

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

**IN THE MATTER OF**

**[REDACTED]**

**APELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE NOS. 24-05 & 24-12**

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**FINAL DECISION**

Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) on December 26, 2023, claiming he was denied employment when he applied for a competitive promotion (MSPB Case No. 24-05). That same day, the Board acknowledged the appeal and advised Appellant that it was necessary to provide a copy of the Notice of Nonselection per Montgomery County Personnel Regulations (MCPR), 2001 § 35-4(d)(3). On April 10, 2024, Appellant filed a second appeal with the MSPB claiming denial of employment based upon the same nonselection for a promotion (MSPB Case No. 24-12). On April 30, 2024, the Board consolidated the two appeals.

On May 15, 2024, Montgomery County Government (County) filed its Response to the Appeal. On October 10, 2024, the MSPB issued a Request for Additional Information letter to the County, requiring the County to provide responses no later than October 24, 2024. The MSPB also provided Appellant with a November 7, 2024, deadline to reply to the County's responses to the Request for Additional Information, should Appellant wish to file a reply.

The County provided its responses to the MSPB's Request for Additional Information letter on October 24, 2024. Appellant did not reply to the County's response by the November 7, 2024, deadline. Instead, Appellant's counsel propounded Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on the County on November 7, 2024. In response, the County filed a Motion to Quash Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on November 12, 2024. Appellant's Counsel filed Appellant's Response to Respondent's Motion to Quash Appellant's First Set of Interrogatories

and First Set of Requests for Production of Documents on November 20, 2024. After considering the arguments of the parties, the Board granted the County's Motion to Quash.

The Board has determined that the record is complete based upon a review of the documents and exhibits provided by the parties and issues the following Decision.<sup>1</sup>

### FINDINGS OF FACT

Appellant, a merit system employee working as a Fire Code Inspector III with the Montgomery County Department of Permitting Services (DPS), applied for a promotion to the newly created position of Manager III, Special Assistant to the Director (Grade M3) in DPS, competitively advertised in Vacancy Announcement IRC60285, which was posted by the County on October 20, 2023. C. Ex. 1.<sup>2</sup> The Advertisement was open for two (2) weeks and closed on November 3, 2023. CR., p. 2. The Announcement listed various responsibilities and preferred qualifications, including "[m]anag[ing] specific small business permitting from permit pre-submission to U&O issuance." C. Ex. 1.

DPS Director R [REDACTED] S [REDACTED] was the selecting official for the position. C. Ex. 8. Per Director S [REDACTED], the hiring process used to select the successful candidate included the following:

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<sup>1</sup> Appellant did not label Appellant's attachments. For ease of reference, the Board has done so. Appellant provided the following documents:

1. A. Ex. 1 – Appeal Form #259, filed on December 26, 2023.
2. A. Ex. 2 – DPS Letter, filed on December 26, 2023.
3. A. Ex. 3 – Appeal Form #268, filed on April 10, 2024 (3:28 p.m.).
4. A. Ex. 4 – Appeal Form #269, filed on April 10, 2024, (5:06 p.m.).
5. A. Ex. 5 – Notice of Nonselection, filed on April 10, 2024.
6. AR. – Appellant Response, filed on June 4, 2024.

The County provided the following documents:

1. CR. – County Response, filed on May 15, 2024.
2. CRAI. – County Response to Request for Additional Information, filed on October 24, 2024.
3. C. Ex. 1 – IRC60285 MLS 3 Job Advertisement.
4. C. Ex. 2 – IRC61449 MLS 3 Job Advertisement.
5. C. Ex. 3 – IRC60285 Export List.
6. C. Ex. 4 – Eligible Candidate Resumes (Redacted).
7. C. Ex. 5 – IRC60285 Appellant [Selection Panel Consensus Evaluation Form].
8. C. Ex. 6 – Communication Memo to Candidates (Redacted).
9. C. Ex. 7 – Bypass Hiring Preference Non-Selection DPS M3 Spec Asst (Redacted).
10. C. Ex. 8 – Affidavit of R [REDACTED] S [REDACTED].
11. C. Ex. 9 – Affidavit of C [REDACTED] C [REDACTED].
12. C. Ex. 10 – IRC60285 [REDACTED] [Selection Panel Consensus Evaluation Form].

