

MERIT SYSTEM PROTECTION BOARD 1984 ANNUAL REPORT

Montgomery County Government
Merit System Protection Board
Rockville, MD

May 1985

TABLE OF CONTENTS

	<u>PAGE NO.</u>
Composition of Merit System Protection Board	1
Duties and Responsibilities of the Board	1
Major Activities of the Board During 1984	4
Classification Activity	5
Interpretations	7
Appeals and Decisions	10
Summaries of Decisions on Appeals	
Classification	11
Compensation	21
Delay of Service Increment	29
Demotion	34
Disability Retirement	36
Dismissal	41
Grievability/Timeliness	49
Harassment	54
Miscellaneous	57
Promotion	65
Recruitment	89
Resignation/Termination	99
Suspension	100
Written Reprimand	105

1984
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT
SYSTEM PROTECTION BOARD

The Merit System Protection Board is composed of three members who are appointed by the County Council, pursuant to Article 4, Section 403 of the Charter of Montgomery County, Maryland. Board members must be County residents, and may not be employed by the County in any other capacity. One member is appointed each year to serve a term of three years.

The Board members in 1984 were:

Richard S. McKernon, Chairman (appointed 2/82)
Sandra M. King-Shaw, Vice Chairwoman (appointed 4/83)
Fernando Bren, Associate Member (re-appointed 1/84)

DUTIES AND RESPONSIBILITIES OF
THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in Article 4, Merit System and Conflicts of Interest, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County, Maryland; Article II, Merit System, Chapter 33, of the Montgomery County Code; and Section 1.2, Audits, Investigations and Inquiries of the Personnel Regulations for Merit System Employees.

Section 404, Duties of the Merit System Protection Board, states as follows:

"Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party

to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law."

Section 33-7, County Executive and Merit System Protection Board Responsibilities, Article II, Merit System, of the Montgomery County Code, defines the Merit System Protection Board responsibilities as follows:

"(a) Generally. In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein shall be fully exercised by the Board as needed to rectify personnel actions found to be improper. The Board shall comment on any proposed changes in the merit system law or regulations, at or before public hearing thereon. The Board, subject to the appropriation process, shall be responsible for establishing its staffing requirements necessary to properly implement its duties and to define the duties of such staff."

"(c) Classification Standards. . . .The Board shall conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and submit findings and recommendations to the County Executive and County Council."

- "(e) Adjudication. The Board shall hear and decide disciplinary appeals or grievances upon the request of a Merit System employee who has been removed, demoted or suspended and in such other cases as required herein."
- "(f) Retirement. The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay."
- "(g) Personnel Management Oversight. The Board shall review and study the administration of the County classification and retirement plans and other aspects of the Merit System and transmit to the Chief Administrative Officer, County Executive and the County Council its findings and recommendations. The Board shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations thereof shall cooperate with the County and have adequate notice and an opportunity to participate in any such review initiated under this Section."
- "(h) Publication. Consistent with the requirements of the Freedom of Information Act, confidentiality, and other provisions of law, the Board shall publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions."
- "(i) Public Forum. The Board shall convene at least annually a public forum on personnel management in the County Government to examine the implementation of Charter requirements and the Merit System law."

Section 1.2, Audits, Investigations and Inquiries, of the Personnel Regulations for Merit System Employees, states:

"The Merit Board shall have the responsibility and authority to conduct audits, investigations or inquiries, whether or not an appeal has been filed, to assure that administration of the merit system is in compliance with the Merit System Law and these regulations. . . The results of each audit, investigation or inquiry shall be transmitted to the County Council, County Executive, and Chief Administrative Officer with appropriate recommendations and/or corrective action necessary."

MAJOR ACTIVITIES OF THE BOARD DURING 1984

The Board received 86 appeals in 1984, which required a total of 41 worksessions, 20 hearings and 11 telephone conferences for receiving and reviewing evidence and reaching conclusions.

The Board also met with groups of employees on two separate occasions; Executive Office staff on three occasions; Fire Department representatives on two occasions; the Fire and Rescue Commission once and with the County Council four times. Additionally, the Board held a Public Forum, open to all interested parties, on January 17, 1984 and an Open House for employees on May 2, 1984. The Board plans to continue more open meetings and meetings with employee representatives, Department Heads, etc. on a regular basis. These meetings have provided the Board and the participants with greater insight into various problems and viewpoints with respect to administration of the merit system.

The Board completed an investigation into alleged violations of the merit system in the Office of Economic Development, and submitted a final report to the appropriate authorities in September 1984, with recommendations for changes needed to improve the administration of the system.

The major areas of emphasis for 1985 will be to conduct an employee attitude survey and to audit the Classification system. The employee attitude survey should help the Board in determining strengths and weaknesses of the present Personnel system and give some direction for needed changes and/or improvements. The Classification audit is expected to clarify and help resolve the many questions related to pay equity and result in recommended changes to shorten the time required to complete studies.

CLASSIFICATION ACTIVITY

CLASSIFICATION ACTIVITY

POSITION ACTIVITY

In 1984, the County experienced an increase of over 400% in the number of positions affected by a classification action, with 93% of the actions resulting in upgrading. A total of 499 positions were affected, with 465 upgraded and 34 being downgraded. In addition to being the highest number of positions upgraded in the last five years, the average grade increase (2.5) was also the highest average for the five year period.

Of the positions upgraded (465), 40% (185) were increased 3 or more grades, while 92% (426) were increased 2 or more grades. 20% of positions downgraded were lowered 3 or more grades, while 82% resulted in a 2 or more grade drop.

<u>Position Activity</u>	<u>1980</u>	<u>1981</u>	1982	1983	1984
Positions Upgraded	252	201	61	115	465
Average Grade Increase	1.2	2.1	1.8	2.1	2.5
Positions Downgraded	11	20	15	7	34
Average Grade Decrease	4.6	2.1	2.5	3.7	2.4

CLASS ACTIVITY

The number of classes in existence continued to decline in 1984, as broader generic classes are gaining in use.

<u>Class Activity</u>	1980	1981	1982	1983	1984
Classes Reallocated					
Up	17	23	3	13	9
Down	1	1	1	1	1
New Classes Created	30	28	10	13	7
Classes Abolished	69	54	26	26	28
Total Number of Classes	681	655	639	626	605

GENERAL OVERVIEW

In 1985/86, the Merit Board will conduct a complete audit of the County's Classification Plan, as required by Section 7.3(b) of the Personnel Regulations, as a means of determining the accuracy and validity of the plan and its implementation.

INDIVIDUAL POSITION RECLASSIFICATIONS

DEPT/OFFICE/AGENCY	NO. OF POSITIONS RECLASSIFIED UPWARD	DOWNWARD
Animal Control	1	2
Consumer Affairs	2	
Correction and Rehab.	4	1
County Attorney	1	
County Executive		1
Economic Development	4	
Environmental Protection	1	4
Facilities & Services	4	
Family Resources	8	1
Finance	10	2
Fire & Rescue Services		2
Health	160	8
Housing & Community Dev.	5	5
Human Relations Comm.		3
Libraries	228	1
Mgmt & Budget	9	
Personnel	5	2
Police	2	
Recreation	14	
Transportation	4	2
Soil Conservation Dist.	3	
TOTAL	465	34

INTERPRETATIONS OF PERSONNEL REGULATIONS

INTERPRETATION OF PERSONNEL REGULATIONS RELATED TO COMPENSATION
OF PAID FIREFIGHTERS

The Merit System Protection Board recently received information from the County Attorney's Office and the Personnel Director, which requires issuance of a new interpretation concerning overtime and holiday compensation of paid firefighters.

Under the present regulations in effect, Section 13.5 Compensatory Leave, Appendix Section 3(i) Overtime Policy, and Appendix Section 27 Computation of Leave Usage provide consistent and fair treatment for paid firefighters. In reviewing Appendix Section 22(a) Holiday Leave the Board found vague and misleading statements that should be construed and applied in a manner consistent with similar provisions in the regulations. Therefore, it is the interpretation of the Merit System Protection Board that:

1. Firefighters should be paid on the basis of eight hours for each shift worked, if that shift consists of 8-14 hours.
2. Firefighters should be paid on the basis of sixteen hours for each 24 hour shift worked.
3. A Firefighter who works in excess of the normal work day or work week, should be paid the overtime rate on an hour for hour basis, up to a maximum of eight hours of overtime for a full shift of 8-14 hours and up to a maximum of sixteen hours of overtime for a full 24 hour shift.
4. Each paid Firefighter should receive 8 hours of regular pay for an official holiday, whether worked or not, if eligible for such pay, pursuant to Section A22 (2), (3) & (4).
5. Each paid Firefighter whose normal work day falls on a holiday, in addition to the 8 hours of regular holiday pay, should be paid at the overtime rate for a maximum of 8 hours for a shift of 8-14 hours and for a maximum sixteen hours for a 24 hour shift.

6. Each paid Firefighter required to work on a holiday that is his/her regular day off, should be reimbursed under #5 above, and given another day off during the work week or credited with eight hours of compensatory leave for an 8-14 hour shift worked and sixteen hours for a 24 hour shift worked.
7. A paid Firefighter, normally scheduled to work on a holiday, who is involuntarily given the day off because of reduced staffing needs, should be paid holiday pay only, if working an 8-14 hour shift and holiday pay, plus 8 hours of administrative leave if working a 24 hour shift.

The Board believes the foregoing will assure fair and equitable compensation for all paid Firefighters in a manner consistent with the intent of the Personnel Regulations and County Code. This interpretation supercedes all prior interpretations and clarifications issued on Section 13.5, Appendix Section 3(i), Appendix Section 22(a) and Appendix Section 27 of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County.

Richard S. McKernon, Chairman

December 18, 1984

RESCISSION OF INTERPRETATION OF PERSONNEL REGULATIONS

On March 29, 1983, the Merit System Protection Board issued an interpretation of Section 15.1 (a) of the Personnel Regulations for both the County Government and the Fire/Rescue Service. This interpretation stated that lateral transfers between the County Government and the Independent Fire/Rescue Corporations were permitted without any loss in salary or benefits, as both systems were sufficiently similar, and all employees were paid from tax funds.


On May 8, 1984, James S. McAuliffe, Judge of the Circuit Court for Montgomery County, Maryland, ruled on a case which had been appealed to the Court on this issue, stating, in part:

". . .It is unquestionably true that the Board in this case was well motivated and that it took its responsibilities seriously, and that it sought to remedy what it viewed as a discriminatory or potentially discriminatory restriction upon movement between an independent fire corporation and a department of the Montgomery County Government.

While understandably well motivated, this court holds that. . .it was erroneous as a matter of law in its interpretation of the regulations relating to transfer of employees. . ."

Whereupon, the Judge proceeded to overturn the Board's decision which, in effect, negated the Board's interpretation.

Accordingly, the Merit System Protection Board hereby rescinds the interpretation of Section 15.1 (a) of both sets of Personnel Regulations issued on March 29, 1983, in order to be in compliance with the order of the Circuit Court for Montgomery County. As a result of this rescission, lateral transfers are only permitted between the Department of Fire and Rescue Services and the Independent Fire/Rescue Corporations.


Richard S. McKernon, Chairman

June 27, 1984

SUMMARIES OF DECISIONS ON APPEALS

APPEALS AND DECISIONS

The Personnel Regulations provide an opportunity for employees to file appeals with the Merit System Protection Board. Once the notice of appeal has been filed, the employee has ten work days to submit additional information required by Section 23.4, Appeal Period, of the Regulations. After this information is received, the appeal is processed in one of two ways.

First, if the appeal involves a suspension, demotion or dismissal, a hearing is scheduled, as required by Section 404 of the County Charter. In cases involving suspension or dismissal, at least two weeks' advance notice of the hearing is required. Upon completion of the hearing, the Board prepares and issues a written decision, usually within three weeks of the hearing.

The second method for processing appeals requires the development of a written record. Upon receipt of the notice of appeal and supplemental information, the County is notified and allowed ten days to respond, in accordance with Section 23.6, Notification and Submission of Record, of the Regulations. The Board then provides the appellant an additional five work days to respond to or comment on the County's submission. The case is then placed on the Board's agenda, copies of all documentation are provided to each Board member, and the Board discusses the case at the next worksession. If the Board is satisfied that the written record is complete, a decision is made on the basis of the record. If the Board believes additional information or clarification is needed, they either request the information in writing or schedule a hearing for the purpose of receiving oral testimony. If the decision is issued based on the written record, it is prepared, in writing, and usually released within three weeks of the worksession. If a hearing is granted, all parties are provided at least thirty days' notice, and a written decision is released within approximately three weeks of completion of the hearing.

CLASSIFICATION

CASE NO. 83-119

A Fire Chief appealed from the decision of the Fire and Rescue Commission to deny his request for a reallocation of the grade assigned to his position.

Based on the language in the Personnel Regulations, it was the judgment of the Board that the final authority for approval of classification actions for independent Fire/Rescue Corporation employees is vested in the Fire and Rescue Commission.

The Board agreed with counsel that the prior regulations on Senior Supervisory positions ceased to exist on July 1, 1982. However, the voiding of that prior regulation left the Fire Services with a class specification for Fire Chief that had never been assigned to a pay grade, as required by Sections 7.1 (a) of the Personnel Regulations. Therefore, it was the Board's judgment that, pending action by the Fire and Rescue Commission to assign the class to a specific grade, a change in the appellant's classification assignment could not be implemented.

This issue was addressed as part of an appeal in Circuit Court on another case, and the Fire and Rescue Commission must now review the Fire Chief occupational class and take steps to bring it into compliance with the Personnel Regulations. Upon completion of that task, each present Fire Chief (including the appellant) will be subject to reclassification or reallocation consistent with the final pay grades and classes approved. If an individual position is reclassified or reallocated to a higher pay grade, the effective date of such action and accompanying pay increase shall be February 12, 1984. This date is based on the guidelines contained in Section 7.6 Classification Review of the Personnel Regulations, which states that studies should normally be completed within six months, and February 12, 1984 is approximately six months subsequent to the Board's initial order to take corrective action.

