BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
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[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 18-27**
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MONTGOMERY COUNTY GOVERNMENT,	*	
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EMPLOYER	*	
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FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of [redacted] (Appellant).

PROCEDURAL BACKGROUND

On April 4, 2018, the Montgomery County Office of Public Information issued a Notice of Termination to Appellant. County Exhibit (CX) 23. On April 17, 2018, Appellant filed this appeal with the Board challenging the decision to terminate her from a position as a Customer Service Representative in the MC311 call center.

On June 4, 2018, the County filed its Prehearing Submission. Appellant filed her Prehearing Submission on July 5, 2018. Appellant came to the Board's office on July 9, 2018 and updated the Prehearing Submission and her exhibits. A Prehearing Conference was scheduled for September 27, 2018. On September 25, 2018, Appellant retained [redacted] as counsel, who requested a postponement of the Prehearing Conference, which was granted on September 26. The Prehearing Conference was rescheduled for October 17, 2018. At the request of Appellant's attorney, it was again rescheduled until October 23, 2018.

Two members of the Board, Appellant, and the County's attorneys met for the Prehearing Conference on October 23, 2018. However, without notice to the Board Appellant's attorney failed to appear. Appellant told the Board that at the last minute her attorney had decided to cease representing her.

The Board attempted to proceed with the conference, but it quickly became apparent that Appellant was at a disadvantage. After discussions among the parties and the Board, the Board agreed to postpone the Prehearing Conference until Appellant could obtain new counsel.

Appellant had difficulty successfully engaging a new attorney. On December 4, 2018, Appellant emailed the Board stating that she was discussing representation by [redacted]. However, it was not until June 25, 2019, that Ms. [redacted] K[redacted] of [redacted] finally entered her appearance as Appellant's attorney.

Appellant submitted a revised witness list and substitute exhibits on September 17, 2019. A Prehearing Conference was held on September 26, 2019, and a Prehearing Order was issued on October 11, 2019, setting the hearing date for December 11, 2019. On December 9, 2019, Ms. K[redacted] filed a Motion to Stay Proceedings for Sixty Days so that Appellant could obtain a loan to pay Ms. K[redacted]'s attorney's fees. Ms. K[redacted] represented that if the stay was not granted she would withdraw from the case and Appellant might be required to proceed *pro se*.

The Board reluctantly granted the motion so that Appellant could have legal representation at the merits hearing. On January 13, 2020, Appellant filed a Motion to Extend Stay of Proceedings for an Additional Forty-Five Days because Appellant's loan application had not yet been approved. The Board granted the motion on January 16, 2020, so that Appellant could have competent counsel, but warned that no further extensions would be granted.

The hearing was set for April 14, 2020. On Sunday evening, March 29, 2020, the County advised the Board that a key County witness was no longer available to testify at the scheduled hearing due to his critical involvement in the County's response to the COVID-19 public health crisis. The County requested that the Board hold the case in abeyance and Appellant agreed with that request. The Board granted the postponement request and scheduled a hearing for July.

A remote hearing was finally held on July 7, 2020. Post hearing briefs consisting of written closing arguments and proposed findings of fact and conclusions of law were filed on August 17, 2020. In addition to and separate from the post-hearing brief filed by her attorney, Appellant submitted a document titled "Victim Impact Statement." In that document, Appellant stated that "Due to internet interruptions beyond my control, I was unable to complete my . . . hearing testimony." The County objected to the supplemental document. The Board provided Appellant with the opportunity to submit a written proffer of the testimony she alleged she was prevented from providing during the hearing. Appellant submitted a proffer of her additional testimony on September 17, and the County objected to the additional testimony on September 18.

On October 7, 2020, the Board issued an Order Denying Supplemental Evidence. After carefully reviewing Appellant's proffer and scrutinizing the hearing transcript the Board concluded that although there were technical issues, Appellant and her attorney were given ample opportunity and wide latitude to fully present her testimony. The Board further found that the proffered testimony would have added little that was relevant and material to Appellant's case and, for the most part, "merely emphasizes, elaborates, and focuses testimony provided at the hearing."[1]

[1] The Board's Order Denying Supplemental Evidence, October 7, 2020, p. 5, also found:

> At no time during the hearing or for six weeks afterwards did Appellant or her attorney object or suggest that there was a need for additional testimony. Nor does Appellant's post-hearing brief argue that there was such a need for supplemental testimony. The Board concludes that Appellant had a

FINDINGS OF FACT

Appellant, a County employee since December 2010, was employed as a Customer Service Representative in the Office of Public Information's MC311 call center. Hearing Transcript, July 7, 2020 (Tr.) 219-20. Appellant was diagnosed with cancer in April 2016. Tr. 221. In April 2016, Appellant went on leave in order to receive treatment, which included surgery, chemotherapy, and radiation treatments. Tr. 221-22.

On July 26, 2016, Dr. [redacted] H[redacted], M.D., Appellant's oncologist, wrote to the County Occupational Medical Services (OMS) Disability Manager[2] "to provide evidence of medical necessity" for Appellant to be placed on priority consideration for reassignment from her MC311 call center position. Appellant Exhibit (AX) 2. Dr. H[redacted] stated that Appellant's description of her position was that it "requires extensive and prolonged sitting and attention to daily operational needs and metrics." *Id*. Dr. H[redacted] suggested that the "various daily job related functions may have contributed to her diagnoses of cancer and chronic gastrointestinal issues due to prolonged sitting and chronic stress." *Id*. Dr. H[redacted]'s medical opinion was that "prolonged daily sitting and chronic stress" contributes "to a number of medical problems" and "can also contribute to emotional and mental distress." *Id*.