<sup>2</sup> Neither the County nor Appellant provided the original IRC 60285 Vacancy Announcement that was advertised on October 20, 2023. According to C [REDACTED] C [REDACTED], Human Resources Specialist with the Office of Human Resources, there were no changes to the body of the announcement between when it was initially advertised and when it was eventually reopened. C. Ex. 9.

1. After the advertisement closed, the Office of Human Resources (OHR) provided Director S [REDACTED] with an eligible list of qualified candidates.
2. Director S [REDACTED] and D [REDACTED] B [REDACTED] (Administrative Services Coordinator, DPS) reviewed the resumes of individuals on the eligible lists and compared them to the advertised preferences. From there, individual candidates were selected for interviews.
3. The candidates selected for interviews were contacted and scheduled for a first-round interview with a three-person panel consisting of L [REDACTED] K [REDACTED] (Manager II, DPS), G [REDACTED] S [REDACTED] (Manager III, Offices of the County Executive), and G [REDACTED] L [REDACTED] (Manager II, DPS).
4. The first-round interview panel asked each interview candidate the same eight questions.<sup>3</sup>
5. At the conclusion of the interview, each panel member completed an individual evaluation form.
6. The panel members then completed a consensus evaluation form and as a group decided whether to recommend, not recommend, or “save for later” each candidate.
7. Candidates who were recommended were offered a second-round interview with Director S [REDACTED] and DPS Deputy Director, E [REDACTED] M [REDACTED].
8. Candidates who participated in the second-round interviews were asked the same six questions.
9. At the conclusion of the second-round interviews, each panel member completed an individual evaluation form.
10. Director S [REDACTED] and Deputy Director M [REDACTED] then discussed the interview and completed a consensus evaluation form.

C. Ex. 8.

Per the process listed above, Appellant’s application was evaluated, and Appellant was placed on the Eligible List. C. Ex. 3; C. Ex. 8. Thereafter, Director S [REDACTED] and Ms. B [REDACTED] selected Appellant and four (4) other applicants for the first round of interviews, which occurred on or around November 29, 2023. C. Ex. 8.<sup>4</sup> However, after the first round of interviews Appellant was not recommended for further consideration for the position based on the Selection

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<sup>3</sup> The eight (8) first-round interview questions can be found in C. Ex. 5 and C. Ex. 10. Note that Director S [REDACTED]’s Affidavit incorrectly cites to C. Ex. 3 regarding the eight interview questions that were asked during the first-round interviews.

<sup>4</sup> There is an inconsistency regarding the interview date between the Selection Panel Documents (November 29, 2023) and Director S [REDACTED]’s Affidavit (November 27, 2023). Both the County Response and Appellant Response indicate that the interview occurred on November 29, 2023. Per the County Response, the first-round interview sessions occurred the week of November 27, 2023, which may account for the discrepancy.

Panel Consensus Evaluation, receiving four (4) “Below Average” ratings and four (4) “Average” ratings regarding Appellant’s eight responses during the interview. C. Ex. 5; C. Ex. 8. Only one applicant – “Candidate A” – was referred to a second-round interview; however, “Candidate A” was not selected for the position. CR., p. 2; C. Ex. 8. According to the County, the second-round interview occurred on December 14, 2023. CR., p. 2.