The appellant was also awarded reasonable attorney's fees.

APPEALED TO CIRCUIT COURT BY THE COUNTY

The Traffic Signal Technicians appealed from the decision of the Chief Administrative Officer, which denied their request for an immediate classification study of the Traffic Signal Technician occupational classes. The record showed that:

1. On March 28, 1980, Section 33-6 Position Classification Plan (a) General Policy of the Personnel Regulations was amended by the County Council to read in part: ". . . Each occupational class in the Classification Plan shall be reviewed at least once every five years to insure proper classification and pay grade assignment. . ." (Underlining added for emphasis). This same wording was included in Section 7.1 of the Personnel Regulations approved by the County Council on December 2, 1980.
2. A study of the occupational classes of Traffic Signal Technician I and II was completed in June 1980. There had been no study or review since that date.
3. The Traffic Signal Technicians filed a request for a classification review, pursuant to Section 7.6 of the Personnel Regulations. This request contained a list of changes in duties and responsibilities that the employees believed had occurred since the last study.
4. The Personnel Director denied the request, based on an interpretation that the issue was one of compensation and not position classification. The Personnel Director stated that, "pay grade assignment" studies were only covered by Section 7.1 and Section 7.6 related only to, "classification assignment".
5. The Department of Transportation requested approval to send two Traffic Signal Technicians to a special training session because, ". . . The state-of-the-art in traffic signal maintenance trouble-shooting and microprocessor technology is constantly changing and it is essential that our personnel. . . keep abreast of the changes. . ."

CASE NO. 84-59 cont.

6. The County has installed and used a COMTRAC Computerized Control System subsequent to the study in 1980.
7. The Chief Administrative Officer denied the request because of, "no compelling evidence of a need to re-examine the Traffic Signal Technician series immediately."

The question in this case involved how frequently, and under what conditions, a classification study had to be conducted.

The Board found that classification studies are conducted to determine the proper assignment of a specified set of duties and responsibilities assigned to a position to the proper class and pay grade. If the position is an existing one, the study may result in a reallocation or a reclassification. Pay grade assignment is an integral part of any classification study as internal and external pay equity has to be maintained, and it should not be considered as a separate or unrelated issue.

The requirement for review of each occupational class, "at least once every five years" had been in effect since March 28, 1980. Based on this, it was the judgment of the Board that a study of the Traffic Signal Technician classes must be completed before July 1985, in order to be in compliance with the Personnel Regulations. Further, Section 7.6 required a classification study, "be undertaken provided there is documentation which shows a significant change in assigned duties and responsibilities has occurred"; and the Board was satisfied that this requirement had been met.

Therefore, it was the decision of the Merit System Protection Board that the Personnel Office must conduct and complete a classification study of the Traffic Signal Technician classes on or before June 30, 1985.

CASE NO. 84-73

An employee appealed from the decision of the Chief Administrative Officer on his grievance concerning the effective date of the reclassification of his position.

The basic facts related to retroactivity were:

1. The initial request for reclassification was submitted on May 18, 1981.
2. A classification study was conducted in February and March 1982, and resulted in a recommendation that several positions be upgraded, but that the appellant's remain the same. The Personnel Office never acted on this study or recommendation.
3. In the summer of 1983, the appellant's office was reorganized, resulting in changes in work assignments.
4. On November 4, 1983, the appellant's supervisor prepared a request for another classification study and submitted it to the Department Head. This request was not forwarded to the Personnel Office until March 12, 1984.
5. A classification study was completed in mid-1984, and the appellant's position was upgraded, effective immediately, while several others were given retroactivity to July 1982. Those granted retroactivity were the positions that had been recommended for upgrading in 1982, as the result of the initial study, which had not been implemented.
6. Under the Personnel Regulations and established policy, retroactivity is usually not granted unless the study is not completed in a timely manner (within six months).

The failure of the Personnel Office to act on and implement the 1982 study and the Department's four month delay in submitting the request after reorganization, were inexcusable and incomprehensible. Despite these shortcomings, the record showed that the second study was completed timely subsequent to proper documentation of a change in duties by the Department. Lacking any evidence to support upgrading of the appellant's position prior to the March 12, 1984 (dated November 4, 1983) submission of the Department, it was the judgment of the Board that denial of retroactivity was proper and in accordance with established procedures. Therefore, the appeal was denied.

CASE NO. 84-74

A Fire Department employee appealed from the decision of the Personnel Director on his grievance concerning pay for the Columbus Day holiday. The record showed that:

1. The appellant was scheduled to work a 24 hour shift on October 8, 1984, the official holiday for Columbus Day, but requested to be on leave that date. The Department approved the request for leave.
2. The appellant was paid eight hours of holiday pay and was charged eight hours annual leave for October 8, 1984.
3. Under the Fire and Rescue pay policies, an individual receives, or is charged leave for a total of sixteen hours compensation for a twenty-four hour shift.

It was the judgment of the Merit System Protection Board that the appellant was paid in accordance with established procedures. Accordingly, the decision of the Personnel Director was affirmed.

A class action appeal was filed from the decision of the Chief Administrative Officer on a grievance concerning applicable policy to be used to determine effective date of a classification action. The record shows that:

1. The last time a classification study was made of the classes in question, appeared to be 1974.
2. On August 19, 1978, the Personnel Director notified all Department Heads that the Personnel Office had established "a classification maintenance program to review major occupational groups once every four years." The Personnel Director also stated the Labor and Trades occupational classes, would not be studied until FY 80.
3. On August 13, 1979, the Chief, Division of Classification, Compensation and Research notified the Director, Department of Facilities and Services of the scope of the study and the material needed from the Department.
4. On February 12, 1980, the Chief Administrative Officer issued a policy memorandum on Effective Date of Reclassification that stated:

". . .(2) Individual Position(s) - When I have approved a position reclassification, the effective date will be the first pay period following the date the reclassification is approved. However, if the classification study is not completed within a six-month period from the date that the Personnel Office receives all the proper documentation from the Department/ Agency that is needed to conduct the classification study, and the classification results in a reclassification, the effective date would be six months from the date the Personnel Office received the documentation required to substantiate the classification study request."

This policy was applied to all classification actions, whether reclassification or reallocation and the results of both individual or periodic studies.

CASE NO. 84-83 Continued

5. On March 28, 1980, Section 2 Classification of the Personnel Regulations was amended (Resolution #9-701) to read, "(a) General Policy. . .Each occupational class in the Classification Plan shall be reviewed at least once every five years to insure proper classification and pay grade assignment." This same wording is part of Section 7.1 of the current Personnel Regulations.
6. The completed Department submission was transmitted to the Personnel Office in September 1980.
7. On March 16, 1981, and July 30, 1981, the Department attempted to find out when the study was going to be conducted by the Personnel Office. On November 3, 1981, the Personnel Director finally responded and indicated the study had been started and would be completed by the end of April 1982.
8. On May 12, 1982, the Personnel Director notified the Department Head that the study would not be completed until the end of August 1982.
9. On October 1, 1982, the Classification Division submitted its findings and recommendations on the Labor and Trade classes to the Personnel Director. On October 21, 1982, the Personnel Director notified the affected Department Heads that he would be reviewing the study and would schedule meetings to brief them on the recommendations.
10. Discussion of the study and submission of additional correspondence continued for the next year. On March 16, 1984, subsequent to final submission by the Department Head on September 9, 1983, the Department Head again inquired about when the study would be completed and was informed orally that it would be June 1984.
11. On May 15, 1984, the Chief Administrative Officer issued a new policy memorandum on Effective Date of Position Reclassification/Occupational Class Reallocations which states:

"The present policy concerning the above subject was established by former Chief Administrative Officer Robert W. Wilson's memorandum of February 12, 1980, to all Department/Agency Heads. Experience from February 1980, to date has shown that modification of this policy is necessary. Therefore, effective this date, the policy stated in Mr. Wilson's memorandum is hereby rescinded and replaced with the following:

"I. Individual Position Reclassification

Whenever a position(s) is to be upgraded as the result of an individual position classification study; the effective date of such action shall be either the beginning of the first pay period following the date the reclassification and/or reallocation is approved by the Personnel Director or the beginning of the first pay period following six months from the date the Personnel Office received all documentation required to conduct the individual position classification study, whichever occurs first. . ."

"III. Five Year Classification/Compensation Maintenance Review Program

As specified in Section 7.1 of the Personnel Regulations, occupational classes, series, and groups are to be studied ". . . at least once every five years to ensure proper classification and pay grade assignment." While classification studies of small occupational series often have been completed within six months from date of the study's initiation by the Personnel Office, such a time frame is not feasible when large occupational groups/series are examined. These studies involve considerable staff time to complete due to the requirement to conduct desk audits and salary surveys, revise class specifications, and obtain input from Department/Agency Heads and employees. A retroactive effective date for upward reallocation in these cases has a significant monetary impact. Therefore, whenever an occupational class/series is reallocated to a higher grade as a result of review under the Five Year Classification Compensation Maintenance Review Program, the effective date of such action shall be the beginning of the first pay period following the Personnel Director's approval of the recommended reallocations. Retroactive effective dates for salary increases resulting from studies of this nature are not authorized. The effective date of individual position reclassifications approved ~~as part of an occupational series study~~ will be in accordance with the provisions of Section I, Individual Position Reclassification."

CASE NO. 84-83 Continued

12. On February 4, 1985, the Department Head was notified that the study was completed and had been approved by the Chief Administrative Officer, effective August 12, 1984.
13. Section 7.6 Classification Review of the Personnel Regulations sets forth the guidelines for conducting studies and states in part: ". . .As a general guideline, individual position classification studies should be completed within six months from date request is received by the Personnel Office. . .or periodic study is initiated."
14. Section 7.8 Effective Date of Classification Actions of the Personnel Regulations gives the Chief Administrative Officer the authority to grant retroactivity for classification actions "particularly in cases where the time guidelines in Section 7.6 have not been met."

The major issue to be resolved was the proper effective date for implementation of the Labor and Trades study.

The Personnel Office initiated this study by requesting information from the Department in August 1979. Extensive documentation was submitted to the Personnel Office in September 1980 and the study was not actually worked on by the Personnel Office until late 1981. This study encompassed 69 classes - approximately 10% of the total number of classes in the Classification Plan - and took over five years to complete, even though the County is required to review all classes at least once every five years. The Board believes management has a responsibility to complete tasks timely and in a manner that is fair and reasonable.

The February 1980 policy was routinely applied to all classification actions if the six month guideline was not met and was in effect when the Department complied with the Personnel Office request for information. It was the judgment of the Board that once that six month guideline (or period) had elapsed, incumbent employees in positions subsequently upgraded as the result of that study, had a vested interest or property right to retroactivity upon completion of that study. It was the Board's further judgment that the May 15, 1984 policy may only be applied to studies started after December 15, 1983, and completed after May 15, 1984, as those individuals would not have any vested or accrued rights since the guideline had not been exceeded prior to a change in policy

The Board also considered the possibility that once the guideline was exceeded, the Personnel Office was not overly aggressive in completing the study, knowing the retroactivity practice would satisfy the employees involved. Yet, once it was realized how significant the monetary impact may be, a new policy was issued to eliminate the right to retroactivity.

CASE NO. 84-83 Continued

Based on the foregoing, and past practice, it was the judgment of the Merit System Protection Board that the law and the doctrine of fairness both required use of the 1980 policy to determine the effective date for implementation of the Labor and Trades study. In determining such date, the Board noted that while the Personnel Office initiated the study in August 1979, proper information was not received until September 1980 and the six month period would have elapsed in March 1981. Therefore, it was the decision of the Merit System Protection Board that the effective date for implementation of the Labor and Trades study shall be the beginning of the first full pay period in March 1981, all records are to be changed and all employees shall be reimbursed accordingly.

COMPENSATION

CASE NO. 84-07

A Public Service Worker appealed from the decision of the Chief Administrative Officer on his grievance concerning leave without pay. A hearing was held and the testimony and evidence of record showed that:

1. The appellant had been injured on-the-job, and had been on disability leave for an extended period.
2. An orthopaedic surgeon who had been treating the appellant, notified the County that he was to continue therapy treatments, and could return to work.
3. The appellant reported to work and was told to report to the Employee Medical Section for a return to work physical examination. The Employee Medical Examiner released him for return to regular duties without restriction. The appellant returned to work and completed the scheduled work day, but did not believe he could perform any heavy lifting, required in his job.
4. The next day, the appellant called his supervisor and requested sick leave for a doctor's appointment. He was informed a doctor's slip would be required before any leave would be granted. Later that day, the appellant went to the work site, and gave the supervisor a doctor's slip showing he had been in for a visit that day. The supervisor informed him that he would be paid for four hours of sick leave for that day, but the other four hours would be leave without pay.

It was the judgment of the Board that management's decision to grant only four hours of sick leave for the doctor's appointment was reasonable and proper. Therefore, the decision of the Chief Administrative Officer to deny any further sick leave was sustained.

A Firefighter appealed from the decision of the Fire and Rescue Commission to deny the request of his fire department to grant an additional 5% pay increase at the time of promotion to off set the loss of pay differential that had been received prior to the promotion. The record showed that prior to promotion, the appellant had received a 5% pay differential for performing technician duties. He was promoted to Fire Sergeant and the fire department submitted a request for a 5% promotional pay adjustment, explaining specifically why the additional increase was being sought.

On May 12, 1983, the Fire and Rescue Commission issued Administrative Procedure 7-6, Promotional Pay Scale Guidelines, which stated that, "The minimum increase for a promotion will be five percent (5%) of base salary" and that, "In exceptional circumstances, a department head may recommend a promotional increase up to ten percent (10%) of base salary, subject to the approval of the Fire and Rescue Commission."