The duties of Ms. B, the County Disability Manager, include meeting with and assisting employees in identifying reasonable accommodations. Ms. B testified that when an employee requests an accommodation and provides medical documentation, the information is reviewed by OMS in consultation with the employee's health care provider. Tr. 38. The physicians working for OMS then determine the type of accommodation needed and the Disability Manager "work[s] with the employee and the department to determine how that accommodation, or if that accommodation, can be provided, based on operational need and what the employee's needs are." Tr. 39. The Disability Manager is tasked with implementing the ADA interactive process. Tr. 50. That means that the Disability Manager reaches out to the employee and the County employing agency in an attempt to come up with approaches that allow reasonable accommodations to be made. Tr. 50-51.

On September 24, 2016, Dr. [redacted] S[redacted] (Dr. S), the lead physician for OMS, emailed Ms. B and the FMLA Administrator saying that:

> I have just reviewed the medical record sent to me by [Appellant's] specialist. She is asking for accommodation of priority placement to a new position which does not require continuous sitting and mandatory presence during emergency weather conditions. Her medical documentation supports this request.

AX 1, p. 4; Tr. 125.

Dr. S explained that he was referring to the accommodations concerning no continuous sitting or mandatory attendance during emergency weather conditions but was unaware whether those accommodations could be made for an MC311 customer service representative like Appellant. He said that Ms. B as the Disabilities Manager was the person to make the determination

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full and fair opportunity to testify at the hearing, and that there is no justification for admitting additional testimony or other supplemental evidence.

[2] [redacted], now going by the name [redacted], is the Program Manager for OMS. Tr. 36. We will refer to her as either Ms. B or the Disability Manager.

if accommodations could be made to Appellant's current job or if a reassignment was needed. Tr. 126-27.

On September 27, 2016, Dr. S emailed the County's Family Medical Leave Act (FMLA) Administrator: "I just talked to [Ms. B] this morning about [Appellant]. She should be in priority placement." AX1, p. 2.

Priority consideration allows certain qualified individuals with disabilities to be considered before other candidates for any available position for which they are qualified and can perform the essential functions of the job, with or without reasonable accommodation. Tr. 43-44, 47, 100-01. Priority consideration is described in the Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), Appendix VIII, as follows:

> **2.4 Priority Consideration** - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. . .

CX 17.[3]

The MCGEO agreement also provides that the employee has a 90-day period in which to choose another available position. If the employee is unable to locate and qualify for a position, under § 4.3 of Appendix VIII the employee will be subject to termination:

> **4.3** When an employee needs reassignment as an accommodation for a disability, a maximum of 90 days will be allocated to secure a placement. Priority consideration will be given for any position for which the person qualifies. If it is determined that reasonable accommodation cannot be made, request the employee's department to initiate a disability retirement application.

CX 17.[4]

Dr. S's explanation under cross examination was that he was not saying that she should be in priority placement as he did not have the authority to make that decision, and that he was using the term "priority placement as a shortcut to say they're [Ms. B & Appellant] already communicating about the accommodation process." Tr. 128-29.

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[3] *See* Montgomery County Personnel Regulations (MCPR), §1-58, ("Priority consideration: Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion."); §1-59, ("Priority eligible list: The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position."); MCPR, § 6-10 ("(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who: (1) is unable to perform the employee's job because of a disability or injury under the ADA; . . .").

[4] *See* MCPR, § 29-2 ("(a) A department director may terminate the employment of an employee: . . . (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; . . .").

On October 14, 2016, Appellant's podiatrist, Dr. [redacted] W[redacted], advised that Appellant should not "be on her feet continuously for more than 2½ hours at a time; but rather, be intermittently standing/walking/sitting in order to not aggravate" her foot conditions. AX 2.

In October 2016 Ms. B was assisting Appellant in her efforts to find a position outside of MC311, and apparently there were jobs available. AX 10; Tr. 68, Tr. 236-37. Appellant testified that Ms. B said that she was going to place Appellant on priority consideration. Tr. 224. Ms. B conceded that Appellant may have been on priority consideration at some time in October 2016. Tr. 70, 109.

Dr. S testified that he met with Appellant and Ms. B on October 17, 2016, to "enumerate what particular accommodations that [Appellant] was asking for or that her providers were asking for, to enumerate them on a health status report, because Ms. [B] had already started her conversation with Appellant's department manager to see how the work area could be changed to accommodate [Appellant]." Tr. 131. Priority placement was no longer under consideration.

That meeting resulted in an October 17, 2016, Return to Work Health Status Report indicating that the accommodations Appellant should receive at the Call Center were: (1) a wireless headset; (2) the option to use a standing desk; and (3) not to be considered an essential employee during inclement weather or emergency conditions or follow the administrative process, which means reassignment. CX 2.

On October 21 Appellant's call center supervisor contacted her regarding her return to work. CX 3. Appellant said she did not intend to return to work as she was seeking priority consideration for reassignment. CX 3.

Appellant reported an incident of sexual harassment. Tr. 223. Ms. B was aware of the sexual harassment complaint. Tr. 70.

On October 24, 2016, the Director of the call center advised Appellant that she had been informed by Ms. B that Appellant was not being considered for priority consideration because she was able to return to work with temporary reasonable accommodations. Appellant was told to return to work with the accommodations outlined in the October 17 Return to Work Health Status Report. CX 3.

On October 25, 2016, Dr. H[redacted] sent another letter advising that for health reasons Appellant should not be placed back in her customer service position in the call center and offering to answer any questions by telephone. AX 2. Ms. B testified that if she received the letter she would have provided it to Dr. S. Tr. 73-74. Dr. S did not have a conversation with Dr. H[redacted] after he received the October 25 letter. Tr. 132-33.