After the first-round interviews, both Appellant and Director S ██████ attended a DPS employee appreciation event on December 11, 2023. C. Ex. 8; A. Ex. 1. Appellant and Director S ██████ spoke during the event, though the parties dispute what was discussed during the conversation. Appellant claims that Director S ██████ approached Appellant and stated that Appellant “performed exceptionally well in the interview process.” A. Ex. 1. Appellant further claims that Director S ██████ disclosed that Appellant was “the only candidate recommended for a second interview out of the five.” A. Ex. 1. Appellant additionally claims that Director S ██████ stated that “DPS was going in a different direction” and was seeking an applicant “with a small business development background.” A. Ex. 1; AR., p. 1. Director S ██████ denies that he stated during the conversation that Appellant was referred for a second-round interview. In fact, Director S ██████ stated that during their conversation, he told Appellant that the position would be re-advertised. C. Ex. 8. Director S ██████ also denied that DPS considered any applicant’s small business development experience during the hiring process. C. Ex. 8.

Since no candidate was selected, Director S ██████ requested that OHR re-advertise the position. C. Ex. 8. On December 20, 2023, Director S ██████ issued a letter to all candidates for the position. C. Ex. 6. The letter stated the following:

Thank you for interviewing for the MLS III/Special Assistant to the Director position (IRC60285). The Department has not made a selection and will continue with the recruitment. Your application remains under consideration.

Thank you again for your interest, we wish you every success in your career pursuits.

C. Ex. 6.

Vacancy Announcement IRC60285 was re-advertised on December 21, 2023, permitting applicants to apply until January 12, 2024. CR., p.2; C. Ex. 1. The Announcement included the following language:

This is a re-announcement. The status of applicants who previously applied will remain the same. Applicants may submit an updated resume directly to the recruitment specialist.

C. Ex. 1.

Subsequently, Vacancy Announcement IRC 60285 was merged into Vacancy Announcement IRC61449, due to an “HRIS (Proforms) Expiration.” CR., p. 2; C. Ex. 2. The Announcement closed on March 8, 2024. C. Ex. 2. The Announcement included the following language:

This is a re-announcement. The status of applicants who previously applied will remain the same. Applicants may submit an updated resume directly to the recruitment specialist.

C. Ex. 2. There were no changes to the body of the announcement. C. Ex. 9.

Updated eligibility lists were provided to DPS. CR., p. 2. Additional first-round interviews were conducted in January and February 2024, including Mr. C [REDACTED] A [REDACTED].<sup>5</sup> C. Ex. 8. Mr. A [REDACTED] was asked the same questions in his interview that Appellant was asked in his interview. C. Ex. 5; C. Ex. 10. Per the Consensus Evaluation Form, Mr. A [REDACTED] received five (5) “Average” ratings and three (3) “Above Average” ratings and was recommended for a second-round interview. C. Ex. 10. Director S [REDACTED] and Deputy Director M [REDACTED] interviewed Mr. A [REDACTED] on February 28, 2024. C. Ex. 10. Per the second-round Consensus Evaluation Form, Mr. A [REDACTED] scored one (1) “Average” rating, three (3) “Above Average” ratings, and two (2) “Well Above Average” ratings. C. Ex. 10.

At the conclusion of the recruitment process, Mr. A [REDACTED] was the highest-rated candidate per the interview Consensus Evaluation Forms and was offered the position. C. Ex. 8. Per Director S [REDACTED], this was due to Mr. A [REDACTED]’s “demonstrated experience in project management, stakeholder management, customer service and field inspections, as well as his in-depth technical knowledge of building codes and working knowledge of the Department of Permitting Services’ operations.” C. Ex. 8. Director S [REDACTED] acknowledges that while Mr. A [REDACTED] did have direct experience with small business permitting, it was not a deciding factor. C. Ex. 8. Mr. A [REDACTED] accepted the offer on March 28, 2024, and began working for DPS on April 7, 2024. CR., p. 2.

On March 29, 2024, Appellant received an email communication from Ms. B [REDACTED] informing Appellant that he was not selected for the position. A. Ex 5.