The appellant questioned the validity of Administrative Procedure 7-6 as there was no indication of review or approval by the Chief Administrative Officer or the Fire Board. Section 3.1 of the Personnel Regulations gives the Chief Administrative Officer and the Fire Board thirty days to object to an Administrative Procedure approved by the Fire and Rescue Commission. While it would appear to be better practice to submit an Administrative Procedure to the Chief Administrative Officer and the Fire Board for review prior to release, such practice is not mandatory. The record showed those individuals received the Administrative Procedure in question, on or about July 13, 1983, and, based on the absence of any objection, the effective date of the Administrative Procedure would be August 12, 1983, instead of May 12, 1983, as stated by the Fire and Rescue Commission. Based on this, the Board found Administrative Procedure 7-6 to be valid and in effect for this case.

The Board noted that the fire department provided a reasonable, well-documented justification for the pay adjustment requested. In light of some of the other pay increases approved by the Fire and Rescue Commission since implementation of Administrative Procedure 7-6, the Board did not understand why the request was denied as it appeared to be completely justified and consistent with actions taken by other fire departments. Further, the Board believed that good management practices require an individual to receive an increase in pay when promoted to a position requiring the performance of higher level duties and responsibilities, which in this case, included supervisory responsibility. The Board found it incomprehensible to expect individuals to accept a promotion and to take on the higher level duties and responsibilities without any increase in pay, and believed such practices were contrary to the intent and purpose of the career development system.

CASE NO. 84-11 Continued

Nonetheless, the authority for approving an increment in base salary beyond the normal 5%, is vested in the Fire and Rescue Commission. While other increments in excess of the usual 5% for other individuals in other departments had been approved, the Fire and Rescue Commission did not specifically approve such actions. While the Board did not agree with the decision of the Fire and Rescue Commission, the Merit System Protection Board has determined that it was not appropriate for it to overturn a decision that was based solely on judgment where there is no evidence that such judgment is totally arbitrary, capricious and unreasonable. Therefore, the decision of the Fire and Rescue Commission was sustained.

CASE NO. 84-33

A Community Health Nurse appealed from the decision of the Chief Administrative Officer on a grievance concerning a within-grade appointment.

The issue at question, was one of pay equity. After learning that two individuals with similar qualifications had been appointed as merit system CHN I's on the same date and one received a 20% higher salary than the other, the Acting Health Officer submitted a request for a 20% pay adjustment for the appellant to make her salary equal to the other individual's salary. This request was denied by the Personnel Office, and the Chief Administrative Officer.

The Board agreed with the Personnel Director, when he stated, "It is important that management maintain their flexibility and latitude through the use of within-grade hiring. . .". In fact, the Board strengthened that concept with its interpretation, dated October 28, 1983. Section 216 of the Charter of Montgomery County, Maryland gives the Department Head the authority to fix salaries for merit system employees under his/her direction, in conformance with the approved pay plan.

The Health Department requested a modification to the appellant's beginning salary, retroactive to appointment as a merit system employee, that was within the approved pay range for the grade.

Based on the Department Head's authority under the Charter, it was the decision of the Merit System Protection Board that the ruling of the Chief Administrative Officer be overturned. The Health Department was directed to correct the appellant's records to reflect the proper starting salary, retroactively and to reimburse her the difference in salary monies due as the result of such change.

APPEALED TO CIRCUIT COURT BY APPELLANT AND THE COURT REVERSED
THE BOARD'S DECISION

CASE NO. 84-42

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning an Extraordinary Pay Award and/or adjustment in pay based on duties performed.

In 1982, the appellant's supervisor recommended him for a "Meritorious Service Award, for service above and beyond the call of duty". The request was denied by the Fire Chief.

In 1984, the appellant's shift commander recommended he be given a 4% Extraordinary Performance Award in recognition of work performance and work on special tasks. This request was also denied by the Fire Chief.

Section 12 (b) Procedure for Recommending an Outstanding Service Increment Award of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County, Maryland states in part, "When a department head believes that an employee. . .has qualified. . .for an Outstanding Service Increment Award he/she may recommend that the employee be given such an award."

Under Administrative Procedure 7-5 Extraordinary Performance Awards, Section 5.0 requires a Department/Squad to submit a recommendation to the Fire and Rescue Commission for approval, with proper justification.

The Personnel Regulations are very clear on this issue, in that the granting of a special pay award is the prerogative of management based on judgment as to level of performance. While there is a difference of opinion as to eligibility, which is solely judgmental, the department head had not recommended an award, as desired by the appellant and his supervisors. Finding this to be a matter of judgment, and finding no evidence that the decision was arbitrary, capricious or discriminatory, it was the Board's decision that the appeal be denied.

CASE NO. 84-45

A Buyer appealed from the decision of the Chief Administrative Officer on a grievance concerning pay equity.

There was no question that a pay inequity existed, and that it had occurred as the result of misunderstandings at the time of the appellant's employment. On June 7, 1983, the appellant's supervisor recommended a salary adjustment to the mid-point for the grade - to correct this inequity.

The grievance was denied because the County believed the Personnel Regulations did not recognize the problem and did not provide a remedy for it. A review of the County law showed that:

1. Section 33-5 (b) Merit System Principles of the Montgomery County Code states, ". . . 6 All applicants and employees of the County Merit System shall be assured fair treatment. . . in all aspects of personnel administration."
2. Section 33-7 County Executive and Merit System Protection Board Responsibilities states, "a . . . The remedial and enforcement powers of the Board granted herein shall be fully exercised by the Board as needed to rectify personnel actions found to be improper. . ."
3. Section 33-11 (b) Uniform Salary Plan states, ". . . All positions involving comparable duties, experience, responsibilities, and authority shall be paid comparable salaries in accordance with the relative value of the services performed. . ."
4. Section 33-14 (c) Decisions states, ". . . The Board. . . shall have authority to. . . (8) Order corrective measures as to any management procedure adversely affecting employee pay. . ."
5. The Statement of Purpose of the Personnel Regulations states, ". . . The County's Personnel Regulations are based on the following merit system principles:

CASE NO. 84-45 continued

- . . .2. Fair and equitable treatment
in all personnel management matters. . .
3. Equal compensation for work of equal
value and performed under similar circum-
stances. . ."

While the laws and Personnel Regulations may not have specifically addressed this issue, there was no restriction against management taking appropriate corrective action when an inequity was found. The Personnel Regulations are provided as a guideline for management, and as such, are not and could not possibly be all inclusive with respect to resolution of all personnel problems. Judgment and discretion are required to assure fairness and equity in specific situations such as this.

Based on the fact that there was an inequity and the Board had the stated authority to order necessary corrective action, it was the judgment of the Board that the appellant's salary should be adjusted as recommended by the supervisor. Therefore, the Department of Finance was directed to correct his pay records to reflect the higher salary, effective the beginning of the first full pay period following June 7, 1983; to adjust all subsequent pay actions accordingly; and to reimburse the appellant the additional salary monies due as the result of this corrective action.

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning reinstatement of a 5% pay differential for hazardous duty. The record showed that:

1. Appellant was originally assigned to motorcycle duty prior to August 1, 1978 and received a 5% hazardous duty pay differential until involuntary transfer to regular patrol duty on March 1, 1981. This transfer was caused by a departmental reorganization.
2. On August 1, 1978, the Department of Police implemented a new policy on hazardous duty pay differentials. Under this policy, all persons then assigned to motorcycle duty were allowed to retain the 5% pay differential for as long as assigned to such duty, but no pay differential would be paid to persons who were assigned to motorcycle duty after August 1, 1978.
3. The appellant was transferred back to motorcycle duty on January 17, 1983, without reinstatement of the 5% hazardous duty pay differential, based on the policy implemented on August 1, 1978.
4. It was the appellant's position that since he had been assigned to motorcycle duty prior to the policy change, and was involuntarily transferred out of that assignment, he should receive the differential being paid to the other officers who were not transferred.
5. Officers who had been assigned to motorcycle duty after August 1, 1978, do not receive a hazardous duty pay differential.

The appellant's transfer back to motorcycle duty occurred subsequent to the change in policy and the policy had been consistently applied to all persons assigned to such duty after August 1, 1978. While this action may have resulted in what the appellant believed was an inequitable pay situation, there was no violation of procedures or regulations, and there is no legal requirement for management to reinstate the pay differential. Therefore, it was the judgment of the Board that the decision of the Chief Administrative Officer be sustained.

CASE NO. 84-61

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning the Police Promotional Plan, which allegedly resulted in inequitable pay.

The appellant was promoted directly from Police Officer III, Grade 18 to Sergeant, Grade 21 without having an opportunity to compete for Master Police Officer I, Grade 19 and received the normal 5% promotional pay increase. Subsequently, Police Officer III's were given an opportunity to compete for MPO I positions and some were promoted to that rank prior to being promoted to Sergeant. Each promotion - first to MPO and then to Sergeant - resulted in a 5% promotional pay increase, giving them an additional 5% over the appellant. A Department Head has the discretionary authority to grant or recommend promotional increments of more than the normal 5% increase in base pay. However, the Chief of Police decided not to do so, which was clearly within his authority under the law.

Based on the discretionary authority of the Department Head, and absent any evidence of a violation of the Personnel Regulations, or any other established procedure, it was the judgment of the Board that the decision of the Chief Administrative Officer be sustained and the appeal was denied.

CASE NO. 84-67

Two Investigators appealed from the decision of the Chief Administrative Officer on their grievance concerning alleged pay inequities and violation of due process. The appellants believed they should be given an additional 5% promotion pay increase to offset that received by another employee.

The Board agreed with the conclusions of the Fact-Finder that there were no procedural violations in this case. It was noted that all three positions involved were now classified at the Grade 21 level, which all parties agree was appropriate. The argument that the other person was being paid at the Grade 23 level was found to be incorrect. At the time of reclassification, all incumbents, including the appellants, received a 5% increase in base pay. When the other person's position was subsequently downgraded, she was allowed to retain the same base salary, as it was within the range for Grade 21. The County's pay plan provided a salary range of \$22,931 to \$34,923 per annum for Grade 21 and \$25,163 to \$38,383 per annum for a Grade 23. There is considerable overlap of the two pay ranges, and it is possible to have as much as a \$12,000 - \$13,000 difference within the same grade. There is no requirement that all persons within a Grade level be paid the same salary, and, based on various factors and personnel actions, incumbents are often found at various salary levels within a grade, as provided for by law.

Based on this, it was the Board's judgment that while an administrative error may have been made in implementing the classification study, there was no pay inequity under the law, that must be corrected. Accordingly, the appeal was denied.

DELAY OF SERVICE INCREMENT

CASE NO. 84-01

A Liquor Store Clerk appealed a six-month delay of service increment for alleged unsatisfactory work performance.

The sole factor used as justification for delay of the service increment was an incident that was still being investigated at the time of the evaluation.

The Board noted that service increments are to be based on an employee's work performance during the entire rating period and the County has published guidelines for managers cautioning them not to allow one isolated incident to unfairly affect a rating of work performance. Despite these guidelines, the Department of Liquor Control had a policy mandating delay of increment if any single violation had occurred during the year. There was no evidence of any other work performance deficiencies or problems during the period in question.

Based on the fact that a decision on the incident had not been finalized prior to the due date of the increment, the Board ruled that it was improper for management to take an adverse action without further justification, as it amounted to pre-judging the outcome of the review then underway. The Board found that the "automatic" delay of increment because of any disciplinary action during a rating period, without consideration of the nature and severity of the act, was an arbitrary and unfair action. The Department of Liquor Control was directed to rescind the delay of service increment and to reimburse the appellant all salary monies due as the result of the action.

CASE NO. 84-30

A Police Technician appealed from the decision of the Personnel Director on a grievance concerning delay of service increment.

The record showed that during the rating period, the appellant was absent from work almost seven months as the result of an on-the-job injury, which included almost all of the last six months. The appellant's supervisors recommended a delay of service increment because they did not believe it possible to do a fair and accurate evaluation as she had been absent more than 60% of the rating period. Eleven days before the increment was due, the appellant was notified that the increment was going to be delayed six months. This action had been approved by the Chief Administrative Officer.

Section A.2.1, Service Increments of the Appendix to the Personnel Regulations states, "A service increment. . .shall be earned by performance of work at an acceptable level of competence, an employee cannot be awarded a service increment automatically or solely on the basis of length of service."

CASE NO. 84-30 cont.

Section A.2.7, Procedures for Recommending Service Increments and Effective Dates states, "Service increment recommendations shall be in writing and shall be submitted for processing at least fifteen days before the recommended effective date. Such recommendation shall be made by one or more of the employee's supervisors, shall contain a certification that the employee's work record is at an acceptable level of competence. . ."

Section A2.12, Notification of Service Increment Delay states, ". . . in all cases of service increment delay, the effected career employee shall be notified in writing by his department head of the reasons for the action. . ."

On November 30, 1982, the Merit System Protection Board issued an interpretation of Section A2, Service Increment/Service Increment Dates, which stated that, ". . . it is required of management to notify an employee of an intended delay of service increment prior to the effective date of that action."

In June 1983, the Police Department, Personnel Division sent a memo to Division and Unit Commanders which stated that the Merit System Protection Board's interpretation, ". . . requires that employees whose service increment is to be delayed must be notified in writing at least fifteen days before the effective date of the action and this notification cannot be made until the action is approved by the Chief Administrative Officer. . ."

The basic issue in this case was the timeliness of the action by the Department. The interpretation of the Board did not contain a fifteen day requirement, but did require advance notice. The Department submitted the recommendation to the Personnel Office on February 10, 1984, and notified the appellant of the action on February 17, 1984. Both actions by the Department met the requirements of the Personnel Regulations, and, in the Board's judgment, the action was timely.

The secondary issue was the fairness or equity of the delay. The Board realized the appellant's absence was caused by a job-related injury, but, an increment must be earned by satisfactory work performance during the rating period, and, since the appellant was not present for a major portion of that period, a fair rating could not be done. The Board concluded that this was a reasonable decision by the supervisors, and, the delay was sustained. However, the reassignment of the increment date effectively delayed the increment for six months in subsequent years, which the Board believed was unfair. Therefore, the Board directed the Department of Police to rescind the reassignment of increment date, and the increment date was to be continued as March 1 of each succeeding year.

CASE NO. 84-38

A Police Officer appealed the decision of the Chief Administrative Officer on his grievance concerning a twelve month delay of service increment.