On October 26, 2016, Appellant returned to her customer service representative position. CX 4. Appellant testified that she agreed to return to the call center position because she thought that it would only be a day or two before the County reassigned her to another position and because she was concerned that if she did not return to work she might lose her job. Tr. 228-29, 263.

When Appellant returned to the call center, she was assigned less demanding responsibilities on a temporary basis in an effort to accommodate her stress and anxiety. CX 7.

The Call Center provided Appellant with a standing desk, which she "rejected . . . almost immediately" and "[s]he never used it." Appellant's Post-Hearing Brief, pp. 7 and 16. Appellant asserted that her medical conditions prevented her from using the standing desk. Tr. 264-65.

On November 22, 2016, Appellant went to see Dr. S with her union representative. Tr. 142. They discussed the accommodations and Appellant told Dr. S that her "gradual return to full duty is moving too quickly, and she feels exasperated at the end of each day." Tr. 143. Appellant also told Dr. S that the standing desk was not helping much. Tr. 143. That same day Dr. S issued an updated Health Status Report instructing the County to remove the standing desk and to not add to her job duties. AX 2. Dr. S also stated that "Due to increased symptomatology of medical condition, she cannot be advanced in time at work or in tasks or amount of work from what she is currently doing this week." AX 2.

Appellant was unable to use the wireless headphones because sounds were amplified. Tr. 271. Appellant was offered the option to take multiple ten-minute breaks throughout the day instead of a half-hour lunch and two 15-minute breaks, but this accommodation was not adequate because Appellant never knew when she would need to go to the bathroom. Tr. 268-69.[5]

Appellant provided additional documentation from multiple health care providers indicating that the anxiety, stress, and the amount of sitting required by her call center position prevented her from working in the call center environment and requesting that she be accommodated with reassignment to another position. AX 2; CX 8 - 12

On December 9, 2016, Appellant's gastroenterologist, Dr. [redacted] B[redacted], sent a letter expressing his opinion that due to Appellant's chronic medical issues she should not continue working in the call center. AX 2. In the Patient Clinical Summary, Dr. B[redacted] noted that Appellant was experiencing rapid heart rate/palpitations, hoarseness, heat or cold intolerance, abdominal pain, change in bowel habits, gas, nausea, rectal bleeding, dizziness, frequent headaches, vertigo, depression, and anxiety/panic attacks. AX 2. Dr. S acknowledged receiving the letter from Dr. B[redacted], but said that he did not know that the accommodations he had recommended were not working for Appellant. Tr. 133, 136.

On December 21, 2016, Appellant's primary care physician, Dr. [redacted] K[redacted], sent a memorandum stating that Appellant was unable to perform work duties requiring prolonged sitting, and should not be exposed to excessive mental strain, stress, agitation or excitement:

> Due to medical sequella following radiation and chemotherapy (including rectal pain, tinnitus, light headed/dizziness, neuropathy of hands and feet, palpitations, heightened anxiety), she is unable to perform work duties requiring prolonged sitting nor should she be exposed to excessive mental strain, stress, agitation or excitement. It is my medical recommendation that she not work in a call center environment and that she may be intermittently able to walk, stand or sit as tolerated.

AX 2.

[5] The MCGEO collective bargaining agreement, § 13.2(c), provides that "[s]ubject to operational and work load needs, employees are entitled to take two 15-minute rest breaks during the work day, in addition to the half-hour meal period."

After receiving Dr. K[redacted] letter, Dr. S immediately issued, on December 22, 2016, an updated Health Status Report. CX 5 and 6; Tr. 138. Dr. S acknowledged that Appellant had "increased symptomatology," by which he meant that the symptoms of Appellant's medical condition were increasing after her return to work. Tr. 141. Dr. S also acknowledged that Appellant "certainly . . . had a condition which is -- which is known to be worsened with stress." Tr. 162. Dr. S also stated that "Due to increased symptomatology of medical condition, she cannot be advanced in time at work or in tasks or amount of work from what she is presently doing." CX 6; Tr. 138. The Health Status Report requested that the temporary reduction in job responsibility be continued. CX 5 and 6.

On January 9, 2017, Appellant's oncologist, Dr. [redacted] A[redacted], requested that she be moved to a position where she could walk and sit throughout the day because she had continued to experience rectal pain that made it difficult to sit for prolonged periods. AX 2.

Dr. S did not speak to Dr. A[redacted] because he believed that the concerns raised in his letter had already been addressed by the County. Tr. 143-44. Dr. S was aware that Appellant had requested that the standing desk be removed. Tr. 144-45.

On January 13, 2017, Appellant accepted a voluntary demotion from a Customer Service Representative II (Grade 16) to Customer Service Representative I (Grade 13) with the following accommodations: not to be required to report to work during a declared emergency or liberal leave periods but to be able to telework from home on those days; not to work more than an 8.5 hour day with two 15 minute breaks and a 30 minute lunch period and the eligibility to volunteer for overtime provided the overtime hours are not added to Appellant's scheduled work day. CX 7; Tr. 77, 98-99. This was because her medical condition prevented her from performing some of the essential functions of her Customer Service Representative II (Grade 16) position. CX 5, CX 7. The demotion was considered a reasonable accommodation.[6]

On March 2, 2017, Appellant's primary care physician, Dr. [redacted] R[redacted], indicated that Appellant was "unable to perform work duties requiring prolonged sitting nor should she be exposed to excessive mental strain, stress, agitation or excitement." AX 2. Dr. R[redacted] reported that Appellant's medical condition had been aggravated by the call center environment, and suggested that "she not work at the call center and that she may be intermittently able to walk, and or sit as tolerated." Dr. R[redacted] expressed the opinion that it was medically necessary for Appellant to be placed in a light duty/priority consideration placement immediately. AX 2.

