

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

**IN THE MATTER OF**

**[REDACTED],**

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE NO. 21-12**

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**FINAL DECISION**

[REDACTED] (Appellant) filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on December 10, 2020. The appeal, in the form of an email, specifically identified the County’s decision that he “Did not meet screening criteria” for a Grade 18 Program Specialist I (Asian American Health Initiative/Community Health) position, announced as IRC46634.

The Board sent a letter that same day to acknowledge receipt of the appeal, “concerning denial of employment as a Program Specialist I (Asian American Health Initiative/Community Health) (IRC46634),” and setting a schedule for the County to respond and for Appellant to reply to the County.

On January 11, 2021, the County filed a response to the Appeal. The County’s response addressed the issues raised in the Appeal and included three attached exhibits. County Exhibit 2 was the Affidavit of [REDACTED] (MD), Chief, Recruitment and Selection Division, Office of Human Resources (OHR).

Appellant filed replies to the County’s submission on February 2, 4 and 9, 2021. In his replies Appellant noted that the affidavit submitted as County Exhibit 2 had misspelled his name, raising a question as to whether OHR had reviewed the correct applicant’s files. Appellant also

argued that there were inconsistencies in the way the County evaluated his work experience in this recruitment versus other recruitments where he was deemed well qualified.<sup>1</sup>

On February 25, 2021, the Board requested that the County address the misspelling and asked for additional information on recruitment IRC46634 and other recruitments.<sup>2</sup>

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<sup>1</sup> Appellant has received the following Notifications of Nonselection:

- IRC46634 –December 10, 2020 (subject of the appeal)
- IRC45228 –December 2, 2020
- IRC45268 –November 17, 2020
- IRC45594 –October 6, 2020
- IRC44367 –July 7, 2020
- IRC44251 –June 15, 2020
- IRC44073 –June 4, 2020
- IRC46053- January 29, 2021 (after appeal filed)
- IRC46713 –January 11, 2021 (after appeal filed)
- IRC46413- Appellant deemed qualified after review but did not make the eligible list.

<sup>2</sup> The Board's February 25<sup>th</sup> request was as follows:

In a February 4, 2021, email Appellant noted that an affidavit (County Exhibit 2) submitted by the County states "I have reviewed the County's recruitment files for [REDACTED]" when Appellant's name is "[REDACTED]." The email refers to an argument on this issue he made on page 28 of his February 2, 2021, response to the County's opposition to his appeal.

The Board asks the County to confirm whether there is a recruitment file for a [REDACTED] and, if there are no records for a [REDACTED], submit a sworn statement attesting to that fact. If there are recruitment records for a [REDACTED], the County shall submit to the Board a sworn statement providing a full explanation of why that individual was mentioned in County Exhibit 2. If the County asserts that the correct recruitment records for Appellant [REDACTED] were nevertheless reviewed, it shall provide sworn verification of that fact. In any event, the Board requests copies of all the recruitment records for Appellant and [REDACTED] that the County asserts were reviewed.

The Board also requests that the County respond to Appellant's assertions that there have been inconsistencies in the evaluation of his education and experience. The County may also respond to any other issue raised by Appellant. In this regard, the County shall provide the following:

1. Copies of Appellant's application materials for IRC46634, including his resume and all other supporting application documents he submitted.
2. A sworn statement explaining the basis for the determination that Appellant "did not meet the minimum screening criteria for the position based on his years of work experience" for IRC46634.
3. A list of applicants for IRC46634 indicating which ones met the minimum qualifications, those who did not because of a lack of experience, the ratings and ranking of the qualified applicants, identification of those with priority consideration, and the selected applicant, if any.
4. The application materials and resumes of those applicants for IRC46634 who were deemed to have met the minimum screening criteria.
5. Copies of job postings and Appellant's application materials for all positions where Appellant was determined to meet the minimum qualifications.
6. A list of the dates Appellant was notified of nonselection for all positions.
7. For any position for which Appellant was sent a notice of nonselection within 10 working days prior to December 10, 2020:
  - a. Copies of all job postings and Appellant's application materials;
  - b. An explanation of why Appellant did not meet the minimum qualifications;
  - c. If Appellant was deemed qualified and not interviewed, an explanation of the basis for that determination;

The County was asked to submit a sworn statement attesting to the fact that the correct recruitment records were reviewed. The County was also asked to respond to Appellant's assertions that there were inconsistencies in the evaluation of his education and experience and to provide specifically detailed documentation addressing the issues raised.

