

**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. 23-01

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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 the Montgomery County Department of Health & Human Services (DHHS) not to promote her to a position as a Nurse Manager. The Appeal was filed on August 24, 2022. The County filed its response to the appeal (County Response) on October 17, 2022, and Appellant replied that same day.

The appeal was considered and decided by the Board.

FINDINGS OF FACT

A DHHS recruitment for a Grade 25 Nurse Manager (IRC54213) was posted on May 11, 2022, with a closing date of June 10, 2022. County Exhibit (CX) 1; Affidavit of ██████████, CX 2, ¶5; Affidavit of ██████████ (RS or “hiring manager”), CX 5, ¶5. By June 10, only Appellant had applied for the position. CX 2, ¶6.

After discussions between DHHS and the Office of Human Resources the recruitment was extended and readvertised with a new closing date of July 1, and then changed to “open until filled.” CX 2, ¶s 7-8.

Appellant continued to be under consideration for the Nurse Manager position. The extended recruitment specifically provided that applicants who had previously applied remained under consideration. CX 2, ¶7.

Ultimately there were eight applicants. Five of the candidates, including Appellant, were placed on the eligible list as qualified to be interviewed. CX 3. Appellant was interviewed by the three-person interview panel. CX 4. The selected candidate received the highest scores in the panel consensus evaluation form from the structured interview process, with six “above average” scores. CX 4. Appellant received two “below average,” three “average” and one “above average” scores. CX 4.

Appellant alleges that RS, the hiring manager, was biased and retaliated against her. Appellant claims that RS urged one of Appellant’s co-workers to apply for the promotion and told the coworker that she had no intention of promoting Appellant. Appeal Form, p. 3.

The hiring manger denied under oath having done so: “I did not inform any staff member that I had ‘no intention’ of hiring Ms. [REDACTED] as the Nurse Manager.” CX 5, ¶6. The hiring manager also stated that she did not know the selected candidate prior to the interview process. CX 5, ¶8.

Appellant suggests that the alleged retaliation by the hiring manager was based on Appellant’s criticisms of the department’s operations: “I feel that I am being discriminated against due to the fact that I have been vocal about changes that need to happen in the Department. . . We (the nurses) also contacted the union in the last year, and I was vocal about wanting to speak to them about the problems we were dealing with, and I think another CHN told her [RS] that I was the one who called them (when it actually wasn’t) and feel she retaliated because of this also.” Appeal Form, p.3.

Appellant further alleged that she suspected improper favoritism based on her speculation that the applicant selected was a friend of someone the hiring manager knows. Appeal Form, p. 3 (“I think the person she hired is a friend of someone she knows.”). Appellant repeated this conjecture in subsequent correspondence. Appellant email of September 14, 2022 (“I’m more convinced than ever that the new Manager is a friend of the Germantown Health Center’s manager and therefore, I was not given a fair chance by her either. The Germantown manager was part of the [interview] panel as well.”); Appellant email of October 17, 2022, to OHR (“The new manager most likely is a friend of someone who works in the county who was told about the position.”).

Appellant provided no basis or proof for her assumptions and the hiring manager denied having knowledge of the selectee. CX 5, Affidavit of RS, ¶8 (“I do not have previous knowledge of the applicant who was selected for the Nurse Manager position.”).

Appellant also alleges that the other members of the interview panel may have been biased against her. Appeal Form, p. 3 (“I also know the other 2 people that were on the panel and they definitely could have preconceived notions about me.”). Appellant does not explain why that may be the case or provide any evidence to support the allegation.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, which provides, in pertinent part:

§33-9(c). Appeals by applicants. Any applicant for . . . 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, Section 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), provides in pertinent part:

§6-3. Employment application deadline.

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

§6-9. Eligible list. . . The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. . .

§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, Section 7, Appointments, Probationary Period, and Promotional Probationary Period (as amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), states, in part:

§ 7-1. Use of eligible list. If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

- (a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.
- (b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.

Montgomery County Personnel Regulations, 2001, Section 27, Promotion, (as amended June 30, 2015), provides, in part:

§27-4. Appeal of promotional action.

- (a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

(c) An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.

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 to deny her the promotion was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MCPR § 27-4; MCPR § 34-9(d)(2). *See* MSPB Case No. 21-12 (2021); MSPB Case No. 20-04 (2020). The County argues that Appellant has failed to meet her substantial burden of proof.

Extension of the Recruitment

Appellant seems to suggest that there was something questionable about the County's decision to extend the application deadline for the recruitment after she was the only one to apply before the original deadline. The Board has found that extending a recruitment to increase the number of candidates may be appropriate. MSPB Case No. 20-04 (2020) ("The Department's desire to broaden the pool of applicants to obtain more qualified candidates is certainly not arbitrary, capricious or illegal."). *See* MCPR §6-3(b) ("The OHR Director may designate certain positions for open continuous or open until filled recruitment."). We do not view the County's effort to seek competition as improper when there was only one applicant during the initial posting period.