Appellant contends that had she been in priority consideration in March 2017 she could have been reassigned to a Grade 16 Office Services Coordinator position in the division of Licensure and Regulatory Services at the County Department of Health and Human Services (DHHS). AX 8; Tr. 211. However, Appellant was not in a priority consideration status and DHHS instead hired another individual who was on a priority consideration list. AX 8; Tr. 202, 286. Furthermore, because of Appellant's demotion to the Grade 13 level in January, even if she had been on priority consideration in March she would have only been eligible for priority placement for positions that were Grade 13 or below. MCGEO agreement, Appendix VIII, § 2.4

[6] A December 22, 2016, Health Status Report indicated that due to Appellant's increased symptomatology she could not perform some of the essential functions of a Customer Service Representative II. CX 7.

On July 28, 2017, Appellant's Otolaryngologist, Dr. [redacted] A[redacted], advised that Appellant should not work with a headset in her current work environment. He noted that she had anxiety from the situation. CX 9. Dr. S called Dr. A[redacted] and asked for more records. During the conversation Dr. A[redacted] reported that Ms. [redacted] was more anxious when she listened to calls while wearing the headset. Tr. 150-52.

On August 17, 2017, there was an email discussion among various County employees, including an Associate County Attorney, concerning resolution of Appellant's concerns. AX 1. As part of the email exchange it was noted that Appellant's union representative was "looking at some options, including priority placement." AX 1.

On October 4, 2017, Appellant's therapist, L[redacted] S[redacted], LCPC, reported that she had significant stress in her work environment which was impacting her mental and emotional wellbeing. He requested that she be transferred to a work environment more suited to her skills and unique needs and further requested that these accommodations be implemented immediately. CX 10.

On October 5, 2017, Appellant's therapist, T[redacted] H[redacted], requested an immediate change in her work setting to decrease Appellant's symptoms of anxiety and stress. Ms. H[redacted] stated that Appellant had symptoms of anxiety related to her work environment. CX 11.

On November 3, 2017, Dr. A[redacted] reported that Appellant had pain in her ears with certain sounds and throbbing and headaches from use of headphone sets. He further stated that he agreed with Appellant's request to be removed from her current work environment. CX 8.

On November 16, 2017, Dr. H[redacted] again requested that Appellant be reassigned to another position due to the deleterious effects of her current position on her overall health. CX 12.

Dr. S testified that after seeing Dr. H[redacted]'s November 16, 2017, letter, CX 12, he met with Appellant in late November. Tr. 158-59. Dr. S concluded that based on Dr. H[redacted]'s view that the call center was having "deleterious effects" on Appellant's "overall health" and his own observation that she was "so stressed out and so anxious," Appellant could no longer perform the essential functions of a Customer Service Representative. Tr. 161-62. Accordingly, on November 28, 2017, Dr. S signed a Health Status Report advising the County that Appellant should be reassigned: "Please move to a different position out of MC311, ASAP. Reasonably accommodate." CX 13.

On December 7, 2017, Appellant was provided with a memorandum dated December 6 advising her that she had been placed on 90-day priority consideration pursuant to the MCGEO agreement. CX 14, 17. Under the MCGEO agreement, Appendix VIII, § 2.4, Appellant could potentially be reassigned to a vacant position before other candidates were considered. CX 17. The County also placed Appellant on 90 days of administrative leave so that she could "pursue [an] alternative placement out of MC311. . ." . CX 15. Unfortunately, on November 30, 2017, the County instituted a "position exemption process" or hiring freeze. CX 19, 20.

Because Appellant had accepted a demotion to Customer Service Representative I, she was only eligible for priority placement to positions that were Grade 13 or below. MCGEO agreement, Appendix VIII, § 2.4; Tr. 91, 106-08. *See Scott v. Montgomery County*, 164 F. Supp. 2d 502, 508 (D. Md. 2001) (Montgomery County MCGEO collective bargaining agreement "only requires that

[an employee] be given priority for those positions at his grade level or lower."). Appellant testified that vacant positions at the Grade 13 level rarely were available. Tr. 279.

Appellant's pre-hearing submission included a list of positions at various grade levels which are identified as "jobs applied for." AX 6. With the exception of the DHHS Grade 16 Office Services Coordinator position Appellant applied for in March 2017, Appellant provided little testimony or other evidence concerning those positions. The Board cannot discern the details of a number of those recruitments, such as the dates the positions were available or why Appellant was or was not deemed qualified. Without more, AX 6 does not provide evidence of available vacant, funded positions for which Appellant was qualified with or without reasonable accommodation.

There were several positions listed in AX 6 Appellant pursued while on priority consideration from December 2017 to early April 2018 and that were briefly discussed in her testimony and the subjects of emails contained in County Exhibit 21. Appellant rejected a Recreation Assistant I position because it was a temporary/seasonal, intermittent position. CX 21 (Email from Appellant, January 4, 2018). Appellant turned down a Library Page position because it was a temporary/seasonal position that would not provide benefits. CX 6, 21 (Email from Appellant January 10, 2018); Tr. 277. A Grade 9, Election Aide I position was also temporary/seasonal and would require substantial overtime. CX 21. A Grade 13 Principal Administrative Aide position at the Department of Transportation was not available because there was a delay in filling it and several other positions due to budget constraints. CX 21 (Email from R[redacted] M[redacted], March 22, 2018).

Due to the hiring freeze most of the vacancies were for part-time, seasonal positions, or those at lower grades. Tr. 106. However, under County rules Appellant would retain her salary and benefits even if she accepted a permanent position at a lower grade level. CX 21; Tr. 44, 47, 77, 91, 99, 107. Under that policy, if Appellant accepted a permanent part time position her salary would be prorated based on the number of hours worked. MCGEO agreement, § 5.21 and Appendix VIII, § 4.0.

