

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

IN THE MATTER OF

██████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 22-08

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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 ██████████ (Appellant) from the determination of Montgomery County’s Office of Human Resources (OHR) Director to rescind a conditional offer of employment. The Appeal was officially filed September 27, 2021, and the County filed its response to the appeal (County Response) on October 27, 2021.¹ The Appellant did not exercise his right to make final comments in reply to the County’s submission. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a position as a Firefighter/Rescuer I (Recruit) (IRC47834). County Exhibit (CX) 1. By letter dated August 4, 2021, Appellant was given a conditional offer of employment with the Montgomery County Department of Fire and Rescue Services (MCFRS), contingent upon Appellant’s successful completion of a pre-employment medical evaluation, including a drug and alcohol screening through urinalysis. CX 2 and CX 3; County Response, p. 1. On August 11, 2021, Appellant submitted to a pre-employment drug screen. CX 4. LabCorp, an independent laboratory tested the specimen and, on August 18, 2021, reported to the Fire and

¹The appeal was filed by electronic mail on Friday, September 24, 2021, a date when the Merit System Protection Board offices are not open. Accordingly, the appeal is considered to have been officially received the next Board business day. See MSPB Case No. 18-13 (2018).

Rescue Occupational Medical Services that Appellant's specimen had tested positive for Cannabinoid, specifically Carboxy THC. CX 5; County Response, p. 1.

On August 19, 2021, Appellant was informed of the test results and the next day he requested a split specimen test. CX 6. Pursuant to Montgomery County Personnel Regulation (MCPR) Section 32, *Employee Drug and Alcohol Use and Drug and Alcohol Testing*, an applicant has a right to request a split specimen test when the laboratory for the initial urine specimen reports a verified positive test result. A split specimen test is a "laboratory test conducted by a second laboratory on the portion of the collected urine specimen that was frozen and stored." MCPR § 32-2(qq).

The laboratory report on the split specimen test conducted by Quest Diagnostics reconfirmed that Appellant's specimen was positive for Marijuana. CX 7; County Response, p. 2. On September 7, 2021, Dr. [REDACTED] of the Fire Rescue Occupational Medical Services notified the MCFRS Fire Chief of Appellant's test results and rated Appellant "Not Fit for Duty." CX 4. On September 8, 2021, the Director of OHR notified Appellant that he did not meet the applicable medical requirements for a Firefighter position with MCFRS and that the conditional offer of employment was withdrawn. CX 8; County Response, p. 2.

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, 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 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:

§ 6-14. 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.

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.

Montgomery County Personnel Regulations, 2001, (As amended October 21, 2008, July 12, 2011, July 24, 2012, June 30, 2015 and September 27, 2017), Section 32, *Employee Drug and Alcohol Use and Drug and Alcohol Testing*.

§ 32-2. Definitions.

(bb) ***Illegal drug***: A controlled substance that is illegal to possess under local, state, or Federal law.

* * *

(qq) ***Split Specimen Test***: The laboratory test conducted by a second laboratory on the portion of the collected urine specimen that was frozen and stored. The applicant or employee has a right to request a “split specimen test” if the test of the primary specimen produces a verified positive test result, or a verified adulterated or substituted test result.

§ 32-3(a) Drug and alcohol prohibitions that apply to job applicants and County employees.

(1) An applicant for an HPR, Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position must not:

(A) have, at the time a urine specimen is given for a drug test, an illegal drug in the applicant’s body above the established cutoff levels for the drug

...

§ 32-3(f) Drug/alcohol designations of County positions.

(4) All nonsupervisory and supervisory positions in the following occupational series are Public Safety positions: . . . (C) Firefighter/Rescuer. . .

§ 32-3(h) Drug and alcohol testing of job applicants and employees.

(3) *Pre-employment drug testing.*

(C) The County conducts pre-employment drug tests on all applicants for: . . . (ii) Public Safety positions not covered by (3)(B) above. . .