Section 8.5 Appeals from Performance Ratings allows the Board to review such ratings only for compliance with established procedures. With respect to the procedural issue, the record showed that:

1. Section 8.3 Performance Planning and Achievement of the Personnel Regulations states, "The performance evaluation system(s) shall include procedures to inform the employee of major duties and responsibilities to be performed, standards to be met, and goals to be achieved during the rating period, provide for interim review and counseling and written notice of inadequacies, and necessary corrective action. Supervisors shall assist employees in improving work performance."
2. Section 8.4 Performance Evaluation Rating states, "Each employee shall receive a written performance evaluation rating at least annually. Clearly defined levels of achievement shall be established by the Chief Administrative Officer."
3. The Performance Appraisal Manual used by the Department of Police requires that a supervisor prepare and maintain a written log to document observations of work performance; personally observe each subordinate's work performance; and evaluate work performance in eight separate categories of behavior, with specific written comments to be made in support of the rating assigned to each category.
4. On February 19, 1982, the Director, Department of Police issued a memorandum reaffirming the requirement to rate and comment on each of the eight categories and made the maintenance of supervisor log books mandatory.

CASE NO. 84-38 cont.

5. The rating forms completed for the eight categories contained the same numerical assignments made in 1982, and the supervisor stated that he decided to recommend a delay of increment before he did the evaluation. The supervisor was also aware of the numerical score necessary to justify a delay of increment. The rating forms did not contain any written comments to justify the numerical ratings, as required by the established procedures. The comments on the summary sheet related entirely to productivity level in traffic and criminal enforcement.
6. The Department of Police took disciplinary action against the appellant for unsatisfactory work performance. That action and appeal were handled under the Law Enforcement Officers' Bill of Rights and were not made part of this record.

The supervisor focused entirely on quantity of work when evaluating the appellant's work performance, without any consideration for the various other factors that were to be evaluated. The Board found this to be a classic case of the "halo effect" in work performance evaluation, which resulted in clear violations of established procedures. Therefore, it was the decision of the Board that the delay of service increment action be rescinded.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 84-43

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning the procedures followed in taking a delay of service increment action.

On November 30, 1982, the Merit System Protection Board issued an interpretation of Section A2 Service Increment Service Increment Dates which stated in part, ". . .a Department Head has the right to delay a service increment, but, because of the requirements of Section A2.8 and A2.9, such delay may not become effective until approved by the Chief Administrative Officer since reassignment of the increment date is required by the delay. Therefore, delays of service increments must be approved by the Chief Administrative Officer."

It was the Board's further interpretation of Section A2 that, in the absence of specific procedures with respect to time limits for delays of service increments, Section A2.7 should be applied to both the granting of service increments and delays of service increments. Based on this, it is required of management to notify an employee of an intended delay of service increment prior to the effective date of that action.

On December 21, 1982, the Personnel Director issued procedures to be followed for recommendations related to service increments and requested the forms be submitted for processing, "at least fifteen (15) days before the effective date." The Personnel Director informed the Department/Agency Heads that they, "must notify the employee of their intention to delay the service increment prior to the effective date."

On March 28, 1983, the Chief Administrative Officer formally delegated the authority for approving a delay of service increment to the Department/Agency Heads. This delegation of authority was reaffirmed on March 29, 1984.

The appellant's supervisor provided counseling during the rating period, evaluated the appellant's work performance and reviewed it with him prior to submitting a recommendation. The work performance evaluation was completed properly, and was reviewed by higher level supervisors in accordance with established procedures, all on or before January 17, 1984.

In a memorandum dated January 19, 1984, the Police Chief notified the appellant that his service increment was being delayed for six months, effective February 1, 1984.

The Personnel Regulations and the Board's interpretation both require that an employee be notified of a delay of service increment prior to the effective date. There is no mandate that the notice be issued fifteen days before the effective date. The fifteen day requirement of Section A2.7 concerns the administrative processing time and is not applicable as a mandatory date of notification to the employee. Therefore, it was the judgment of the Board that the action was taken properly and advance notice was given in accordance with the established procedures. The appeal was denied.

DEMOTION

CASE NO. 84-82

A Work Force Leader II appealed an Involuntary Demotion and Transfer to the position of Equipment Operator III for allegedly striking a subordinate employee in the face with his forearm, which was considered inexcusable behavior for a supervisor.

The appellant had been employed by the County for approximately 29 years, had never been disciplined previously and had received an "Exceeded" work performance evaluation in July 1984.

The appellant was responsible for daily work assignments and supervision of a crew of 10-12 employees. He had attended several County classes concerning supervisory duties and responsibilities, but management was uncertain as to the specific amount or type of training that was provided to him when he was promoted to a supervisory position, seven or eight years ago, or when such training was provided.

On November 15, 1984, the crew completed work at one site and then moved to another work site. After arrival at the new work site, the appellant expressed a concern to one of the employees about how long it was taking two of the trucks to get there and indicated they may be "goofing off".

When the trucks arrived, the employee told the drivers that the appellant thought they might have been "goofing off", and one of the drivers approached and confronted the appellant. An argument ensued and apparently became very heated, with the employee using inflammatory language towards the appellant. The appellant indicated he'd like to get the employee off the job and slap him around a little. The employee also openly questioned the appellant's ability to supervise the crew. During the argument, physical contact occurred with the appellant's left forearm brushing the employee, causing his sunglasses to fall off with minor damage (bending). The appellant immediately apologized; offered to pay for the glasses, if damaged; the matter was ended and the crew returned to work.

After investigation by superiors, charges were issued to the appellant and disciplinary action taken. No disciplinary action was considered or taken against the employee involved.

The Board recognized that a supervisor is expected to maintain his composure and control at all times, and should have taken steps to terminate the discussion before it reached the intensity indicated. However, the Board could not overlook two major mitigating factors. First, the confrontation was initiated by the employee, who appeared to have been disrespectful and insubordinate in his own conduct, with complete impunity. Secondly, the County had an obligation to provide the appellant with appropriate training, counseling and supervision to

CASE NO. 84-82 continued

assure he was properly prepared to carry out the assigned supervisory duties. In the Board's judgment, while the appellant may have "attended" several training classes, the County did not adequately show that it had met this requirement, or that any in-depth training was provided.

In light of these factors, the appellant's work record and the nature of this incident, the Board did not believe the matter to be serious enough to justify removal from supervisory duties, but was of the opinion that a lesser disciplinary action was more appropriate and reasonable. Accordingly, the Department of Transportation was directed to:

1. Rescind the Involuntary Demotion and retain the appellant in the Work Force Leader II position.
2. Issue a 5% Within-Grade Reduction for a period of six-months, with subsequent reinstatement to the proper salary level.
3. Provide the appellant proper guidelines and training to assure his knowledge and understanding of the role of a supervisor.

Other relief, including attorney's fees, was denied.

DISABILITY RETIREMENT HEARING BOARD

CASE NO. 83-117

A Police Officer appealed from the decision of the Disability Retirement Hearing Board, which denied his application for a service connected disability retirement.

This case had been heard previously, (Case No. 80-84) had been appealed to Circuit Court and remanded for further hearing.

The Merit System Protection Board had reviewed the extensive record and noted Counsel's objection to the Board's obtaining additional information on the question of whether the appellant was able to effectively perform the duties of another available position within the County Government for which he was qualified. In reviewing the Court Order that the case be remanded, "to the Disability Retirement Hearing Board for an appropriate hearing on the issue of whether or not the member is or is not unable to effectively perform duties of another available position (for) which he is qualified".

Based on the specific wording of the Judge's Order, it was the judgment of the Merit System Protection Board that the Disability Retirement Hearing Board was required to hold a hearing and to receive specific evidence and testimony on that particular question. The Board recognized that the Department of Police was willing, at the time of the initial request in this case, to retain the appellant as a Police Lieutenant, which, essentially, rendered this issue moot. However, the Board could not ignore the Court's specific Order and remanded the case to the Disability Retirement Hearing Board for further hearing on the issue set forth by the Circuit Court.

CASE NO. 84-04

A Police Sergeant appealed from the decision of the Disability Retirement Hearing Board to deny his request for a service-connected disability retirement.

The only issue before the Board was the reasonableness of the decision of the Disability Retirement Hearing Board in denying the request for a service-connected disability retirement based on the evidence of record and provisions of the Retirement Law.

Section 33-43 (c) (1) of the Employees' Retirement System of Montgomery County states that an individual may be retired on a service-connected disability if disabled as the result of a, "condition aggravated while in the actual performance of duty". The Medical Review Committee, in this case, stated, "There is no question that stress of his duty exacerbated his underlying disease, thereby precipitating his Myocardial Infarction." This statement was not refuted by any evidence in the record.

While the Board recognized that the individual's family medical history and personal habits may have contributed to, or even been the primary cause for the illness, the medical evidence leaves no doubt that the stress of his duties aggravated the hypertension and Myocardial Ischemia problems. Therefore, it was the judgment of the Merit System Protection Board that the decision of the Disability Retirement Hearing Board was inconsistent with the evidence, and it was reversed. The County was directed to revise the appellant's retirement records to reflect a service-connected disability retirement, retroactive to the date retired; to recalculate benefits payable under Section 33-43 (f) (1) of the Employees' Retirement System of Montgomery County and reimburse him the difference in benefits due as the result of this change; and to reimburse him for reasonable attorney's fees incurred.

CASE NO. 84-52

A Police Officer appealed from the decision of the Disability Retirement Hearing Board on his application for a service-connected disability retirement. The Disability Retirement Hearing Board found the officer to be disabled, but the majority of the voting members ruled it was a non-service connected disability.

The appellant suffered a myocardial infarction, while on duty.

The two issues to be resolved in this case were:

1. Was the Police Officer disabled?
2. If so, was he eligible for a service-connected or non-service connected disability retirement?

The Disability Retirement Hearing Board found that the Police Officer was, "totally and permanently disabled from performing the full duties of a Police Officer III", but that he was capable of performing sedentary or office type work. Therefore, the appellant was clearly disabled from his position as a Police Officer III.

Eligibility for a non-service connected disability requires that a member be, "unable to productively perform the duties of another available position for which qualified". The record showed that the appellant was able to perform other duties and would be qualified for alternative placement with the County, or for employment elsewhere. Therefore, he was not eligible for a non-service connected disability, and such an award was incorrect. It was the judgment of the Merit System Protection Board that the decision of the majority of the Disability Retirement Hearing Board was in error and it was rescinded.

Eligibility for a service connected disability retirement requires that a member be, "incapacitated for duty as the result of . . . an occupational disease incurred or condition aggravated while in the actual performance of duties", and that the member, "is unable to perform the duties of the occupational classification to which assigned at the time disability occurred or a position of comparable status within the same department, if qualified". Based on the difference of opinions of the medical specialists and lack of clarity as to the cause, the Board concurred with the minority member's judgment that any doubts be resolved in favor of the appellant. It was the judgment of the Merit System Protection Board that the appellant's disability was service connected and the County was directed to correct his records to reflect such retirement retroactive to date retired, and reimburse him the additional monies due as the result of this change.

The Board also concurred with the recommendation that the County actively pursue alternative placement of the appellant within the Department of Police, to minimize the loss of his experience and knowledge, and to allow him to continue and complete his career as a dedicated County employee. The Board believed that such action was required if the County's commitment to employment of the handicapped was to have any meaning or purpose.

CASE NO. 84-64

A Police Officer appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement.

The Disability Retirement Hearing Board found that he was an acknowledged alcoholic; that the problem was not job-related; and that he had not made sufficient effort to secure appropriate treatment for his problems with alcohol. Therefore, the application was denied.

The medical evidence of record, in the Board's judgment, clearly supports the argument that the appellant was unable to perform the full duties of a Police Officer because of psychological and emotional problems related to or caused by alcohol abuse. There was no evidence of any disability related to physical injuries sustained either on or off duty.

The first question to be addressed was whether the disability was service connected or non-service connected. The appellant had argued that the assignment to the Narcotics Unit had been a primary cause of the alcohol abuse problem. However, the record clearly showed a history of alcohol abuse pre-dating that assignment, with associated accidents and personal problems that impacted on his psychological state. The burden of proving service related problems rested with the appellant, and in the Board's judgment, the appellant failed to do so. Therefore, the Board found the cause of the disability to be non-work related and sustained the decision to deny a service connected disability retirement.

The second issue concerned whether the appellant was totally disabled and eligible for a non-service connected disability retirement. The medical evidence showed that he needed extensive, ongoing psychological treatment, but that he was capable of being employed while doing so. The Department of Police had a sedentary position in the Telephone Reporting Unit that he had been filling in a satisfactory manner and they were cooperating and assisting him in the flexibility of his work schedule to facilitate rehabilitative treatment. The appellant apparently became disenchanted with Police work and preferred not to continue in that line of work. It was the judgment of the Board that the appellant was capable of being employed in another capacity within the County, and therefore, did not meet the eligibility requirements for a non-service connected disability retirement. Accordingly, the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 84-69

A Police Officer appealed the decision of the Disability Retirement Hearing Board on his application for a service-connected disability retirement. The only issue to be resolved was the amount of disability benefits to be paid.

The majority of the Disability Retirement Hearing Board ruled that the Whittaker case was not applicable, and awarded the appellant a partial disability retirement under Section 33-43 (f)(2) of the Employees' Retirement System for Montgomery County. A review of the Whittaker and Hackley decisions led the Merit System Protection Board to the conclusion that the end result was the same, i.e., if an employee is unable to perform full duties, he or she may be placed in an alternative position of equal status instead of being given a retirement. However, if the County is unable to utilize that person in another position, and if the disability is service-connected, then full disability benefits must be paid, with appropriate financial protection being provided the County under Section 33-43 (g).

If the County is unable, or unwilling to find alternative placement for a person injured in the line of duty, that person should be provided adequate financial protection until other income becomes a reality. Section 33-43 (g) gives the County the right to adjust a pension when a person on disability retirement obtains other employment and should serve as an incentive to all parties to facilitate rehabilitation efforts.