However, the situation was different for temporary/seasonal positions. Appellant was advised that she would not be eligible to receive health benefits for temporary/seasonal positions. Tr. 277; CX 21 (Email from Ms. B, April 4, 2018). Appellant did not accept reassignment to a temporary/seasonal position due to the lack of health benefits.

Pursuant to the MCGEO CBA, when the 90-day priority consideration period expired Appellant was terminated on April 4, 2018. CX 17; CX 23.

APPLICABLE LAW

Montgomery County Personnel Regulations, § 1, Definitions (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, February 23, 2016, July 17, 2018 and June 1, 2020)

> **§ 1-58. Priority consideration:** Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.

§ 1-59. Priority eligible list: The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position.

Montgomery County Personnel Regulations, § 6, Recruitment and Application Rating Procedures (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010 July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016)

§ 6-10. Priority eligible list.

(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who:

(1) is unable to perform the employee's job because of a disability or injury under the ADA; . . .

Montgomery County Personnel Regulations, § 8, Medical Examinations and Reasonable Accommodation, (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015)

§ 8-7. Required medical examinations of employees; actions based on results of required medical examinations.

(g) ***Application of ADA and reasonable accommodation.***

(4) The department director must first try to reasonably accommodate an employee with a disability in the employee's current job unless the OHR Director determines that accommodation in the current job would impose an undue hardship on the County. . .

(5) If the employee is an individual with a disability who cannot perform the essential functions of the current job with or without accommodation or if accommodation would impose an undue hardship on the County, the department director may:

(A) reassign the employee through a voluntary transfer or demotion to a vacant position for which the employee is qualified, with essential duties that the employee can perform with or without accommodation; or

(B) terminate the employee's County employment, if the employee is not reassigned to a vacant position.

Montgomery County Personnel Regulations, § 10, Employee Compensation, (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015)

§ 10-5. Salary-setting policies.

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

(1) demoted the employee because of . . . disability under Section 10-5(d); . . .

Montgomery County Personnel Regulations, § 29, Termination, (as amended October 21, 2008)

§ 29-2. Reasons for termination.

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

(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; . . .

(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.

Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO)

ARTICLE 5 – WAGES, SALARY, AND EMPLOYEE COMPENSATION

5.21 Reclassification or Reallocation of a Position to a Lower Pay Grade or an Employee Placed in a Lower Pay Grade as a Result of a Disability.

A department director must ensure that an employee whose position is reclassified or reallocated or placed in a lower pay grade as a result of a disability:

(a) keeps the salary the employee received immediately before the effective date of the reclassification or reallocation (or the salary received immediately prior to the effective date of the demotion or change to lower grade in cases of disability); and

(b) receives a general wage adjustment that other employees in the same occupational class covered by the same salary schedule receive even though it results in the employee's salary exceeding the maximum salary for the pay grade or pay band assigned to the position**.**

APPENDIX VIII – REASONABLE ACCOMMODATION

2.4 Priority Consideration - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. Employees will be entitled to priority consideration for vacancies in the same branch of government to which they are assigned. . .

2.6 Reassignment - Placement of an employee with a disability in a different vacant position for which the employee is qualified and can perform the essential functions of the new position. . .

2.9 Special Eligible List - An eligible list which sets forth employees who will receive priority consideration for a vacancy as defined in Section 5-11 of the Personnel Regulations and 2.4 of this procedure. . .

> **4.0** When the reasonable accommodation effort results in a voluntary demotion and the maximum for the pay range of the new grade is less than the employee's current salary, the employee will retain his/her current salary. Additionally, the employee will receive any future annual general wage adjustment that other employees in the same (new) occupational class covered by the same salary schedule receive, even though the employee's salary will continue to exceed the maximum salary for the pay grade assigned to the employee's new position, consistent with Section 5.22 of the Agreement.
>
> **4.3** When an employee needs reassignment as an accommodation for a disability, a maximum of 90 days will be allocated to secure a placement. Priority consideration will be given for any position for which the person qualifies. If it is determined that reasonable accommodation cannot be made, request the employee's department to initiate a disability retirement application.

ISSUE

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

ANALYSIS AND CONCLUSIONS

Appellant, a County employee since 2010, was a Customer Service Representative in the County's MC311 call center. In April 2016 Appellant was diagnosed with cancer and went on leave in order to receive surgery, chemotherapy, and radiation treatments. The record suggests that before her illness Appellant was an excellent employee. Tr. 140.

As a qualified individual with a disability under the ADA, Appellant was entitled to a reasonable accommodation. Appellant and her medical providers urged the County to provide her with what they believed would be the only effective accommodation, namely reassignment. From October 2016 to late November 2017 the County, however, insisted that Appellant remain in the MC311 call center while other accommodations were tried.

After a year the County finally concluded that the only effective accommodation would entail reassignment to a different position and placed Appellant on priority consideration. Unfortunately for Appellant, by then the County had implemented a hiring freeze for fiscal reasons. Because the hiring freeze dramatically limited the number of vacant, funded positions, Appellant could not find an acceptable position within 90 days. As a result, under the MCGEO agreement and County regulations, Appellant was terminated.

The County was not obligated to immediately provide the reassignment Appellant requested.

Appellant argues that Appellant should have been reassigned in October 2016 because that was the accommodation recommended by her health care providers.

