoppel, that doctrine may not be used to confer jurisdiction on the Board. *Id.*

Appellant also suggests that his late filing should be excused because the written notice informing him of his nonselection did not contain information concerning his appeal rights. *Id.* at p. 2; Appellant Response to Show Cause Order, p. 1. Appellant’s argument is unavailing because, as the Board has previously ruled on this precise issue, the County Code and regulations do not require the County to provide information concerning an applicant’s appeal rights in a notice of non-selection. MSPB Case No. 17-07 (2017).

Moreover, the Board does not lightly consider a waiver of the mandatory time limits, and the length of delay is always a critical factor in assessing whether an untimely filing may be excused. Here the extremely long delay strongly militates against any finding of good cause. MSPB Case No. 17-22 (2017) (appeal filed seven weeks late); MSPB Case No. 14-07 (2013) (appeal filed 10 weeks late); MSPB Case No. 13-03 (2013) (appeal filed 14 months late). This is not a circumstance where the County misinformed or deceived the employee. Appellant claims only that he erroneously relied on what, at most, were vague reassurances that his concerns would be discussed and that perhaps there would be another promotional opportunity. He then waited four months before ascertaining his appeal rights and attempting to act upon them. Appellant’s four-month delay in ascertaining his appeal rights does not demonstrate due diligence and cannot be characterized as reasonable. MSPB Case No. 10-08 (2010) (appellant waiting nearly a year to appeal “was not diligent in attempting to discover and exercise her appeal rights in a timely

manner”). *Cf.*, MSPB Case No. 18-16 (2018) (appellant waited 11 months before inquiring as to the status of his appeal).

Accordingly, Appellant’s appeal must be dismissed as untimely.

ORDER

Based on the foregoing, Appellant’s appeal regarding his denial of a promotion is hereby **DISMISSED** as untimely.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
January 30, 2019



Michael J. Kator
Chair