Based on the provisions of the Employees' Retirement System for Montgomery County and the Court cases, it was the judgment of the Merit System Protection Board that the appellant was entitled to receive full disability benefits under Section 33-43 (f)(1) of the Employees' Retirement System for Montgomery County. Accordingly, the majority decision of the Disability Retirement Hearing Board was modified to reflect this change and the County was directed to change the appellant's records and reimburse him additional monies due.

APPEALED TO CIRCUIT COURT BY THE COUNTY

DISMISSAL

CASE NO. 82-119

A Public Administration Intern appealed a dismissal for alleged insubordination, violation of an established policy/procedure and knowingly making false statements in the course of employment.

Each County employee has the responsibility to carry-out reasonable directives and orders of supervisors, and to do so in a satisfactory manner in order to ensure continued employment as a County employee. Management, on the other hand, has the responsibility to make certain that employees are fully knowledgeable of what is expected in the way of work performance, to continuously monitor and counsel employees with respect to shortcomings, and to provide the employee with proper training and a reasonable period of time to correct any deficiencies.

In this specific case, a major concern of the Board was that management dealt ineffectively, and, consequently, inappropriately, in applying warranted disciplinary action. There was serious question as to whether the employee had been properly informed of the ramifications of his actions at the time they occurred.

There was no question that a breakdown in communications resulted in the parties communicating through written memoranda only, creating a totally defensive attitude on both sides. While this may have been the cause for many of the problems. The Board did not believe it was sufficient justification for inappropriate actions by either party.

The Personnel Regulations set forth the requirement that disciplinary actions be progressive in nature, except in cases of theft or serious violations of policy or procedure that create a health or safety risk. The appellant violated an established policy with respect to use of County cars, and his refusal to meet with his supervisors to discuss his work performance and to accept memoranda related thereto constituted insubordinate behavior. The Board was not convinced of the gravity of the alleged making false statements with respect to the public forum and falsification of a timesheet. While the Board recognized that problems occurred in both of these latter two situations, it did not believe it was serious enough to justify a charge of falsification as set forth. In reviewing the nature of these infractions, and the requirements of the Personnel Regulations, the majority of the Board was not convinced that they were serious enough to justify dismissal in lieu of a lesser disciplinary penalty. Based on the individual's generally satisfactory work performance, as evidenced by his performance evaluations, and the length of service with the County, with no indication of prior disciplinary action, it was the majority members' judgment that:

1. The dismissal action be rescinded.
2. The appellant be suspended without pay for a period of thirty days for the numerous acts of insubordination and violation of established policy as noted herein.

CASE NO. 82-119 continued

3. The appellant be placed in a leave without pay status from date of dismissal to the date of reinstatement, as the delay in resolution of this case was caused by his actions and not those of the County.
4. The appellant be offered a County position of comparable status, with no loss in salary or benefits that he would have been entitled to had he been continuously employed by the County, within thirty days of the date of this decision, unless he indicates he does not desire to be re-employed.
5. The request for attorney's fees should be denied since the charges of insubordination and violation of established policy were found to be proper, and the employee was not vindicated.

APPEALED TO CIRCUIT COURT BY THE APPELLANT AND THE COUNTY.
THE COURT AFFIRMED THE BOARD'S DECISION AND BOTH PARTIES HAVE
APPEALED TO THE COURT OF SPECIAL APPEALS.

CASE NO. 84-46

A Liquor Store Clerk appealed from his dismissal for alleged misappropriation of County property/goods.

On February 19, 1985, the appellant failed to appear for the scheduled hearing. After requesting and receiving a response concerning his failure to appear, the Merit System Protection Board rescheduled the hearing for April 23, 1985. The appellant received that notice on March 16, 1985 and was also informed that a Pre-Hearing Submission was due by April 18, 1985, and that failure to comply or appear again would result in dismissal of his appeal.

The Board met on April 23, 1985 to conduct the hearing and the appellant failed to appear as directed and failed to submit the required Pre-Hearing Submission. Therefore, it was the judgment of the Merit System Protection Board that the appeal be dismissed for failure to follow established procedures and failure to appear as scheduled.

CASE NO. 84-19

A Firefighter appealed his dismissal for alleged insubordination and making false statements or reports in the course of his employment.

The appellant began employment as a County Firefighter in 1976.

The station to which the appellant was assigned had implemented a policy in 1979 that required all personnel to be checked out as an operator of all emergency equipment, and the appellant had been checked out on the ambulance only.

In April 1981, the Fire Department issued a General Order, which required personnel hired before July 1, 1979, to meet the following timetable for driver check-out:

1. Within three months. . .become a driver on EMS vehicles.
2. Within 12 months. . .become a driver on all trucks or pumpers.
3. Within 24 months. . .become a driver on all apparatus except the Special Unit and the Foam Wagon. . ."

In December 1981, the appellant was directed to spend all free time to gain the necessary knowledge, and was warned that failure to check out on trucks and pumpers by April 4, 1982, would result in disciplinary action.

The appellant failed to comply with the directive and was transferred to the "B" shift to provide maximum time to meet the driving requirements.

A written reprimand was issued to the appellant on June 3, 1982 for his failure to meet the April deadline. It included the requirement that the appellant check out on pumpers or trucks by August 8, 1982, or face more severe disciplinary action, up to and including dismissal.

The appellant passed the written pumper and the practical tests and completed the pumper check out on August 10, 1982.

In early 1983, the appellant underwent surgery, which required him to be off work and on light duty for an extended period. He was notified on February 24, 1983, that the deadline for meeting the final requirement of the General Order would be extended to six weeks after his return to full duty. He returned to full duty on May 17, 1983.

CASE NO. 84-19 cont.

The appellant subsequently stated that he had a real fear of driving the tiller unit.

After examining the appellant on June 30, 1983, the Employee Medical Examiner recommended that he seek therapy; continue treatment for as long as necessary to overcome the fear; have the therapist provide periodic progress reports to the Medical Section; and continue his fire-fighting duties, without driving responsibilities.

On July 25, 1983, the Department directed the appellant to seek therapy as recommended; to provide the Medical Examiner with written documentation of the therapy and on-going monthly progress reports; and continued the driving restriction. He was informed that a decision on his continued employment would be made after receipt and evaluation of the reports on the diagnosis and prognosis of the problem.

In January 1984, the appellant told his supervisor that he had met with the doctor for several hours in October 1983. It was subsequently determined that the appellant had not met with the doctor since the initial meeting in August 1983, and had not participated in the phobia program as previously directed and agreed to.

The appellant met with a therapist for individual therapy in February 1984, but did not make a decision to participate in the program. He said he would think about it, and try to make the necessary arrangement to allow for therapy as recommended.

The Board found that there was an insufficient effort by the appellant to overcome his own shortcomings and comply with a lawful order of the Fire Department. Moreover, the appellant was not truthful with the Department about such efforts. Such behavior by the appellant amounted to insubordination, and was clearly disruptive of discipline in the Fire Department, which must function like a paramilitary organization.

The appellant argued that his dismissal should be overturned because progressive discipline was not applied, and there was no attempt by the Fire Department to work out some type of reasonable accommodation for his handicap. The Fire Department tried to give the appellant every opportunity to overcome his alleged handicap. During the three years the Department was attempting to obtain compliance with the General Order, a written reprimand was issued, and he was repeatedly warned that failure to comply with the General Order could result in his dismissal. Under these circumstances, the Board found that the dismissal was fully in accordance with the law relating to progressive discipline and reasonable accommodation, and the dismissal was sustained.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 84-56

An Office Assistant III appealed a Delay of Service Increment; a 5% Within-Grade Reduction; and a Dismissal.

The Delay of Service Increment was taken because of alleged unsatisfactory performance during the preceding year. The appellant received a "marginal" work performance evaluation for this period, and the attendance and associated problems were not refuted by the appellant. Section A2.1 of the Personnel Regulations requires a service increment, ". . . be earned by performance of work at an acceptable level of competence. . .", as determined by the Department Head. In this case, the Department Head determined the overall level of work performance was insufficient to merit an increase, and based on the record, the Board concurred. Accordingly, the Delay of Service Increment was sustained.

The 5% Within-Grade Reduction action was based on three specific incidents. The County, in the Board's judgment, failed to document or sufficiently prove the first charge, so it was dismissed.

The second incident occurred at a time when a snow emergency was in effect and the rest of the staff had been excused. The supervisor gave the appellant a choice of either answering the phones or going on leave. The appellant chose to go on leave, which was approved by the supervisor. Later, the department wanted to discipline the appellant because it apparently was not happy with her choice to leave. Based on the fact the employee was given a choice and the leave was approved, the Board found this charge must also be dismissed.

With respect to the third charge, the appellant did absent herself from the workplace for an extended period without proper permission and without notifying her supervisor, in violation of specific instructions from her superiors. Based on this, disciplinary action was appropriate for this infraction, and in light of prior disciplinary actions, it was the judgment of the Board that a 5% Within-Grade Reduction for three months was reasonable and progressive in nature, even though all of the charges had not been sustained. Accordingly, the 5% Within-Grade Reduction was sustained.

With respect to the dismissal action, the Board found that the allegations related to personal calls were based on assumption and supposition and were not proven by a preponderance of the evidence. The Division allegedly allowed use of flex-time, yet held employees responsible for specific times to report to work, etc., with no flexibility, which was a contradiction of the intent and purpose of flex-time.

CASE NO . 84-56 Continued

The appellant appeared to be singled-out for reasons unknown - with respect to location of her desk, use of the telephone and attendance and enforcement of oral restrictions was often overlooked or administered on a selective basis, rather than even-handedly towards all employees. The appellant knowingly violated the stated policy on prohibition of eating breakfast on County time, at her desk on June 13 and 15, while a higher level employee was allowed to eat breakfast on County time in the cafeteria.

Disciplinary actions must be based on the fair and equitable treatment of employees within an operating unit. While the Board agreed that the appellant was guilty of the allegations related to June 13 and 15, the seriousness of the charges was severely mitigated by the laissez-faire management style and the disparate treatment of the appellant for actions others were permitted to do with total freedom. Based on this, the Board found the dismissal action to be inappropriate and it was rescinded.

It was the further judgment of the Board, however, that with the history and continuing nature of problems with the appellant, the knowing violation of a policy should not, and could not, go unpunished. Therefore, the Board directed that the appellant receive a 5% Within-Grade Reduction for three months for this action, and said action should be implemented subsequent to the prior 5% Within-Grade Reduction.

With respect to the other relief requested, the Board directed the County to reimburse the appellant for reasonable attorney's fees incurred, subject to submission of an itemized bill and Board approval as to exact amount.

CASE NO. 84-37

A Bus Operator appealed his dismissal, but withdrew the appeal before the hearing could be held.

CASE NO. 84-78

A Bus Operator appealed his dismissal for allegedly being under the influence of alcohol or unprescribed controlled dangerous substances while at work or when reporting to work in violation of established Department of Transportation policy.

The appellant had been scheduled to work a split shift and reported to work a few minutes early for the second part of his shift to discuss a problem with his supervisor. Based on observation of the appellant's actions and an unusual breath odor, the supervisor suspected possible use of alcohol. Another supervisor was called in to discuss the situation, and after the appellant denied use of alcohol and volunteered to undergo a test, it was decided to take him to the Silver Spring Police Station for a breathalyzer test.

A Montgomery County Police Officer administered a breathalyzer test, which showed a .18% level of blood alcohol. A second test was conducted with a result of .17% blood alcohol. Under State law, a person is considered intoxicated if the blood alcohol level is .12% or higher.

The appellant testified that he had not had anything to drink since the night before and that he was taking medicine that could have affected the test results.

The Toxicologist for the State of Maryland informed the Board that the prescription drug would not have affected the analysis for ethyl alcohol in breath as performed on a Breathalyzer instrument.

The Department of Transportation had established Department Procedure - Administrative XII Alcohol and Drug Abuse Procedure on July 1, 1983. The appellant was aware of this procedure, as it had been given and explained to him at the time of hire.

In consideration of the evidence, and the safety of passengers, it was the judgment of the Board that the dismissal was appropriate and necessary. Accordingly, the dismissal was sustained.

CASE NO. 84-80

A Bus Operator appealed from his dismissal, effective December 4, 1984, for allegedly forcing another Bus Operator to stop her bus and then physically assaulting her; for failure to remain on his assigned route; and for providing false information when questioned about the incident.

The Board found that the appellant deviated from his assigned route, did force the other operator to stop her bus and did strike her after boarding the stopped bus to talk to her. The appellant also admitted that the statement he signed on September 26, was incorrect.

The appellant was considered a good driver and worked whenever needed. He was aware of the practice and policy concerning, "dead-head" routes.

The appellant had been subject to prior disciplinary actions on four occasions in 1984: December 16, 1982, one day suspension for attendance problems; January 11, 1984, one day suspension for leaving his bus unattended and running ahead of schedule; April 3, 1984, a written reprimand for attendance problems; July 24-26, 1984, a three day suspension for leaving bus unattended and running ahead of schedule; and September 12, 1984, a one day suspension for attendance problems. Each time he had been warned of the possibility of more severe punishment for further infractions.

The record showed that there had been previous problems, that the appellant had been counseled and warned about further infractions, and that he did commit serious violations on September 26, 1984. Based on the nature and seriousness of the incident, and the prior work history, the Board found the decision of the Department to dismiss was reasonable and necessary. Accordingly, the dismissal was sustained.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

GRIEVABILITY/TIMELINESS

CASE NO. 84-02

Two investigators appealed from the decision of the Acting Personnel Director that their grievance would not be accepted for processing because it involved an issue that was "not grievable".

The appeal questioned the classification assignment of a class of employees in an office. The County has established a separate appeal process for classification, independent of the grievance process. Accordingly, the decision of the Acting Personnel Director that the issue was "not grievable" was sustained.

CASE NO. 84-18

A Police Officer appealed from the decision of the Personnel Director that his grievance concerning motorcycle duty was not filed timely.

The record showed that in March 1981, a grievance was filed by the appellant concerning involuntary transfer from motorcycle duty to a shift assignment, which resulted in a 5% reduction in pay. On March 8, 1984, the Merit System Protection Board issued a decision on that grievance and on March 12, 1984 the appellant filed a second grievance concerning motorcycle duty.