## **POSITIONS OF THE PARTIES**

### **a. Appellant**

Appellant argues the County’s selection process violated County law, claiming that:

- the selection was based on factors not included in the job announcement, specifically small business experience, and Appellant was prevented from demonstrating his small business experience in his interview;

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<sup>5</sup> Two candidates with hiring preference were interviewed; however, they were not selected as they did not possess the requisite qualifications. C. Ex. 7.

- the County failed to provide justification for reopening the advertisement, selecting a candidate that did not apply for the position when it was originally advertised; and
- the County intended to non-competitively select Mr. A[REDACTED] for the position but used the selection process to conceal the County's violation of County competitive recruitment procedures.

To remedy the violation, Appellant requests that the Board either place him in the Special Assistant to the Director (M3) position or place him in an equivalent position.

b. County

The County denies Appellant's claims, arguing that:

- OHR "adhered to established hiring procedures, including posting job advertisements, reviewing applicant qualifications, providing eligible candidate lists to hiring departments, extending conditional and final job offers, and facilitating the County's virtual orientation program for new hires"; and
- Appellant has not met his burden of proof, failing to allege any evidence to support that the County's actions were arbitrary, capricious, or otherwise illegal.

**APPLICABLE CODE PROVISIONS AND REGULATIONS**

***MONTGOMERY COUNTY CODE***

Sec. 33-5. Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article.

\* \* \*

(b) Merit system principles. The merit system established by this chapter encompasses the following principles:

\* \* \*

(2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment;

\* \* \*

Sec. 33-9. Equal employment opportunity and affirmative action.

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- (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 discrimination prohibited by chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. 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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

***MONTGOMERY COUNTY PERSONNEL REGULATIONS, 2001***

**SECTION 6. RECRUITMENT AND APPLICATION RATING PROCEDURES**

**6-2. Announcement of open jobs.**

- (a) The OHR Director:

\* \* \*

- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;

\* \* \*

**6-5. Competitive rating process.**

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-7 or 27-2(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

\* \* \*

- 6-9. Eligible list. After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories. 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. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

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- 6-13. Selection process. A department director may, in consultation with the OHR Director, use any selection process that meets the department's needs and is consistent with these Regulations.
- 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.

## **SECTION 7. APPOINTMENTS, PROBATIONARY PERIOD, AND PROMOTIONAL PROBATIONARY PERIOD**

- 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.
  - (c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.



## **SECTION 27. PROMOTION**

### **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.

## **SECTION 34. GRIEVANCES**

### **34-9. Grievance procedure.**

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- (d) Burden of Proof.

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- (2) The grievant has the burden of proof in a grievance on any other issue.

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## **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

To prevail in a nonselection case, an appellant must demonstrate that the decision was arbitrary, capricious or illegal. MCC § 33-9(c); MCPR § 34-9(d)(2).

- a. Appellant has failed to prove that the selection was based on factors not included in the job announcement, specifically small business experience, and that he was denied the opportunity to discuss his small business experience in his interview.**

Appellant suggests that the recruitment process was flawed due to his belief that the Department considered criteria not included in the original position announcement or listed in the subsequent re-announcements, specifically that the Department was seeking candidates with small business experience. Appellant supports his argument based on statements he claims were made to him orally by Director S [REDACTED] in their December 11, 2023, conversation, that “DPS was going in a different direction and that DPS wanted a candidate with small business experience.” AR., p. 1. Director S [REDACTED] confirms that he spoke with Appellant on December 11, 2023, and in fact that he informed Appellant that the position would be re-advertised. Director S [REDACTED] denies that in re-advertising the position the Department was seeking someone with more small business experience. C. Ex. 8.