Because of the volume of material requested, the County was given an extension of time to provide the requested information and provided its responses on March 18 and 29, 2021. Appellant responded on March 20 and 21, 2021.

### FINDINGS OF FACT

Appellant applied for a Grade 18 Program Specialist I (Asian American Health Initiative/Community Health) position (IRC46634) on December 9, 2020. County Supplemental Response, (March 29, 2021), Attachment 1. On December 10, 2020, the County OHR reviewed Appellant's application, decided that he did not meet the minimum qualifications for the IRC46634 position, and he was thus deemed "not qualified." *Id.* That same day, Appellant filed an appeal challenging the County's decision not to select him for the IRC46634 because he "Did not meet screening criteria." Appeal Email, December 10, 2020, p. 2.

The minimum qualifications for the Program Specialist I (Asian American Health Initiative/Community Health) position were specified in IRC46634 as follows:

**IRC46634 minimum qualifications:**

**Experience:** One (1) year of professional experience managing or performing health programs administration, social services, and/or health education outreach.

**Education:** Graduation from an accredited college or university with a Bachelor's Degree.

**Equivalency:** An equivalent combination of education and experience may be substituted.

County Response, Attachment 1 (January 11, 2021); Corrected Affidavit of MD, Attachment 2 (March 16, 2021).

Appellant's application for the IRC46634 position was reviewed by an OHR Human Resources Specialist (OHR recruiter). County Supplemental Response, (March 29, 2021), Attachment 2, Affidavit of [REDACTED] (MS), (March 26, 2021). When reviewing Appellant's application for relevant experience the OHR recruiter used the following standard:

[R]elevant experience means pertinent, applicable, appropriate, relevant, or related experience. It means having previous work experience that is related to the job opening. Relevant volunteer experience may also be credited if enumerated on resume. Relevant internship experience may be credited if enumerated on the resume. Internships that are part of a degree requirement/curriculum are not credited towards relevant experience. However, summer internships and

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- d. If Appellant was deemed qualified and not interviewed or selected, provide an explanation of the reasons and the application materials and resume of the selected candidate, including whether the selectee was on priority consideration.

internships where credit is not received may be considered, if relevant and related to the qualifications for the position.

Affidavit of MS, Attachment 2, ¶18.

Appellant received one month of experience credit for his work with the Emergency Assistance Relief Payment (EARP) Program. Attachment 2, ¶9; Appellant's Application Materials for IRC46634, County Supplemental Response, (March 29, 2021), Attachment 1, p. 5. The OHR recruiter also gave Appellant experience credit for the time Appellant stated that he was engaged in 10 hours per week of volunteer activity as a Youth Commissioner, Co-Chair of Opioid Abuse Sub-Committee, Montgomery County Commission on Children and Youth. Attachment 2, ¶9. Appellant indicated that he worked in this volunteer position for 10 hours per week from August 2016 to August 2017. Attachment 1, p. 8. The OHR recruiter credited Appellant with three months of work experience for the hours he claimed to have worked over the course of the year. Attachment 2, ¶9.<sup>3</sup>

The OHR recruiter determined that, at most, Appellant could only be legitimately credited with four months of the required professional experience managing or performing health programs administration, social services, or health education outreach. Attachment 2, ¶10.<sup>4</sup> The OHR recruiter also asked five other OHR Specialists to review Appellant's application. Attachment 2, ¶11.<sup>5</sup> The other five OHR Specialists confirmed that Appellant lacked the one year of professional experience required for the IRC46634 position. *Id.*

A careful review of Appellant's application does not reveal a combination of listed work or volunteer experience that would support crediting him with an additional eight months of professional experience managing or performing health programs administration, social services, or health education outreach. Appellant's Application Materials for IRC46634, County Supplemental Response, (March 29, 2021), Attachment 1.