Based on the above, the Board determined that the appellant was justified in awaiting the outcome of the March 1981 grievance before filing the current grievance. Accordingly, it was the decision of the Merit System Protection Board that the grievance must be considered timely. The County was directed to accept the grievance as being timely and proceed with processing in accordance with established procedures.

CASE NO. 84-34

An Office Assistant appealed from the decision of the Personnel Director that four of the five issues raised in her grievance on the promotional process were not timely and would not be reviewed.

The examination in question, was administered on April 12, 1984, and issues three, four and five raised by the appellant were related to the application process, the announcement and identification for entry to the examination. These incidents all occurred on or before April 12, 1984.

Issue number one raised questions related to the position description provided the appellant on April 26, 1984, by the Personnel Office. Issue number two was held to be timely, and was being processed.

Under the County's approved Grievance Procedure (Administrative Procedure 4-4), an employee is required to file a grievance, "within ten (10) calendar days from the date of the occurrence. . .or knowledge of the same. . ."

The appellant's grievance was filed on Monday, May 7, 1984, the first business day following the tenth calendar day (Sunday, May 6, 1984) after receipt of the position description.

The Board ruled that the grievance on issues numbered three, four and five were not filed timely. However, issue number one was raised as the result of material provided on April 26, 1984, and, therefore, was filed in a timely manner. The Personnel Office was directed to accept and process the grievance related to the position description in accordance with established procedures.

CASE NO. 84-41

Three Health Room Technicians appealed from the Personnel Director's decision that their grievance on the effective date of reclassification was not filed in a timely manner.

The record showed that the appellant's failed to file the grievance within the established appeal period. Regrettably, based on this fact, the Board sustained the decision of the Personnel Director, and, denied the appeal.

CASE NO. 84-49

Two Deputy Sheriffs appealed from the decision of the Personnel Director not to accept their grievance as it was, "substantially the same" as one filed previously. The grievance had to do with scheduling of work assignments to facilitate car-pooling efforts.

Under the Personnel Regulations, a grievance may be filed by an employee if that person believes he/she has been adversely affected with respect to a term or condition of employment or treatment by management. While the Board understood the appellant's concern and the desire for frequently compatible work schedules, there was no evidence of an adverse affect on work performance or ability to perform the assigned duties.

Scheduling of employees is a prerogative of management based on available staff and service needs. It was the judgment of the Board that the matter was not grievable and the decision of the Personnel Director was sustained.

CASE NO. 84-50

Seven Department of Fire and Rescue Service employees appealed from the decision of the Personnel Director that their grievances were not filed in a timely manner.

Under the County's grievance procedure, an employee is given ten days from the date of an occurrence or knowledge of same to file a grievance. Employees are urged to seek informal resolution whenever possible. In this case, the issue was what event should be considered the, "date of occurrence" - the date of each person's promotion or the date the Chief Administrative Officer denied their Department Head's request for review of each case in light of a recent court decision. The grievances were filed within the time limit allowed after the Chief Administrative Officer's decision was made known to the appellants.

It was the judgment of the Board that the date of the Chief Administrative Officer's denial was the more realistic and fairest date for all concerned. Accordingly, the Board ruled the grievances were filed timely and they were remanded to the Personnel Office for processing in accordance with established procedures.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 84-53 & 54

Two Alcoholism Counselors appealed from the decision of the Personnel Director that their grievances would not be accepted for processing as it was not a grievable matter.

The grievances involved the proper classification of the appellant's positions and the effective date of any change made. A classification study was underway and decisions had not yet been made on the issues raised by the appellants.

The County has established a separate appeal process for classification and the only grievable issue in this area involves alleged violation of procedures. The Board found no violation of procedure that could be grievable, therefore, the decision of the Personnel Director was sustained.

CASE NO. 84-55

A Work Force Leader appealed from the Personnel Director's decision to change his grievance from Track I to Track IV after the Personnel Office had responded to it under Track I, and, after a Fact-Finder had been selected and a hearing scheduled.

The grievance concerned applicability of policy on retroactivity of classification decisions. In the Board's judgment, Track I of the Grievance Procedure clearly covered disputes concerning application of policies. Therefore, the Board overturned the decision to change the grievance Track and directed the grievance be processed in accordance with Track I.

CASE No. 84-63

A Recreation Specialist appealed from the decision of the Personnel Director that her grievance concerning classification of her position and duty assignments of another employee would not be accepted for processing as they were not grievable issues.

Section 7.10 Appeal of Decision on Classification of the Personnel Regulations allows for appeal to the Merit System Protection Board, "only if there is a violation of established procedure or due process. . ." While the Board understood the appellant's frustration with the fact that the classification study took over three years - instead of the general guideline of six months - there was no evidence that the established procedure was violated or that the appellant had been denied due process.

Section 15 Transfer gives management the prerogative to move employees from one position or task assignment to another at the same grade level and salary without the necessity for a competitive process. The Board found no evidence to show that the decision to transfer another employee violated the Personnel Regulations in any manner, and was satisfied that the action was a proper prerogative of management.

Based on the foregoing, the Board sustained the ruling of the Personnel Director that the issues are not grievable and the appeal was denied.

CASE NO. 84-71

A Bus Operator appealed from the decision of the Personnel Director that his grievance concerning an Extraordinary Performance Award would not be accepted for processing because it involved an issue that was not grievable.

Granting of special awards is a prerogative of management and the Personnel Regulations do not contain time limits or procedures that must be followed in processing such actions. In the absence of these requirements, or guidelines, the Board agreed with the decision of the Personnel Director that the issue was not grievable. However, the appeal had been rendered moot as the award had been granted.

HARASSMENT

CASE NO. 84-08

A Counselor appealed from the decision of the Chief Administrative Officer on his grievance concerning alleged harassment related to a request for outside employment and denial of his request for an extended period of leave without pay. The Board noted that:

1. In mid-1983, a decision was made to reorganize and reassign certain duties and responsibilities within the program area.
2. In August of 1983, another employee submitted a request for approval of outside employment, and based on the changes in the reorganization, superiors recommended that the individual's request and the appellant's request be reviewed and approved, subject to the limitations required by the reorganization. Approval was subsequently granted by the Ethics Commission in accordance with established procedures.
3. Subsequent to the reorganization, three individuals resigned from the unit, three were on extended sick leave and one person was on leave without pay pending modification of the new office to make it accessible.
4. The appellant's request for extended leave without pay was denied because of the limited staff available and the workload to be performed by the individuals who remained.
5. The Chief Administrative Officer indicated that the issues of assigned duties and responsibilities was being addressed through a classification study that was underway.

While the Board may not have reached a similar conclusion, the decisions and actions of management, based on the information available were found to be reasonable and completely within their areas of responsibility. The Board did not find sufficient evidence to support the charge of harassment. Accordingly, the decision of the Chief Administrative Officer was sustained.

CASE NO. 84-39 & 84-47

A supervisor appealed from the decision of the Chief Administrative Officer on five grievances (consolidated into one appeal) alleging that management had been guilty of harassment and unfair treatment in dealing with his problems.

After due consideration of the record, the Board concurred with the Chief Administrative Officer's assessment that there was insufficient evidence to support the charges set forth in the grievances. There were inter-personal problems between the appellant and his supervisors and corrective action was needed. The Chief Administrative Officer had directed certain actions be taken to alleviate the management situation, and the Board found that his response was clearly appropriate and responsive to the problems. The appeal was denied.

CASE NO. 84-62

An Office Assistant III appealed from the decision of the Chief Administrative Officer on her grievance concerning alleged harassment, abuse, intimidation, and discrimination as the result of, or related to, the playing of a radio.

The Board reviewed the written record in detail, and found insufficient cause or evidence to reverse the findings and decision of the Special Investigator or the Chief Administrative Officer. In cases of this nature, the burden of proof rests with the party making the charges (appellant) and the Board, did not find sufficient supporting documentation to sustain the charges. Accordingly, the decision and directives of the Chief Administrative Officer were sustained.

CASE NO. 84-84

A supervisor appealed from the decision of the Chief Administrative Officer on his grievances concerning alleged harassment and retaliation. The relief requested was a finding that a pattern of harassing actions had occurred that had caused the appellant to suffer great harm and he wanted to be transferred to another position in another division.

It was noted that when the appellant brought problems to the attention of higher level management, corrective action had usually been taken, and while there was temporary distress, the appellant's work history had not been damaged, as most of the questionable documents and comments had been removed and apologies issued. In fact, in the last four years, the appellant had received three "outstanding" and one "Exceeded" work performance ratings, which was clearly indicative of his ability and dedication.

In the judgment of the Board, there had been a major difference of opinion between the appellant and his immediate supervisors as to management style and operational needs and efficiency, that had resulted in a loss or lack of meaningful communication and cooperation. While the Board may not have reached the same conclusions as management, the issues involved the soundness of judgment used in certain situations, such as transfer. The Board may not replace management's judgment with its own, unless there is clear evidence that it was arbitrary and capricious. In this case, corrective action had been taken by management, and they had agreed to a transfer to another division as soon as a vacancy was available.

The only unresolved issue noted was the 1984 EPPE that had been placed in the appellant's file without providing him an opportunity to respond in accordance with established procedures. The Department of Transportation was directed to review that rating, to process it properly and to take any corrective or additional actions found necessary as the result of that review.

With respect to the harassment and retaliation charges, the Board found insufficient evidence to sustain the allegations, and the appeal was denied.

MISCELLANEOUS

CASE NO. 84-03

An employee appealed from the decision of the Chief Administrative Officer on his grievance concerning payment of legal fees incurred while pursuing grievances.

The County denied the grievance because "The issue of payment of legal fees incurred as a result of disciplinary action resolved by administrative action and not by order of the Merit System Protection Board does not represent a term or condition of employment; nor does there exist a policy, procedure or regulation governing the payment of same." In reviewing appropriate legislation, the Board determined that it did not have the authority to award legal fees to an employee, except in cases where the Board issued a formal decision on an appeal. Therefore, lacking authority to grant the relief requested, it was the decision of the Board that the appeal be denied.

CASE NO. 84-05

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning the procedure followed for evaluation of work performance.

The appeal was subsequently withdrawn, prior to Board decision.

CASE NO. 84-13

An employee appealed from the decision of the Chief Administrative Officer on his grievance concerning group insurance benefits. The appellant withdrew the appeal before final action had been taken.

CASE NO. 84-15

A Firefighter appealed from the decision of the the Personnel Director on his grievance concerning reimbursement for medical expenses incurred and reinstatement of leave used for purposes of complying with the request of the County for medical information.

The record showed that the appellant had been given a stress test by the Employee Medical Section, and subsequently received a letter referring him to his private physician for evaluation of premature heart beats noted during the testing.

The appellant complied with the request, which necessitated using six hours of leave, and his personal physician sent him a bill for doing the evaluation.

From 1978 to 1982, the County paid for follow-up cardiology examinations required as a result of stress tests. The practice was stopped in 1982, and, at the present time, the County only pays for follow-up evaluations by orthopaedic specialists involving back injuries.

The County contended that it was the responsibility of the employee to demonstrate continued fitness for duty, and, as part of that responsibility the employee should bear the costs incurred.

The purpose of regular physical examinations for employees is to assure that they are capable of performing the duties and responsibilities assigned, as required by Section 5.12 of the Personnel Regulations. If the County believes an employee is unable to perform satisfactorily, then the County has the burden of arranging for and obtaining sufficient documentation and medical evaluations to justify its determination. The Board was concerned that the policy for paying for one type examination, but not another created a situation of questionable equity. Despite this, the Board could find no legal requirement for the County to reimburse an employee for such expenses, and, therefore, while the Board did not agree with the action taken, it lacked authority to order reimbursement as requested. With respect to the issue of using accrued sick leave for medical appointments, it was the judgment of the Board that such a practice is permitted by the Personnel Regulations, and is reasonable. Sick leave is leave paid by the employer, and use of such leave for medical appointments is certainly reasonable and appropriate under the law. The Board had no alternative but to deny the appeal.

CASE NO. 84-16

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning being assigned as a "second" driver as part of normal duties.

The appellant had requested to be relieved of the driving duties based on disagreement with some policies and management of the Fire Department. His request was not the result of some medical or physical limitation or problem.

Under the Personnel Regulations, duty assignment for employees is the prerogative of management within the parameters of the guidelines of the approved class specification. The class specification for a Firefighter specifically states that periodic driving may be required.

Based on the fact that the duties being assigned are clearly within the approved class specification, and that management is within their rights in assigning such duties, it was the judgment of the Board that the decision of the Personnel Director be sustained.

CASE NO. 84-29B

An Equipment Operator II appealed from the decision of the Chief Administrative Officer on his grievance concerning duty reassignment.

The appellant was assigned to a crew as an Equipment Operator II and drove a truck regularly. He was moved to another crew and was seldom required to operate a vehicle.

Section 15.1 Definition of the Personnel Regulations states, "Transfer of employees is a prerogative of management and is the movement of an employee from one position or task assignment to another position or task assignment at the same grade and salary level. . .Transfers usually involve . . .(c) A change in duty assignment but within the same occupational class.

Section 15.4 Appeal of Transfer, states, ". . .it shall be the responsibility of the employee to show that the action was arbitrary and capricious and/or discriminatory."

While alleging the action was arbitrary and capricious, and taken to benefit another individual, the appellant did not submit any documentation to support those allegations, or refute the documentation submitted by the Department. While the department may not have fully explained the action, there was no evidence that it was arbitrary or capricious and the appellant failed to meet the burden of proof, as required by the Personnel Regulations. Therefore, the appeal was denied.

CASE NO. 84-20

A Program Assistant appealed from the decision of the Chief Administrative Officer on her grievance concerning reduction-in-force(RIF).

The appellant had been employed in a merit system conditional position, which under present Personnel Regulations is defined in Section 3.6 as, "(a) a position created for a special term, project or program, or one which is funded in whole or in part by Revenue Bonds (C.I.P.) or Federal, State or private funds or organizations."