It is true that on July 26, 2016, Dr. H[redacted], Appellant's oncologist, provided "evidence of medical necessity for priority consideration to re-assign" Appellant from her call center position. AX 2. Emails written by Dr. S in September 2016 indicate that Appellant's medical record supported reassignment. AX 1. In fact, he specifically wrote that "(Appellant) should be in priority placement." His explanation under cross examination was that he was not saying that she should be in priority placement as he did not have the authority to make that decision, and that he was using the term "priority placement as a shortcut to say they're [Ms. B & Appellant] already

communicating about the accommodation process." Tr. 128-29. While it is correct that Dr. S did not have the authority to select the eventual accommodation provided by the County, he did have the authority to evaluate the medical evidence, indicate what the medical information supported, and recommend an accommodation, if warranted. In this case, Dr. S recommended reassignment in two contemporaneous communications.

The evidence of record further indicates that Ms. B informally started the priority placement process for Appellant in October 2016. Under *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,* U.S. Equal Employment Opportunity Commission, EEOC-CVG-2003-1 (October 17, 2002) (EEOC Enforcement Guidance), reassignment is the reasonable accommodation of last resort; however, "if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer can transfer the employee." CX 24, p. 26. [7] Thus, it was entirely proper for the County to initially pursue this type of accommodation.

At the October 17, 2016, meeting the reassignment "effort" ceased, and the County attempted to maintain Appellant in her current position with reasonable accommodation. This approach appears to be favored under the EEOC Enforcement Guidance ("Reassignment is the reasonable accommodation of last resort"). CX 24, p. 26.

Appellant claims that after she had disclosed to Ms. B that a manager had sexually harassed her, Ms. B told her that priority placement was "off the table" until Appellant had filed an EEO complaint. There is insufficient credible evidence in the record to support this assertion. Ms. B testified that the reason for the change in accommodations was the belief that the County should attempt to accommodate Appellant in her present job. Tr. 51.

While the County was required to provide Appellant with reasonable accommodations, it was not required to provide a specific accommodation she requested. *Peninsula Regional Medical Center v. Adkins*, 448 Md. 197, 237 (2016) ("an employer must only provide a reasonable accommodation and not the accommodation of the employee's choice."); *Reyazuddin v. Montgomery County*, 789 F.3d 407, 415-16 (4th Cir. 2015) ("An employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested."); EEOC Enforcement Guidance, Question 9, CX 24, p. 13 ("(An) employer may choose among reasonable accommodations as long as the chosen one is effective.").

The County had legitimate reasons for exploring other possible accommodations. After meeting with Appellant and Ms. B, Dr. S suggested reasonable accommodations based on his assessment of Appellant's disabilities in the October 17, 2016, Return to Work Health Status Report. The accommodations Appellant was to receive were: (1) a wireless headset; (2) the ability to have a standing desk; (3) to not to be considered an essential employee during inclement weather or emergency conditions. CX 2. These were temporary accommodations. CX 3.

Dr. H[redacted] specifically and repeatedly stated that due to Appellant's condition she could not sit for extended periods of time and should avoid stress. *See* AX 2 ("prolonged daily sitting and chronic stress" contributes "to a number of medical problems"). Thus, the accommodations of a standing desk and not being considered an essential employee during inclement weather or

[7]Document may also be found at: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

emergency conditions were consistent with the Dr. H[redacted]'s July 26, 2016, medical opinion even if they differed from her proposed accommodation of reassignment.

Indeed, before considering reassignment, the County was required to first consider accommodations that would enable her to remain in her current position. 29 C.F.R. §1630.2(o). Reassignment is the reasonable accommodation of "last resort" and is required only after the employer concludes that accommodations are not possible in her current position:

> Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.

EEOC Enforcement Guidance, *Reassignment*, CX 24, p. 26. *See Allen v. Baltimore County*, 91 F. Supp. 3d 722, 734-35 (D. Md. 2015); *Reyazuddin v. Montgomery County*, 7 F. Supp. 3d 526, 550 (D. Md. 2014), *aff'd in part, rev'd in part and remanded, Reyazuddin v. Montgomery County, Maryland*, 789 F.3d 407 (4th Cir. 2015) ("Reassignment . . . has traditionally been seen as an 'accommodation of last resort'"); *Henry v. Department of Veterans Affairs*, 108 M.S.P.R. 458, 462 (2008).

A letter from Appellant's primary care physician dated December 21, 2016, sets forth Appellant's conditions arising from her cancer treatment including rectal pain, tinnitus, dizziness, neuropathy of hands and feet, palpitations and anxiety. AX 2. The physician states that Appellant cannot perform duties that require prolonged sitting. In response, Dr. S wrote in a Health Status Review dated December 22, 2016, that due to increased symptomatology, Appellant cannot perform all of the duties of her position. In an attempt to address these issues, the call center director proposed a voluntary demotion to a Customer Service Representative I , Grade 13 position with the following accommodations: not be required to report during an emergency, 8.5 hour day with two breaks and 30 minutes for lunch.

For an accommodation to be reasonable it must be effective. Although the demotion reduced some of Appellant's job duties, it did not adequately address Appellant's medical conditions outlined in the notes submitted by Appellant's two oncologists, gastroenterologist, podiatrist and primary care physician.

Even after the demotion, the County continued to receive medical documentation from Appellant's gastroenterologist in February and her primary care physician in March reiterating Appellant's physical and psychological conditions and repeating their requests that Appellant be reassigned. Thus, at that point in time, it was clear that the accommodations put in place by the County were not effective and were not enabling Appellant to perform the essential functions of her position. Accordingly, we find that reassignment was warranted after it was apparent that the County's attempts to accommodate Appellant in place were ineffective. As the County did not start the reassignment process until December, we will address the reasons for the delay.

Appellant has not established that the delay in placing her on priority consideration for reassignment violated the ADA.

Appellant contends that the County should have continued its efforts to reassign Appellant in October 2016, and not have required her to return to work at the call center. Appellant's argument is that because there was no appropriate accommodation possible in the call center, she should have been placed on priority consideration.