Appellant's educational background did meet the minimum qualifications for IRC46634, as he had earned a bachelor's degree from the University of Maryland, College Park, with a major in Government and Politics and a minor in Asian American Studies. Attachment 1, p. 6. Because IRC46634 required a bachelor's degree as an educational requirement, that same degree could not also have been used as a substitute for his lack of work experience. Attachment 1 to March 26, 2021, Supplemental Affidavit of MD, p. 4, Attachment 7 to County Supplemental Response, (March 29, 2021) ("if education can be substituted for work experience, the candidate **must** have completed at least the minimum required education level. Any degrees or certifications above the minimum may be substituted for any minimum work experience deficiency.") (emphasis in original); Appellant Response, (February 4, 2021), Attachment 3 ("Credit for one year of

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<sup>3</sup> The number of Appellant's claimed work hours for the year was 25% of a typical work year of 2080 hours.

<sup>4</sup> Appellant's application materials include his self-reported Preferred Criteria Self-Assessment (ProForm). Attachment 1, pp. 9-35. The OHR recruiter reviewed the information Appellant provided in his resume and the ProForm to assess his level of experience. Attachment 2, ¶6. ProForm includes preferred criteria but is only used to determine whether an applicant is "well-qualified" or "qualified," not whether an applicant meets the minimum criteria or is "not qualified."

<sup>5</sup> Because the OHR recruiter's affidavit contains a typographical error by listing the last two paragraphs as "10" we identify the second one as paragraph "11."

experience will be given for each relevant degree above a bachelor's degree level (second or additional bachelor's, master's and/or doctoral degree)"). *See* Corrected Affidavit of MD, Attachment 2 (March 16, 2021), ¶9, and Attachment 3 (Equivalencies for Education and Experience, Common Recruiting Terms, Disability Employment & Initiatives, Resume Preparation Tips, and FAQs). Appellant did not have additional academic credit or degrees that could be substituted to meet the minimum experience requirement for the IRC46634 position.

Appellant suggests that as an individual with a disability he was entitled to a Priority Consideration hiring preference under MCPR § 6-11(a). Priority Consideration is when a candidate is considered for a vacant position before others are considered. MCPR § 1-57. Priority Consideration does not guarantee appointment. *Id.* To be entitled to Priority Consideration an applicant must be rated in the highest rating category on the eligible list. MCPR § 6-11(b).<sup>6</sup>

Appellant did not receive a priority consideration hiring preference for IRC46634 because he was rated as "not qualified." Corrected Affidavit of MD, (March 16, 2021), ¶8. Appellant did receive priority consideration hiring preference for other vacancies where he was qualified for the positions and in the highest rating category. County Supplemental Response, (March 29, 2021), Attachments 5 & 6, (March 26, 2021). *See* Affidavit of [REDACTED] (EP), (March 25, 2021), ¶s 11 & 12.

An affidavit filed by the County in its initial response to this Appeal contained a single misspelling of Appellant's name as "[REDACTED]" when Appellant's name is spelled "[REDACTED]." Affidavit of MD, Chief, Recruitment and Selection Division, Office of Human Resources, County Exhibit 2 (January 8, 2021). That affidavit contained other references to Appellant in which his name was spelled correctly. In a subsequent affidavit MD acknowledged the typographical error in the spelling of Appellant's name and swore that she "never reviewed any recruitment files for [REDACTED]," and "that there is no record of a [REDACTED]" in the County OHR's recruitment files. Corrected Affidavit of MD, (March 16, 2021), ¶s 4 & 5. The County employee who drafted the original affidavit apologized and explained that it was a typographical error. Affidavit of [REDACTED] (DG), (March 15, 2021), ¶¶ 5 and 7. DG also noted that the affidavit he had prepared for MD had contained another unintentional typographical error involving the transposition of numbers. *Id.*, ¶6. There is no record evidence indicating that Appellant was in any way confused with another applicant.