Section 19.5 Appeals of the Personnel Regulations states, "Except for those employees as defined in Section 3.6 (a). . .of these regulations, a merit system employee who is demoted or terminated due to reduction in force, may appeal. . ." This same exclusion is contained in Administrative Procedure 4-19.

The appellant was never terminated or demoted. She was allowed to use annual leave for approximately one month, to maintain continuous employment, and was then transferred to another department without any loss in pay grade or benefits.

Appeal rights of a reduction-in-force are limited to County merit system employees, and then only if they have been demoted or terminated. In this instant case, the appellant was in a position that was specifically excluded from the right of appeal in both the Personnel Regulations and the Administrative Procedures. Additionally, she was neither demoted nor terminated. Based on this, it was the judgment of the Merit System Protection Board that the appeal be denied for lack of appeal rights.

CASE NO. 84-23

A Division Chief appealed a within-grade reduction, but subsequently withdrew the appeal before the Board heard the case.

CASE NO. 84-40

A Police Officer appealed the decision on his grievance concerning a request for approval of secondary employment.

On August 10, 1983, the Department of Police Issued Department Directive #83-11, Secondary Employment, which set forth the procedures and responsibilities related to approval of outside employment.

Section III D of Department Directive #83-11 states in part, ". . . Approval or denial will be determined initially by the Chief. In those instances where approval is granted, the employee may begin work. All requests, with the Chief's decision, will then be forwarded to the Ethics Commission for review. . ."

The appellant submitted a request to be allowed to work as a security guard. The Police Chief denied the request because the appellant was assigned as a patrol shift supervisor in the area where the job was located, and his presence could possibly affect the ability of on-duty police personnel to take appropriate action if incidents occurred at that location.

The Personnel Director overturned the decision of the Chief and allowed the appellant to begin employment on an interim basis, pending action by the Ethics Commission. The Chief asked the Chief Administrative Officer to delay implementation of the Personnel Director's decision pending action by the Ethics Commission. The Chief Administrative Officer approved the request for a delay.

The disagreement in this case involved proper procedures, while the basic issue was the appellant's right to work in secondary employment pending a decision by the Ethics Commission. A review of applicable law and regulations showed that the Chief had the authority to grant or deny interim employment rights, with the final review and authority vested in the Ethics Commission. Therefore, it was the Board's judgment that the Chief's initial decision was not grievable under the County's grievance procedure and all reviews and action subsequent to that were voided.

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) concerning this request for reinstatement of compensatory leave. The record showed that:

1. During 1983, the appellant earned 198.5 hours of compensatory leave and used 128 hours of compensatory leave and 144 hours of annual leave.
2. At the beginning of 1984, 66.5 hours of compensatory leave, the amount in excess of the maximum allowable carryover, was transferred to the appellant's sick leave account.
3. The appellant's request to be allowed to carry this excess compensatory leave over to 1984 was denied.
4. Section 13.5 Compensatory Leave of the Fire Services Personnel Regulations states in part:

" . . . (b) Use of Compensatory Leave
Compensatory leave may not be used until credited and until approved by an employee's supervisor. Application for compensatory leave shall be made in advance of use. . . It shall be the responsibility of each corporation to schedule the use of compensatory leave so that not more than ten (10) days . . . is carried over from one leave year to the next. The requirements of an employee's job may require the corporation to restrict the use of compensatory leave. . . "

"(c) Limitations on Accrual of Compensatory Leave. Not more than ten (10) days of compensatory leave may be carried over from one leave year to the next. Unused compensatory leave in excess of this amount will automatically be credited to sick leave. Upon specific approval of the Fire and Rescue Commission, an employee may be permitted to retain a compensatory leave balance in excess of ten (10) days at the end of a leave year whenever it is shown that the employee was unable to reduce the compensatory leave balance to ten (10) days because of emergency or special workload considerations. "

CASE NO. 84-48 continued

5. It was the appellant's contention that he was unable to use the excess compensatory leave because of man-power shortages on his shift. However, he did not submit any evidence to show that he had requested leave on specific dates and/or that it had been denied by the Fire Department.

Based on the total amounts of annual and compensatory leave earned and used during 1983, it was the judgment of the Board that the appellant could have reduced the amount of compensatory leave to the maximum carry-over level, and that failure to do so was not the fault of the Fire Department. Waiver of the carryover limitation is discretionary and the Board found no evidence to show that the decision to deny the request was arbitrary or unfair. The appeal was denied.

CASE NO. 84-75

A Fire Department employee appealed from the decision of the Personnel Director that his grievance concerning purchase of retirement credit was not filed in a timely manner. The record showed that:

1. The appellant brought the problem to the attention of the Kensington Volunteer Fire Department (KVFD) on May 31, 1983.
2. KVFD wrote the Personnel Office on October 6, 1983, seeking help to resolve the issue.
3. On January 12, 1984, the KVFD received a letter from the Personnel Office informing them (KVFD) what needed to be done to resolve the issue. The appellant was made aware of the contents of this letter in January 1984.
4. Because of various problems, the KVFD did not take final action on this issue, so the appellant filed a grievance on October 4, 1984.
5. Section 5.0 of Administrative Procedure 7-3 Grievance Procedures requires an employee to file a written grievance within 20 calendar days from the date of occurrence or knowledge of the same.

The record showed that the appellant's grievance had not been filed within the mandated time limits. Therefore, the decision of the Personnel Director was affirmed.

CASE NO. 84-85

A Police Officer appealed from an oral admonishment for an incident that occurred while performing duties as a Police Officer and requested a waiver of the Law Enforcement Officers' Bill of Rights coverage.

The Board reviewed the Law Enforcement Officers' Bill of Rights (Article 27, Section 727, et seq.) and determined that while the appellant may waive certain rights under that law, he could not waive coverage of that law. Based on this, the Board found that it did not have jurisdiction in this case, and that Article 27, Section 734 set forth proper appeal procedures to follow. Accordingly, the appeal was dismissed for lack of jurisdiction.

PROMOTIONS

CASE NO. 84-09

A Firefighter appealed from the selection of another individual in a lower rating category for appointment to a position of Fire Sergeant in the Department of Fire and Rescue Services. The County raised the question of whether the appeal was filed timely, while the appellant raised the issue of whether the selection bypass was accomplished in accordance with proper procedures, was justified, and whether the advertisement and filling of the position was done in accordance with proper procedures as set forth in the Personnel Regulations.

While the record showed that the appellant may have received informal notification in December 1983, the County never formally notified the successful candidate of his selection until February 28, 1984. The appellant's appeal of the promotional action was noted on March 1, 1984. It was the judgment of the Merit System Protection Board that the appeal period commenced on the date the County officially took action with respect to selection of a candidate for promotion. Accordingly, the Board found the appeal was noted in a timely manner.

Counsel made the argument that the position was not properly advertised and filled as required by the County's Personnel Regulations.

The Board noted that the examination in 1982, while approved by the Fire and Rescue Commission, was essentially, developed and administered by the Personnel Office and the Department of Fire and Rescue Services. The promotional announcement and subsequent eligible list clearly showed that the process was going to be used to develop promotional lists for the Suppression and EMS career ladders, which are used largely by the independent fire departments, and the fire prevention, training and communication career ladders, which essentially, are utilized by the Department of Fire and Rescue Services. The Board further noted that the Personnel Regulations for both the County Government and the independent fire corporations are almost identical with respect to the employment process.

There was no doubt, in the Board's judgment, that the appellant was fully aware of, and had accepted, the dual promotional process, as he had applied for the vacancy when it was announced in June 1983. Based on these factors, it was the judgment of the Merit System Protection Board that the use of the 1982 examination process and subsequently certified eligible list for promotions in the independent fire corporations and to positions in the Department of Fire and Rescue Services, was appropriate and in accordance with the Personnel Regulations for both organizations.

CASE NO. 84-09 continued

On the final issue of appropriateness of the bypass decision, the Board noted the detailed justification submitted by the Department of Fire and Rescue Services, the comments and position of the County's Personnel Office, and the arguments of counsel. The justification set forth by the Department of Fire and Rescue Services was reasonable, and set forth specific reasons for the request. It was the judgment of the Board that the test of reasonableness for the decision had been met adequately by the Department of Fire and Rescue Services, and, therefore, since the issue then resolved totally on the basis of judgment, the Board should not substitute its judgment for that of the department. Accordingly, finding the action to be based on reasonable conclusions, it was the decision of the Board that the selection of another candidate for promotion be, sustained. The appellant's appeal was denied.

CASE NO. 84-12

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning a lack of an item appeal process in the promotional examination procedures established by the Fire and Rescue Commission.

The Board noted the Personnel Director's findings that there was no requirement in the Personnel Regulations for providing an item appeal process as part of the promotional procedures. It was further noted that the Fire and Rescue Commission had the authority to develop promotional programs for all Fire and Rescue positions.

In this specific instance, the Fire and Rescue Commission provided a process for appealing any question that was believed to be inappropriate and established the process by which this was to be accomplished. This appeal resulted from the fact that the individual questions were reviewed and had to be appealed prior to the time an individual was allowed to review his/her answer sheet. The appellant believed that such a process hindered his ability to appeal the specific question if he disagreed with the scoring of the answer sheet.

It was the judgment of the Board that the decision of the Personnel Director on the grievance was correct and it was sustained. However, the Board pointed out that if an individual believed the examination had been scored incorrectly, there was nothing that would have prohibited that individual from filing a grievance in accordance with established procedures.

CASE NO. 84-17, 22, 27 & 26

The Merit System Protection Board received four separate appeals concerning Fire and Rescue Service promotional practices, filed by counsel representing twenty-two individuals and one fire department. The County raised a question of jurisdiction.

The Board concluded that it clearly had jurisdiction in this matter. This position was fully supported by law and regulation, as well as common sense. The Board has always held that a grievance should be filed at the level above the one being challenged or disagreed with. In this case, the action, or inaction, of the Fire and Rescue Commission in enforcing established policy and procedure was the issue. To require an employee to file through the immediate supervisor, the Corporation and the Fire and Rescue Commission - in that order - would be a waste of time and resources since the Board was the only available administrative level of review above the Fire and Rescue Commission.

The Board also concluded that only a merit system employee or applicant has the right of appeal. Therefore, the Fire Department did not have proper standing, and its appeal was dismissed.

All but two of the appellants, were eligible for promotion when the appeals were noted, and could have been adversely affected with respect to promotional capabilities. Therefore, the Board found that the two did not have proper standing at the time of the appeal, and they were dismissed as parties to the action.

The major issues raised in this case were:

1. Did the Fire and Rescue Commission take proper action to ensure vacancies would be filled from existing eligible lists in accordance with established procedures?
2. Are the positions in question, "merit system positions" and are they subject to the Personnel Regulations?
2. Were the appellants' promotional opportunities adversely affected by the delays in filling vacancies, and should the 1982 eligible lists be extended and used as a means of correcting an inequity, if found?

In considering these issues, the Board noted:

1. The Fire and Rescue Commission had conducted promotional examinations in 1982, and had certified eligible lists for the ranks of Fire Sergeant, Fire Lieutenant, Fire Captain and Assistant Fire Chief. These lists were to remain in effect until new examinations were administered.

2. The vacant positions in question were Assistant Fire Chief, Rockville Volunteer Fire Department (RVFD); Captain, Cabin John Park Volunteer Fire Department (CJPVFD); Captain, Gaithersburg-Washington Grove Volunteer Fire Department (GWGVFD); Captain, Glen Echo Volunteer Fire Department (GEVFD); and Captain, Sandy Spring Volunteer Fire Department (SSVFD).

3. The Vacancy Procedure approved and re-issued by the Fire and Rescue Commission in December, 1982, stated:

"The following specific procedures are to be used:

- "1. All vacancies, unless otherwise authorized by the Fire/Rescue Commission, must be listed within one week after the vacancy occurs.
- "2. All information concerning vacancies must be called into the Fire/Rescue Commission office at 251-2461 by Wednesday of each week. Openings will be placed on the vacancy list that will go out to all departments/rescue squads every Friday.

"A copy of the vacancy list must remain posted until the next vacancy list is received and/or the closing date* has been met.

"Individuals on the promotional list are required to keep abreast of all openings, i.e., vacancy lists, and it shall be their responsibility to contact the appropriate departments when an opening occurs. In addition, the departments must acknowledge in writing receipt of all applications/resumes for vacancies, with a copy for the Fire/Rescue Commission. A copy of the letter extending an offer of a position must be sent to the Fire/Rescue Commission.

- "3. Interviews shall be held in a reasonable length of time after the vacancy closing date. This will not exceed three weeks from the date of closing. Approval to extend interview time beyond three weeks must be justified and granted by the Fire/Rescue Commission. This request shall be made when the vacancy is listed.

- "4. Lateral transfers - If a department requests an employee laterally transfer from another department, the department where the employee is currently employed must respond to the requesting department within 15 days of receipt of the written request."

"5. Notification of appointment is not to exceed one week after interview and final selection.

"*Closing Date: No applications/resumes may be accepted beyond the closing date listed on the Vacancy List. Closing date is the end of the business day or no later than 2400 hours of the day specified."

4. The vacancy at the RVFD occurred on or about August 1, 1983, and the department tried to appoint a person who was not on the eligible list. On September 8, 1983, as the result of an appeal, the Merit System Protection Board ruled that the RVFD had failed to comply with proper promotional procedures in attempting to fill the Assistant Fire Chief vacancy, and ordered the RVFD to advertise and recruit in accordance with established procedures. This decision was not appealed to the Circuit Court by either party, and must be considered final and binding. The position of Assistant Fire Chief was found to be a merit system position, and there was an approved promotional eligibility list for that rank at the time of the vacancy, as well as an established policy for filling such vacancy.