The merit system law requires the “full and open consideration of qualified applicants.” MCC § 33-5(b)(2). Therefore, the selection process must be open and known to everyone involved from the beginning and throughout the process. MSPB Case. No. 13-12 (2013). The Personnel Regulations require that a job vacancy announcement include the rating process and rating criteria that will be used to create an eligible list. MCPR §§ 6-2(a)(2) & 6-5(b). Consequently, a recruitment selection is flawed and violates the merit system law and the Personnel Regulations if the selection is based upon criteria that is not included in a vacancy announcement. *See* MSPB Case No. 13-12 (2013). *Cf.* MSPB Case No. 04-10 (2004) (“Appellant was disadvantaged by the selecting official’s decision to consider only those individuals who possess college degrees when that educational requirement is not mandatory for either the class specification or the position because it is an improper promotion practice in violation of Montgomery County Personnel Regulations. . .”).

The record does not support Appellant’s argument that the Department added a “small business experience” requirement to the selection criteria. Neither the original announcement nor the subsequent re-announcement includes a small business experience requirement. C. Ex. 1; C. Ex. 2. In fact, “small business experience” was not the subject of any questions posed to any of the applicants. The record reflects that the only question asked during the first-round interviews that mentioned “small business” focused on skills associated with establishing and maintaining relationships, develop action plans to initiate the County’s initiatives, and effectively monitor and report on the program.<sup>6</sup> C. Ex. 1; C. Ex. 2. Additionally, the Selection Panel notes provided by

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<sup>6</sup> Per the announcements, the successful applicant is responsible for “[m]anag[ing] specific small business permitting from permit pre-submission to U&O issuance.” C. Ex. 1; C. Ex. 2. First-round interview question 5 asked the following: “One of the Department’s planned initiatives is to educate and assist small business owners on the role of the Department of Permitting Services and to provide guidance in navigating the permitting process in Montgomery

the County are devoid of any mention of either Appellant's or Mr. A■■■■'s small business experience. C. Ex. 5; C. Ex. 10. Although Appellant argues that he was not afforded the opportunity to discuss his small business experience, we do not see how that would have changed the trajectory of the selection, as the selected candidate also did not discuss his small business experience during his interview.

To support his argument, Appellant relies heavily on his December 11, 2023, conversation with Director S■■■■. Even assuming this conversation occurred as Appellant has alleged, Director S■■■■'s statements are at most oral misrepresentations regarding the status of the selection process, as Appellant's Consensus form states that he was "Not Recommended," and Appellant was not selected for a second-round interview. C. Ex. 5; C. Ex. 8. While Appellant does not expressly assert a claim of equitable estoppel against the County, that argument might be inferred from Appellant's submissions. We find that Appellant has not sufficiently alleged the elements of equitable estoppel. Appellant cannot rely solely on oral misrepresentations. *United States v. Vanhorn*, 20 F.3d 104, 112 (4th Cir. 1994) ("estoppel against the Government cannot be premised on oral representations"). Moreover, Appellant did not allege that any County employees engaged in affirmative misconduct. *Perez Peraza*, 114 M.S.P.R. 457 (2010) (Affirmative misconduct is a prerequisite for invoking equitable estoppel against the government; negligent provision of misinformation does not constitute affirmative misconduct).

Based upon the foregoing, the Board finds that "small business experience" was not a determining factor in the selection process. Appellant, thus, has failed to carry his burden.

**b. Appellant has failed to prove that the County failed to provide justification for reopening the advertisement and selecting a candidate that did not apply for the position when it was originally advertised.**

Appellant also argues that the County violated the Merit System law by failing to provide justification for extending the advertisement, thereby allowing an individual who did not apply for the position when it was originally advertised in October 2023. We find no merit to this argument.

The selection of the Special Assistant to the Director was based on applicant ratings assigned by the interview panel established through the same job-related questions asked of all applicants selected for interviews. Upon completion of each interview, the panel issued a Consensus rating for each individual applicant. Applicants who received a Consensus rating of "Recommended" were considered for second-round interviews. Applicants who received "Not Recommended" were not considered for second-round interviews. Indeed, Appellant's Consensus Evaluation Form indicates that the panel did not recommend Appellant for a second interview. C. Ex. 5. The record indicates that of the five (5) applicants who were interviewed after the position was originally announced, only "Candidate A" was recommended for a second interview. CR., p. 2; C. Ex. 8. Ultimately, the Department did not select "Candidate A." CR., p. 2; C. Ex. 8. Because there were no applicants who responded to the original announcement in the highest rated category

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County. The person in this position will need to know how 1) to establish and maintain relationships with internal and external stakeholders; 2) to develop and execute an action plan to implement the initiative, and 3) to effectively monitor, evaluate, and report on the program. Please describe your experience in applying each skill set."