The County attempts to recharacterize Appellant's argument as "in essence, that Appellant was not terminated soon enough, and was given too long of an opportunity to find an appropriate accommodation." County Closing Argument, p. 2. The County further maintains that the "Board should not encourage County departments to begin the termination process before fully and reasonably attempting to accommodate employees in their positions." *Id.*

The County's argument characterizing the priority consideration process as a termination procedure, instead of a policy designed to provide a reasonable accommodation, greatly troubles the Board. It is the policy of Montgomery County to make sincere efforts to provide employees with disabilities with reasonable accommodations before termination. MCPR § 29-3(c) ("A department director must not terminate a qualified employee with a physical or mental disability . . . unless efforts at reasonable accommodation . . . are unsuccessful."). We note that Montgomery County Code, § 27-50, states, in part, "The County government adopts the policy that no qualified person with a disability should, on the basis of their disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of the County government." *See* Montgomery County Code, § 33-7(d) ("(1) Findings. (A) Persons with disabilities are a largely untapped resource for outstanding candidates for County employment. . . (C) Persons with disabilities suffer from a high . . . underemployment rate in the County due in part to unfounded myths, fears and stereotypes associated with many disabilities.").

Priority consideration is part of the County's reasonable accommodation process. As such, it should be viewed as a means to enable qualified individuals with disabilities to be retained in County employment by supporting and assisting them in the reassignment process. We strongly believe that the focus of priority consideration should be to successfully identify a vacant position for which the disabled employee is qualified. County officials should not view priority consideration as a "termination process."

The County appropriately treated reassignment as the accommodation of last resort and attempted other accommodations for Appellant in the call center before deciding that there were no reasonable accommodations that would allow her to perform the essential functions of her position in the call center. *Gile v. United Airlines*, 95 F.3d 492, 498 (7th Cir. 1996) ("an employer may be obligated to reassign a disabled employee only when, even with reasonable accommodation, the employee can no longer perform the essential functions of his present job.").

The reasonable accommodation process is an interactive one, requiring both the employer and employee to work cooperatively to enhance the probability of success. EEOC Enforcement Guidance, Question 9, p. 13 ("as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.").

When engaging in the interactive process the employer must not take an inordinate amount of time to identify and implement reasonable accommodations. The EEOC Enforcement Guidance, Question 10, p.14, cautions:

> An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible. Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.

A delay does not necessarily require a remedy since it may be part of the process of identifying an effective reasonable accommodation. "[I]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." EEOC Enforcement Guidance, Question 32, p. 30. The "employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." *Humphrey v. Memorial Hospital Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001)

Whether there was unreasonable delay in providing Appellant with an accommodation is "a matter for a trier of fact to determine." *Armstrong v. Reno*, 172 F. Supp. 2d 11, 23 (D.D.C. 2001) (delay of over a year before providing accommodations, such as a chair and an accessible parking space, that "were not especially burdensome"). *See Pandazides v. Va. Bd. of Educ*., 13 F.3d 823, 833 (4th Cir. 1994) ("reasonable accommodation" is a question of fact). [8]

We are unable to find that the delay before finally placing Appellant on priority consideration for reassignment was clearly unreasonable. This is not a situation involving an employer who unjustifiably delayed granting a request for *any* accommodation. *Krocka v. Riegler*, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997) (eight-month delay in assigning employee to a desired shift can constitute an "unreasonable delay in implementing a 'reasonable accommodation'" when "the employer initially refused outright to consider any accommodation for that particular disability."). Rather, in this case, the County did attempt to provide additional accommodations after the initial ones did not work. Also, there were attempted or actual discussions between the County Attorney, the Appellant's supervisor, and union representative in an effort to resolve the situation; however, it took an additional four months before the County eventually concluded that reassignment was warranted. The County's attempts to provide reasonable accommodations for Appellant from October 2016 until November 2017 may have been less than robust and certainly not stellar, but we are unable to conclude that they were unreasonable or in bad faith. *Jay v.*

[8] The EEOC Enforcement Guidance, n. 38, suggests the following factors in assessing whether there has been undue delay:

> In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

Intermet Wagner Inc., 233 F.3d 1014, 1017 (7th Cir. 2000) (twenty-month delay in reassignment of plaintiff was not unreasonable because employer acted "reasonably and in good faith.").

Appellant Has Not Established That There Were Vacant Funded Positions for Which She Was Qualified

When Dr. S reviewed Appellant's medical records in the Fall of 2017 and concluded that Appellant was unable to perform the essential functions of a call center Customer Service Representative, with or without accommodation, she was placed on priority consideration for reassignment without further delay. CX 13, 14. The County also placed Appellant on administrative leave so that she could "pursue [an] alternative placement out of MC311. . ." . CX 15. Unfortunately, the County-wide hiring freeze limited her opportunities. CX 19, 20.

The Disability Manager provided Appellant with a link to a data base of available County positions that was also accessible to non-County employees seeking employment with the County. Tr. 46, 89; CX 21. According to Ms. B, the County's role in identifying vacant positions was by "providing the employee with all the tools that they need to search the website, search the county available jobs on the website." Tr. 88. Although Appellant would have priority consideration for positions that were Grade 13 or lower, it was primarily her obligation to identify appropriate positions. The Disability Manager would provide additional assistance only after the employee had on their own found and expressed an interest in a specific vacancy. Tr. 46-47; 87-89.