(14) *Substances tested.*

(B) For drug testing under County authority, the laboratory must test specimens for the following drugs or their metabolites: . . . (iv) cannabinoids (marijuana) . . .

(19) *Consequences of a verified positive drug test result or an alcohol test result of 0.02 or higher.*

(A) A department director must not select a job applicant who has a verified positive drug test result.

ISSUE

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

ANALYSIS AND CONCLUSIONS

In a nonselection appeal the appellant has the burden of proving that the County's decision on the 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). *See* MCPR § 34-9(d)(2). The County argues that Appellant cannot meet this substantial burden of proof under the Personnel Regulations and County Code to show that the County's decision was arbitrary and capricious, or illegal.² The Board agrees and concludes that Appellant has failed to meet this burden.

The County conducts pre-employment drug tests on all applicants for public safety positions, a category that expressly includes Firefighter/Rescuer positions. MCPR § 32-3(a)(1)(A), § 32-3(f)(4)(C), and § 32-3(h)(3)(C)(ii). The Personnel Regulations provide that public safety applicants must not "have, at the time a urine specimen is given for a drug test, an illegal drug in the applicant's body above the established cutoff levels for the drug." MCPR § 32-3(a)(1)(A). The County Personnel Regulations define an "illegal drug" as "[a] controlled substance that is illegal to possess under local, state, or Federal law." MCPR § 32-2(bb). The list of illegal drugs under the employee and applicant drug use and testing regulation specifically includes "cannabinoids (marijuana)." MCPR § 32-3(h)(14)(B)(iv).

Under legislation enacted in 2014, the use or possession of less than 10 grams of marijuana has been decriminalized in Maryland. *Lewis v. State*, 470 Md. 1, 9 (2020). However, even though such use under Maryland law is a civil offense and not a crime, it is still unlawful and punishable by fine. Maryland Code Ann., Criminal Law, § 5-601 and § 5-601.1.³ Moreover, marijuana remains an illegal drug under Federal law as a Schedule I Controlled Dangerous Substance, and its use is punishable by incarceration and monetary fines. 21 U.S.C.S. § 812(c). Marijuana is unquestionably still an illegal drug under State and Federal law and the County Personnel Regulations.

The record reflects that Appellant was properly notified that his offer of employment was contingent upon meeting the County's medical standards for employment, including a "drug/alcohol screening." CX 3. When Appellant's urine specimen produced a positive drug result he availed himself of the opportunity to have the split specimen tested. CX 4, 5 and 6. The split specimen was tested by a different independent laboratory and the positive result was confirmed. CX 7. The results were reviewed by a Fire and Rescue Occupational Medical Services doctor who certified the verified positive test and concluded that Appellant was "Not Fit For Duty." CX 4.

² There is no allegation or any evidence that the County's actions were based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

³ We note that Appellant has made no claim that he used marijuana for medical purposes.

Accordingly, the conditional offer of employment was then rescinded because under MCPR § 32-3(h)(19)(A), a “department director must not select a job applicant who has a verified positive drug test result.”

Other than his unsupported allegation “that the tests were somehow in error,” Appellant has provided no basis or proof to explain the positive test results. He simply states that the tests were somehow in error and asks for retest.⁴

Appellant alleges that he was not allowed to submit another urine specimen for retest. The County correctly argues that Board precedent holds that there is no obligation for the County to allow submission of a new specimen and a retest. MSPB Case Nos. 18-13 & 18-20 (2018).

Appellant has not carried his burden of proving that the County’s decision was arbitrary and capricious, illegal, or based on nonmerit factors. The Board finds that the County acted properly and reasonably in rescinding the conditional offer of employment to Appellant based on his verified positive drug tests. Accordingly, the OHR Director’s decision was not arbitrary, capricious, or otherwise unlawful.

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 Firefighter/Rescuer I (Recruit) (IRC47834).

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

For the Board
February 7, 2022


Harriet E. Davidson
Chair

⁴ In this regard it is notable that Appellant did not reply to the County’s submission despite reminders from Board staff that he had the opportunity to do so.