(“Recommended”) after completion of all first- and second-round interviews, the Department re-announced the position. The Department’s desire to broaden the pool of applicants to obtain more qualified candidates is certainly not arbitrary, capricious or illegal. *See* MSPB Case. No. 23-01 (2023); MSPB Case No. 20-04 (2020).

**c. Appellant has failed to prove that the County intended to non-competitively select Mr. [REDACTED] for the position but used the selection process to conceal the County’s violation of County competitive recruitment procedures.**

Finally, without proof, Appellant suggests that the entire selection process was a smokescreen to conceal the Department’s intention to non-competitively select Mr. A [REDACTED] for the position. However, there is simply no reliable evidence to support Appellant’s bald allegations of unequal treatment or favoritism. 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 . . . [a]llegations without proof may not form a basis for us to uphold the appeal . . .”); MSPB Case No. 23-01 (2023); MSPB Case No. 20-11.

Nor did Appellant attempt to provide proof that he was the more qualified candidate. In a nonselection 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. MSPB Case No. 20-04 (2020); MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006).

The record clearly shows that, in the end, Mr. A [REDACTED] was the highest rated candidate and was properly selected for the position. The interview records submitted by the County indicate that Appellant was appropriately rated as “Not Recommended,” and that Mr. A [REDACTED]’s significantly higher scores justified his rating as “Recommended.” Documents submitted by the County indicate that Appellant and the selected candidate were interviewed on the same questions and that the selected candidate performed significantly better than Appellant. The un rebutted evidence of record indicates that the selecting official had sufficient evidence that the candidate selected was the best qualified applicant for the position. While Appellant claims that he was not provided the opportunity to discuss his previous small business experience, the Board has determined that such experience was neither required nor relied upon by the Department in its recruitment for the position. During the first-round interviews, all candidates were asked a question related to the Department’s planned initiative to educate and assist and guide small businesses through the County’s permitting processes (Question 5). Appellant’s Consensus rating on this question was “Below Average,” while Mr. A [REDACTED]’s Consensus rating was “Average.” And Mr. A [REDACTED]’s Consensus rating was clearly higher than Appellant’s based upon his responses overall to the interview questions. In fact, there were no questions where Appellant’s responses were rated higher than Mr. A [REDACTED]’s responses. Conversely, Mr. A [REDACTED]’s responses to five questions were rated higher than Appellant’s responses (Questions 2, 4, 5, 6, and 7).

It was entirely appropriate for the Department to select a candidate from the highest rating category. If the Department had for some reason wished to select a candidate from a lower rating category, under § 7-1(c) the Department would have had to justify that unusual selection in writing.

Moreover, bypassing the higher rated candidate to select Appellant would have required CAO approval. As Appellant was rated “Not Recommended,” the Department would have had to justify bypassing the selected candidate. The County Personnel Regulations and selection guidelines certainly do not require an agency to take those extraordinary steps. MSPB Case. No. 20-11 (2020); MSPB Case No. 20-04 (2020).

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Manager III, Special Assistant to the Director (Grade M3) position, and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations, MCPR § 7-1. As we stated in a prior failure to promote case, “[s]election of a higher rated candidate is consistent with the County personnel regulations.” MSPB Case No. 17-05 (2017). *See* MSPB Case No. 20-11 (2020); MSPB Case No. 20-04 (2020).

### 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.

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 10, 2025

  
Barbara S. Fredericks  
Chair