#### **APPLICABLE CODE PROVISIONS AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action**, which provides, in pertinent 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,

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<sup>6</sup> Appellant also suggested that as a person with severe disabilities he was entitled under MCPR § 6-15 to a Noncompetitive Appointment. However, as discussed below, the MSPB does not have jurisdiction to review that claim: "An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board." MCPR § 6-15(f).

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 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), Section 1, *Definitions***, which provides in pertinent part:

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

**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, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, *Recruitment and Application Rating Procedures***, which provides, in relevant 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.
- (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
- (3) All applicants and employees must comply with established reference and investigation requirements.
- (b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if: . . .
- (5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

**§ 6-11. Priority consideration for initial appointment to a County merit system position.**

(a) Definitions

(1) Person with a disability: A person who:

- (A) has a developmental disability, severe physical disability, or a psychiatric disability within the meaning of 5 C.F.R. 213.3102(u), the criteria for disability used by the Federal Office of Personnel Management

for noncompetitive appointment to Federal merit system positions under its special hiring authority; and

(B) has been certified by the Maryland Department of Education Division of Rehabilitation Services or by an equivalent out-of-state vocational rehabilitation agency as meeting the definition of disability contained in (A) above. . . .

(b) Subject to persons who must be given priority under Section 6-10, the OHR Director must give priority consideration in the following order to persons who apply for initial appointment to a County merit system position in a normal competitive process and who are rated and placed in the highest rating category on the eligible list:

(1) a veteran with a disability;

(2) an equal preference for a veteran without a disability and for a person with a disability.

(c) To receive priority consideration under 6-11(b), an eligible applicant must apply for the preference on the application form and must provide the necessary certification or documentation within 14 calendar days after it is requested by OHR.

**§ 6-14. Appeals by applicants.**

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

**§ 6-15. Noncompetitive Appointment of Persons with Severe Disabilities to County Merit Positions.**

(a) A department director may noncompetitively appoint a qualified person to a County merit position if the individual: . . . (3) meets the minimum qualifications for the position; . . .

(f) Noncompetitive appointment under this section is the prerogative of management and not a right or entitlement of a person with a severe disability. An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board.

**Montgomery County Personnel Regulations, 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, June 30, 2015, and June 1, 2020), 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.

(d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

### ISSUE

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

### ANALYSIS AND CONCLUSIONS

Appellant has the burden of proving that the County's decision on his application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). *See* MCPR § 34-9(d)(2).

*Appellant Did Not Meet the Minimum Qualifications for the Program Specialist I (Asian American Health Initiative/Community Health) position*

Appellant has filed one appeal with the Board. That appeal, concerning the Program Specialist I (Asian American Health Initiative/Community Health) position (IRC46634), is the only matter before us. Based on Appellant's allegations of bad faith and inconsistency in OHR's evaluation of his applications, including IRC46634, the Board reviewed other recruitments that had not been appealed to the Board. The Board sought to determine if there was merit to Appellant's allegations that OHR's evaluation of his qualifications for the position in IRC46634 was inconsistent with the way his qualifications were evaluated in other recruitments and whether there was any indication of irregularity. After careful review of the voluminous documentation, we see no impropriety in the evaluation of Appellant's qualifications for the IRC46634 position, and further find that the evaluation of his qualifications in other recruitments appears reasonable.