Alleged Retaliation or Bias

Appellant argues that the hiring manager was biased and retaliating against her, alleging that RS urged one of Appellant's co-workers to apply for the promotion and telling her that she had no intention of promoting Appellant. Appeal Form, p. 3. Appellant suggests that the alleged retaliation was "due to the fact that I have been vocal about changes that need to happen in the Department. . . We (the nurses) also contacted the union in the last year, and I was vocal about wanting to speak to them about the problems we were dealing with, and I think another CHN told her that I was the one who called them (when it actually wasn't) and feel she retaliated because of this also." Appeal Form, p.3.

The hiring manger denied under oath telling another employee that she had prejudged Appellant's candidacy: "I did not inform any staff member that I had "no intention" of hiring Ms. [REDACTED] as the Nurse Manager." CX 5, ¶6.

Appellant's allegations concerning what her coworker told her the hiring manager had said constitutes second level hearsay, also referred to as "hearsay within hearsay." While it is true that hearsay is admissible in administrative proceedings, Montgomery County Code, Administrative Procedures Act, § 2A-8(e), we are obligated to take into consideration that such hearsay is less reliable than a sworn statement. MSPB Case No. 17-05 (2017). *See Travers v. Baltimore Police Department*, 115 Md. App. 395, 413 (1997); *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725-26 (1989). Appellant did not provide any written statement from the coworker, either sworn or unsworn. She instead complains that DHHS or OHR should have obtained a statement from the coworker. However, because in nonselection appeals it is the appellant who bears the burden of proof we are unable to credit Appellant's claim that the hiring manger made the contested statement.

In this regard we note that Appellant's response to the County's submission acknowledges that she cannot carry her burden of proof without a statement from the coworker. *See* Appellant's Email of October 17, 2022 ("Did anyone speak with [EP]? She is my co-worker that advised that my previous supervisor, ██████████, made these statements. . . I can't prove anything if you don't speak to the person who told me. I don't understand why no one has asked [EP] about this or asked for an affidavit from her.").

Favoritism

Appellant's allegations of favoritism are based on her assumption that the selected applicant was a friend of someone the hiring manager knows, specifically the Germantown Health Center's manager. *See* Appellant email of September 14, 2022. However, Appellant is clearly speculating, as indicated by the language she uses. For example, in her Appeal Form Appellant says, "*I think* the person she hired is a friend of someone she knows." (emphasis added). And in Appellant's email of October 17, 2022 to OHR she says, "The new manager *most likely* is a friend of someone who works in the county who was told about the position." (emphasis added). Appellant also alleged that the other members of the interview panel might have been biased against her, without explaining how Appellant knows that may be the case or even why she thinks it may be the case. Once again, Appellant's language indicates that she is guessing. Appeal Form, p. 3, ("I also know the other 2 people that were on the panel and they definitely *could have* preconceived notions about me.") (emphasis added). These are not factual assertions; they are suppositions without proof.

The Board has held that allegations of favoritism without proof may not constitute a basis for upholding an appeal. MSPB Case No. 20-04 (2020) ("There is no evidence to support Appellant's bald allegation of favoritism . . . Allegations without proof may not form a basis for us to uphold the appeal. . .").

The Board has also held that a hiring official knowing a candidate is an insufficient basis to find favoritism or bias:

Indeed, even if the selected candidate was known to those involved in the selection process it would not be enough for us to conclude that there had been improper favoritism. *See* MSPB Case No. 00-12 (2000), *aff'd*, *Montgomery County v. Clarke*, No. 2580, Sept. Term, 2000 (Md. Ct. Spec. App. Dec. 5, 2001) ("The fact that the selecting official picks someone who is previously known and viewed favorably,

or doesn't select someone who is previously known and viewed unfavorably, does not, in the Board's view, render the procedure defective.”).

MSPB Case No. 20-04 (2020).

In her appeal Appellant mentioned that she has “a chronic illness and the supervisor knows this and this stress doesn't help.” Appeal Form, p. 3. The hiring manager acknowledged in her affidavit that Appellant verbally shared information concerning her health condition but noted that she did not have a Health Status Report from OMS from 2021 or 2022. CX 5, ¶10. Appellant also disclosed the nature of her health condition in her October 17 response to the County submission: “FYI, I have [REDACTED]. It's a chronic disease and yes, I should have given OMS my health record from my neurologist but it's very bothersome to submit this yearly when it's not changing.” However, Appellant does not allege that as part of the promotional process she has suffered discrimination due to her health condition or that she required an accommodation.

The Board must give deference to the hiring authority because Appellant has not provided any evidence that she was subjected to retaliation, favoritism, or bias, or was clearly the best candidate. *See* MSPB Case No. 18-05 (2018) (“In a non-selection case, the Board will not substitute its judgment for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee.” *citing* MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). *See also* MSPB Case No. 14-03 (2013); MSPB Case No. 10-11 (2010); and MSPB Case No. 09-01 (2009). Moreover, the undisputed record evidence indicates that the consensus evaluation of the interview panel rated the selected candidate higher than Appellant. The Board has consistently held that “Selection of a higher rated candidate is consistent with the County personnel regulations.” MSPB Case No. 18-05 (2018). *See* MCPR § 7-1.

ORDER

On the facts in the record before us and based upon the foregoing analysis, the Board must **DENY** Appellant's appeal from her nonselection for the position of Nurse Manager.

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
January 18, 2023

[REDACTED]
Harriet E. Davidson
Chair