Appellant strenuously contends that the County's efforts to assist her in identifying appropriate vacant positions were woefully inadequate. The Board is also disappointed that the County did not undertake a more active and effective role in helping Appellant. Simply pointing an employee with a disability to a website with vacant positions and encouraging them to apply "does not satisfy [the] responsibility to conduct an individualized assessment to formulate an effective accommodation." *Peninsula Regional Medical Center v. Adkins*, 448 Md. 197, 221 n.16 (2016) *citing Hendricks-Robinson v. Excel Corp*., 154 F.3d 685, 694-95 (7th Cir. 1998). See *Wehner v. Best Buy Stores, L.P*., 2017 U.S. Dist. LEXIS 34349, 2017 WL 952685 (D. Md. 2017) ("Courts have recognized that the employer is in a far better position than the employee to identify vacant positions that the employee may qualify for because of the employer's advanced capacity and resources."). *See also* EEOC Enforcement Guidance, Question 28, p. 29, ("The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time. . . the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment.").

However, even if the County failed to fully engage in an interactive process to formulate an effective accommodation such as a reassignment, Appellant still bears the ultimate burden of proving that a vacant, funded position for which she was otherwise qualified was available. *Peninsula Regional Medical Center v. Adkins*, 448 Md. at 223-24, *quoting Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 233-34 (3d Cir. 2000) (Alito, J.) ("[I]n a failure-to-transfer case [under the Rehabilitation Act], if, after a full opportunity for discovery, the summary judgment record is insufficient to establish the existence of an appropriate position into which the plaintiff could have been transferred, summary judgment must be granted in favor of the defendant - even if it also appears that the defendant failed to engage in good faith in the interactive process."). *See Reyazuddin v. Montgomery County*, 7 F.Supp.3d 526, 550-51 (D. Md. 2014), *aff'd in part, rev'd*

in part and remanded 789 F.3d 407 (4th Cir. 2015); *Wehner v. Best Buy Stores, L.P*., 2017 U.S. Dist. LEXIS 34349, at *28-29 (D. Md. 2017) ("Crucially, 'if, after an opportunity for discovery, the employee still has not identified a position into which she could have transferred, the court must grant summary judgment in favor of the defendant.'") *quoting Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002); *Jackan v. N.Y. State DOL*, 205 F.3d 562, 566-67 (2d Cir. 2000) (employee "seeking to hold the employer liable for failing to transfer her to a vacant position as a reasonable accommodation must demonstrate that there was a vacant position into which she might have been transferred."); *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 53-54 (1998); *Combs v. SSA*, 91 M.S.P.R. 148 (2002) (Appellant must identify "a vacant funded position to which she could be reassigned.").[9]

Appellant identified a Grade 16 DHHS Office Services Coordinator position she alleges she would have been given in March 2017 if she had been on priority consideration at the time. However, Appellant was demoted in January 2017 to the Grade 13 level. CX 7. That meant that even had she been placed on priority consideration by March 2017 she would not have had priority status for the Grade 16 DHHS position. Appellant was only eligible for priority placement for positions that were Grade 13 or below. *Scott v. Montgomery County*, 164 F. Supp. 2d at 508; MCGEO agreement, Appendix VIII, § 2.4; Tr. 91, 106-08. Appellant also failed to provide evidence that she could have performed the essential functions of the job with or without reasonable accommodation. These failures of proof undermine any claim she may have that the DHHS position was a vacant, funded position for which she was entitled to reassignment. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332 (2005) (employee has burden of showing that she can perform the essential functions of a vacant position).

Appellant provided a list of positions at various grade levels which her pre-hearing submission identified as positions that to which she had applied. AX 6. Unfortunately, largely because of the hiring freeze there were few vacant positions at or below her grade level that were being filled, and most of the ones that were being filled were temporary/seasonal positions that lacked health benefits. Appellant turned down several such positions because of the lack of health benefits. *See* Findings of Fact, *supra* at p. 9.

The record shows that Appellant could no longer perform the essential duties of her customer service representative position with or without reasonable accommodation. Because Appellant was unable to identify a vacant, funded position for which she could perform the essential functions, with or without accommodation, and that she was willing to accept, at the end of the 90-day period of priority consideration the County was permitted under the ADA and by its regulations and the MCGEO agreement to terminate Appellant's employment. MCPR § 8-7(g)(5)(B) ("If the employee is an individual with a disability who cannot perform the essential functions of the current job with or without accommodation . . . the department director may: (B) terminate the employee's County employment, if the employee is not reassigned to a vacant

[9] Although the Appellant bears the burden of proving that there were vacant, funded positions to which she could have been reassigned and for which she was qualified, the Board is troubled by the County's lack of meaningful efforts in assisting Appellant to remain employed, especially during a hiring freeze. As the Chief of Recruitment and Selection for the County's Office of Human Resources testified, not all the available positions were on the County website. Tr. 185-88. Moreover, employee transfers within or between departments were specifically exempt from the hiring freeze. CX 19; Tr. 189-92.

position."); MCPR, § 29-2 ("(a) A department director may terminate the employment of an employee: . . . (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; . . ."). *See* EEOC Enforcement Guidance, Question 28, "When an employer has identified any vacancies . . . , notified the employee, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation." CX 24, p. 28. *See Elledge v. Lowe's Home Ctrs., LLC*, 2020 U.S. App. LEXIS 36236 at *30; __ F.3d __; 2020 WL 6750363 (4th Cir. 2020) (no violation of the ADA to terminate employee who declined reassignment to positions with less responsibility and reduced compensation); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177 (10th Cir. 1999) ("If the disabled individual rejects that reassignment, the employer is under no obligation to continue offering other reassignments. . . Once the employer has offered such a reassignment, its duties have been discharged.").

ORDER

For the foregoing reasons, the Board **DENIES** Appellant's appeal of her termination.[10]

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

For the Board
December 29, 2020

[redacted]
Harriet Davidson
Chair

[10]Member Angela Franco certified that prior to voting on the decision in this matter she reviewed the evidence of record and read the transcript of the hearing. *See* Montgomery County Code, § 2A-10(c).