The Program Specialist I (Asian American Health Initiative/Community Health) position, IRC46634, required one year of specialized professional experience managing or performing health programs administration, social services, or health education outreach. Although Appellant was engaged in various volunteer activities with multiple organizations, his actual professional experience managing or performing health programs administration, social services, or health education outreach was significantly less than one year. Indeed, the affidavit of the OHR recruiter who evaluated Appellant's application for IRC46634 details the analysis used to conclude that "at most, Appellant could be credited with 4 months of professional experience." Affidavit of MS, Attachment 2, ¶10.

Our review of the documents submitted by the County supports the conclusion that Appellant did not have the professional work experience to meet the minimum experience qualifications for the IRC46634 position and was thus properly deemed "not qualified." County Supplemental Response, (March 29, 2021), Attachment 1.

Appellant did meet the minimum educational qualification for the IRC46634 position, which was a bachelor's degree. However, since Appellant lacked education beyond a bachelor's degree, he had no additional education to substitute for the lack of professional experience. *See*



Supplemental Affidavit of MD (March 29, 2021), Attachment 1, p. 4, (“if education can be substituted for work experience, the candidate **must** have completed at least the minimum required education level. Any degrees or certifications above the minimum may be substituted for any minimum work experience deficiency.”) (emphasis in original); Appellant Response, (February 4, 2021), Attachment 3 (“Credit for one year of experience will be given for each relevant degree above a bachelor’s degree level (second or additional bachelor’s, master’s and/or doctoral degree)”). The County provides information for applicants on the OHR website explaining the policy on Equivalencies for Education and Experience and followed those guidelines in this case. *See* MSPB Case No. 15-05 (2015) (“The Board expects the County to follow uniform guidelines, as published on its website and in the Personnel Regulations, when assessing the qualifications of candidates for County positions.”).

Accordingly, we conclude that Appellant has failed to carry his burden of proving that the County’s determination that he lacked the requisite experience for the position was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors.<sup>7</sup>

Appellant also raised the issue of his entitlement to a Priority Consideration hiring preference. To be entitled to Priority Consideration an applicant must be rated in the highest rating category on the eligible list. MCPR § 6-11(b). In the IRC46634 recruitment there were 19 applicants rated “well-qualified” and 22 rated as “qualified.” Appellant was one of 33 applicants deemed “not qualified.” County Supplemental Response, March 29, 2021, Attachment 8. Because Appellant was properly rated as “not qualified” he was not entitled to a Priority Consideration hiring preference.

The Board will not substitute its judgment for that of the hiring officials unless the appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 20-04 (2020); MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). In this case, unlike at least 41 other applicants, Appellant failed to meet even the minimum qualifications for the position.<sup>8</sup>

*Alleged inconsistencies in the evaluation of Appellant’s experience*

Appellant suggests that the fact that he was deemed “qualified” or “well qualified” for some positions, but was rated as “not qualified” for IRC46634, demonstrates that the County is inconsistent in the way it evaluates his applications. *See e.g.*, Appellant Response, (February 4, 2021), pp. 3, 26; Appellant Email, December 7, 2020. Appellant was, for example, deemed “well-qualified” for the positions being recruited for in both IRC45268 and IRC45228, and “qualified” for those in IRC46413 and IRC46053. However, after careful analysis of the record of those recruitments we discerned that there was no inconsistency when the County determined that Appellant was not qualified for one position, yet was qualified or well qualified for other, different

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<sup>7</sup> The Board has held in previous cases that the County may rely on the information provided with the application itself, and that the Board will not reverse the County’s decision based on subsequently provided information. MSPB Case No. 16-15 (2016); MSPB Case Nos. 15-14 and 15-23 (2015). To the extent that Appellant, as part of his Appeal, provided additional information that was not part of his application that information must be disregarded. In any event, we see nothing in the subsequently provided information that would justify altering our finding.

<sup>8</sup> We note that the selected applicant was demonstrably more qualified than Appellant, having substantial relevant experience far in excess of Appellant’s and a Masters of Public Health. County Supplemental Response, (March 29, 2021), Attachment 10.

positions.

Unlike IRC46634, the positions for which Appellant was found qualified or well qualified did not require experience with health programs, social services, or health education outreach, the professional experience requirements that rendered Appellant not qualified for IRC46634. For example, IRC45268, a Program Manager II position in the Office of Racial Equity and Social Justice, Appellant was determined to be qualified because of his general experience in program management and coordination. Affidavit of EP, (March 25, 2021), ¶7. After review of his ProForm self-assessment he was found to be “well qualified,” given priority consideration, and interviewed. *Id.*, ¶s 10 & 11. Appellant was not selected because the Office of Racial Equity and Social Justice interview panel decided he had insufficient experience with racial equity and social justice issues. Affidavit of EP, (March 25, 2021), ¶12; County Supplemental Response (March 29, 2021), Attachment 5.

For IRC45228, an Office Services Coordinator position with the Office of Human Rights, Appellant met the minimum qualifications in part because the position required four years of progressively responsible office support experience, but did not require experience with health programs, social services, or health education outreach, as was the case with IRC46634. Appellant was deemed “well qualified,” received priority consideration, and was interviewed. The Human Rights Commission interview panel determined that Appellant lacked enough relevant experience and he was not selected. Supplemental Affidavit of MD (March 29, 2021), ¶6; County Supplemental Response (March 29, 2021), Attachment 6.<sup>9</sup>

The County’s detailed explanations of the hiring process in IRC46634 as well as the other recruitments involving Appellant are reasonable and satisfactory. Appellant, who has the burden of proof, has not shown that the County’s actions were in any way arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Nor has Appellant provided any evidence to support his belief that he was denied the appointment in IRC46634 for reasons other than those related to his qualifications. The County’s explanation and *mea culpa* concerning the misspelling of his name seems sincere and truthful. That isolated typographical error does not suggest any illegality or that decisions were based on non-merit factors.

The County provided sworn statements and documents that satisfactorily prove that Appellant’s application was not confused with that of another applicant and that the misspelling of his name in an affidavit was a typographical error. No other instances of OHR misspelling Appellant’s name have been called to our attention. A typographical error does not justify a finding that the County acted improperly. *Cf.*, MSPB Case No. 19-13 (2019), *aff’d*, Circuit Court for Montgomery County, Case No. 470431-V (January 7, 2020).

To the extent Appellant alleges discrimination based on his national origin, Appellant’s claims are outside of the Board’s jurisdiction. *See* MCC § 27-19(a); MCPR § 35-2(d). MSPB Case

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<sup>9</sup> The selected applicant was given the highest interview rating by the panel (Well Above Average) and had significant relevant experience. Our review of the record leads us to the conclusion that the selected applicant was unquestionably more qualified than Appellant. County Supplemental Response (March 29, 2021), Attachment 11.

No. 20-04 (2020); MSPB Case No. 18-05 (2018); MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). The County Code explicitly requires that appeals alleging discrimination prohibited by Chapter 27 of the Montgomery County Code must be filed with the Human Rights Commission. MCC § 33-9(c); MCPR § 35-2(d).

Finally, even if Appellant could make a viable case that he was qualified, the County has express discretion under MCPR § 6-15, Noncompetitive Appointment of Persons with Severe Disabilities. That regulation specifically states that such appointments are a “prerogative of management and not a right or entitlement.” Moreover, the regulation specifically deprives the MSPB of jurisdiction to review the decision: “An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board.” MCPR § 6-15(f).

Based on the record evidence, the determination that Appellant lacked the qualifications required for IRC46634 was legitimate, and that there is no indication that action was based on any impermissible non-merit factor. The Board therefore concludes that Appellant has failed to meet his burden of showing that the County’s decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors.

### **ORDER**

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant’s appeal from his nonselection for the position of a Grade 18 Program Specialist I (Asian American Health Initiative/Community Health) (IRC46634).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
September 28, 2021

  
Harriet E. Davidson  
Chair