On February 29, 1984, the RVFD requested approval to develop a recruitment plan for the vacancy in lieu of using the eligible list, and the Fire and Rescue Commission approved the request on March 22, 1984.
5. On September 8, 1983, the Fire and Rescue Commission approved a proposed change to the County Code concerning "Senior Supervisory" positions, but the County Council had not approved any change or addition to the Code or Personnel Regulations on this subject. The Personnel Regulations have not been amended to exclude any Fire Service positions from merit system coverage.
6. The vacancy at the GNGVFD occurred on or about December 1, 1983. The GNGVFD had requested permission to delay filling the vacancy pending resolution of the "senior supervisory" position problem, and had received approval from the Commission to do so on September 8, 1983, and again on December 8, 1983. The vacancy was finally announced on April 13, 1984, and, on May 10, 1984, the Fire and Rescue Commission granted a 60 day extension in filling the vacancy.
7. The GNGVFD submitted documentation purporting to show proper action had been taken in 1982 to extend the "senior supervisory" provisions of the prior Personnel Regulations.

CASE NO. 84-17, 22, 27 & 26 cont.

8. The vacancy at the Cabin John Park Volunteer Fire Department occurred in mid-December 1983, and was announced on January 20, 1984. On March 22, 1984, the Fire and Rescue Commission approved the Department's February 16, 1984 request for an indefinite extension for filling the vacancy pending resolution of the "senior supervisory" issue. On May 9, 1984, the CJPVFD selected a candidate from the 1982 list for promotion to the position of Fire Captain in that Department.
9. The vacancy at the Sandy Spring Volunteer Fire Department occurred on or about March 1, 1984, and was announced on April 13, 1984. The Fire and Rescue Commission had granted two extensions of time for filling the vacancy for purposes of salary lapse. The first extension, until March 9, 1984, was approved on February 9, 1984, and, on March 22, 1984, it was extended until June 30, 1984. Subsequent to the announcement on April 13, 1984, the SSVFD selected a candidate from the 1982 list for promotion to the vacant Fire Captain position in that Department.
10. The vacancy at the Glen Echo Volunteer Fire Department had been held in abeyance pending resolution of an appeal in the Circuit Court, and, therefore, was not considered part of this appeal.
11. On April 4, 1984, the Fire Board of Montgomery County, Maryland, composed of representatives of all the independent Fire Departments, passed two motions stating:

"That the Fire Board take a position to have all senior supervisory positions filled." and,
"All officer positions be filled from the current eligibility list that are not in question in regards to the Ottinger case."

The evidence of record showed that the Vacancy Procedure was not followed properly in filling, or attempting to fill, the vacancies at the RVFD, CJPVFD and the GWGVFD. Also, the Board's decision of September 8, 1983, was not implemented and adhered to by the RVFD and the Fire and Rescue Commission, in violation of law. The Fire and Rescue Commission's approval of the RVFD request to recruit completely independent of the established procedures and eligible list for Assistant Fire Chief, must be considered null and void, as it is in violation of a Board decision and the law. It was the further conclusion of the Board that the delay in filling vacancies in authorized and required positions until such time as a law could be amended to please the desires of several departments, was an arbitrary and unreasonable action, and was in violation of the intent and purpose of established procedures.

CASE NO. 84-17, 22, 27 & 26 cont.

Based on these factors, it was the judgment of the Merit System Protection Board that the Fire and Rescue Commission had not taken appropriate steps to assure the filling of vacancies in the prescribed manner in a timely fashion.

The law clearly stated that all Fire and Rescue Service positions are covered by the merit system, and attempts to modify those provisions had not been successful. Therefore, all of the positions in question, were merit system positions, and had to be filled in accordance with the approved Vacancy Procedure, and from the approved eligible lists.

There was no question that timely action in filling the positions in question, would have resulted in selection of individuals from the eligible lists approved in 1982, and would have resulted in vacancies at the Fire Lieutenant and Fire Sergeant levels that would have also been filled from the 1982 eligible lists. The failure to follow proper procedures, and to act timely, therefore, had adversely affected the appellants' promotional opportunities.

Accordingly, the Fire and Rescue Commission and all Fire Departments involved or affected by this award, were directed to:

1. Fill the Assistant Fire Chief vacancy at the Rockville Volunteer Fire Department, the Fire Captain vacancy at the Gaithersburg-Washington Grove Volunteer Fire Department, and the Fire Captain vacancy created by the promotion to Assistant Fire Chief, in accordance with established procedures and from the 1982 approved eligible lists, based on eligibility for promotion as of April 27, 1984.
2. Fill all Fire Lieutenant vacancies created as the result of promotions to the positions of Fire Captain at the Cabin John Park Volunteer Fire Department, Gaithersburg-Washington Grove Volunteer Fire Department, Sandy Spring Volunteer Fire Department, and the vacancy created by promotion to Assistant Fire Chief, in accordance with established procedures, and from the 1982 approved eligible list.
3. Fill all Fire Sergeant vacancies created as the result of the promotions in #2 above in accordance with established procedures, and from the 1982 approved eligible list.
4. Appellants were also awarded reasonable attorneys' fees, payable by the Fire and Rescue Commission.

APPEALED TO CIRCUIT COURT BY TWO FIRE DEPARTMENTS.
THE COURT AFFIRMED THE BOARD'S DECISION.

CASE NO. 84-21

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning the extension of the eligible list for Police Sergeant from December 31, 1983 to June 30, 1984. The Board noted that:

1. On October 7, 1983, the Department of Police issued Memorandum #83-57, which contained the anticipated schedule for future promotional processes. A review of that schedule showed that approximately two and one-half years would elapse between the prior promotional examination and the next examination for various ranks.
2. On November 8, 1983, the Department of Police announced its intention to hold a promotional examination for the rank of Sergeant in late Spring of 1984.
3. On November 29, 1983, the Department of Police requested the Chief Administrative Officer's approval for extension of the eligible list for the rank of Sergeant until a new examination could be given and a new eligible list certified.
4. In December 1983, the Chief Administrative Officer approved a six-month extension of the eligible list to June 30, 1984.
5. Section 5.10 Eligible List of the Personnel Regulations gives the Chief Administrative Officer the authority to determine the length of time the eligible list should remain in effect and allows him to abolish or extend the eligible list as deemed necessary and appropriate.

Management must have flexibility to assure the effective functioning of the Department until such time as a new eligible list could be certified. While giving the examination in a more timely fashion, may have been desirable, the actions to date were clearly within the stated guidelines and intentions as provided to the affected employees. Therefore, it was the judgment of the Board that the decision be sustained.

CASE NO. 84-24

A Firefighter appealed from the decision of a Fire Department to promote an individual to the position of Fire Sergeant who was in a lower rating category on the eligible list. The record showed that the Fire Department received six applications from individuals on the approved eligible list who were interested in the promotional opportunity. Five applicants were interviewed by the Department.

After review of the information provided in the application of each candidate, and each person's response to the questions asked in the interview, the Department determined that one of the individuals in the qualified category was the best suited for the vacancy. On March 2, 1984, the Fire Department submitted a request to the Fire and Rescue Commission for permission to hire an individual from the qualified category, as required by Section 6.3 Selection Procedures of the Fire/Rescue Personnel Regulations. The appellant was the only applicant who was in the well-qualified rating category of the approved eligible list.

At its meeting on April 12, 1984, the Fire and Rescue Commission approved the appointment of an individual from the qualified category instead of the well-qualified category.

The ultimate decision of selection for appointment for promotion rests with the appointing authority, who, according to Section 6.3 of the Fire/Rescue Personnel Regulations, "shall be free to choose any individual from the highest rating category based on the person's overall rating, character, knowledge, skill, ability and physical fitness for the job, as well as possible future advancement." The appointing authority has the right to select somebody from a lower rating category, subject to submission of written justification, which must be approved by the Fire and Rescue Commission.

It was the judgment of the Merit System Protection Board that the selection of an applicant from the lower rating category was based on the appointing authority's determination of which qualified applicant had a management style that would fit into the overall operation and need of the Department. This was clearly a judgment call, and the Board found no evidence to show that the decision was arbitrary and/or capricious, or that it violated established procedures. Accordingly, the appeal was denied.

A Firefighter and a Fire Sergeant appealed the 1984 promotional examination process for Fire Sergeant and Fire Lieutenant.

The appellants alleged that the testing process violated Sections 5(a), (b) and (c) of the Personnel Regulations and the approved Career Development Plan by failing to include Emergency Medical Services (EMS) material and specific patient care questions relative to the EMS career ladder. With most of the questions related to the other career ladders, the appellants contend the examination was discriminatory in its effect on EMS personnel test scores, resulting in adverse impact on promotional opportunities. The record showed that:

1. Section IV Promotional Examinations of the Career Development Program for the Fire and Rescue Services stated:

". . . Promotional examinations should be revised in order that they will be job related to the various career ladders. This would require an examination consisting of two parts. One part would be a general or core examination covering material common to the duties of all career ladders. The second part would cover material related to a specific career ladder. For example, at Level II (Sergeant) there would be multiple choice examination questions covering the following representative areas:

1. material necessary to be FF III
 2. material covered in Officership I
 3. instructional techniques
 4. material necessary to be an EMT-A
 5. County personnel regulations
 6. disaster plan. . ."
2. The EMT Manual, which had been used as study material for prior core examinations, was deleted from the 1984 list in recognition of the fact that each firefighter must be recertified in CPR annually and EMT-A every three years, after completion of a refresher course. The recertification process was believed to be adequate measure of a person's knowledge and ability in the EMS area, so less emphasis was placed on this specialty area in the core examination in 1984.

3. On December 8, 1983, the Fire and Rescue Commission released the 1984 Promotional Examination Procedure for the ranks of Fire Sergeant, Fire Lieutenant, Fire Captain and Assistant Fire Chief. In this procedure, the Commission stated:

". . .For the ranks of sergeant and lieutenant, the core examinations shall consist of sixty (60) questions each, and the specialty examinations shall consist of forty (40) questions each. . ."

The Commission also set forth the requirement for establishment of a committee, consisting of representatives from each specialty area, to develop test questions from the list of study materials included in the announcement.

4. Some of the questions on the core examination were related to rescue efforts, but none were directly related to patient care.
5. On the core examination, the Firefighter scored a 52. The highest score attained was a 58 and the lowest, a 33. The appellant was in the top 15% on the core examination and was the highest rated candidate for promotion to EMS Sergeant.
6. The Fire Sergeant, was not on the eligible list for promotion to Lieutenant and neither party submitted any documentation on his test results.

The burden of showing disparate effect or discriminatory treatment rests with the appellants.

This Board found no evidence to show that the scores of EMS personnel were disproportionately lower than other persons or that the established procedure was violated or discriminated against EMS personnel in any way. The examination was clearly job related and there was no requirement that specific questions on a specialty area be included on the core examination. In fact, the Career Development Plan stated that questions on the core examination should cover material, "common to all career ladders." The Board further believed that the ongoing CPR and EMT-A certification requirements provided an adequate measurement of a person's knowledge and ability in the EMS area, which clearly lessened the need for testing those skills at this time.

CASE NO. 84-44 & 84-65

It was the decision of the Merit System Protection Board that the examinations for Fire Sergeant and Fire Lieutenant were given in accordance with established procedures and did not discriminate against or adversely affect EMS personnel in any manner. Accordingly, the appeal was denied and the Fire and Rescue Commission was allowed to proceed with certification and use of the 1984 Promotional Eligibility List for Fire Sergeant and Fire Lieutenant.

CASE NO. 84-66

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning the denial of promotion to Police Sergeant.

The appellant was the highest ranked person on the eligible list and was not promoted to a vacant position prior to expiration of the eligible list. The Board found no legal requirement for filling vacancies within a certain period of time, and historically, the County had left positions vacant for extended periods because of salary lapses necessitated to pay for accrued annual leave of the prior incumbent. Additionally, the County was involved in a law suit concerning promotional practices of the Department of Police and the Chief Administrative Officer had determined that it was in the County's best interest to allow the eligible list to expire and to defer any further promotions.

The eligible list had been in effect for 30 months - the original two years, plus a six-month extension - and approximately ten persons had been promoted during that time. With the expiration of the list, and no immediate plans to conduct a promotional examination, the Department of Police the position of not being able to fill any Sergeant vacancies until list

It was the judgment of the Board that the decision to delay promotions was a management prerogative and that the stated reasons for doing so were reasonable. Accordingly, the Board found insufficient cause to overturn that action, and the appeal was denied.

CASE NO. 84-66 - REQUEST FOR RECONSIDERATION

The appellant subsequently submitted a Request for Reconsideration for alleged fraud or irregularity. The record showed that:

1. The County had delayed the 1984 promotional examination process for Sergeant because of pending litigation related to promotions.
2. The eligible list for Sergeant was allowed to expire on June 30, 1984.
3. In July 1984, the Black Coalition of Police Officers, (the group involved in the litigation) changed counsel and the Fraternal Order of Police asked to be allowed to intervene in the case, resulting in continuation of the trial date that had been scheduled for October 22, 1984.

CASE NO. 84-66 Request for Reconsideration continued

4. On September 18, 1984, the Chief Administrative Officer denied the grievance stating: ". . . while it is unfortunate that several months have passed since the last eligibility list for promotions expired and no new exam has been administered, the decision to hold in abeyance the testing process was made in consideration of pending litigation. . ."
5. On September 19, 1984, (the day after the Chief Administrative Officer denied the grievance), the County announced the 1984 examination process for Sergeants.
6. On October 23, 1984, the Personnel Director, in responding to the Board on the appeal, stated: ". . . I would reiterate that the decision to hold in abeyance the promotion process was not arbitrary and capricious. The Chief Administrative Officer (CAO made the decision in consideration of pending litigation regarding hiring procedures in the Police Department. . ."
7. A new eligible list for Sergeant was certified on March 6, 1985 and the "Well-Qualified" category (highest category on the list) contained the names of 32 persons - all white, 31 males and 1 female.
8. On April 7, 1985, five white males were promoted to Sergeant, even though the litigation is still pending.

The Board's primary reason for denying the appeal was the Chief Administrative Officer's decision to forego promotions pending outcome of the litigation. The Board was never informed of or provided the information concerning delay of the trial and proceeding with the examination process until the Personnel Director responded to this Request for Reconsideration on April 18, 1985. The fact that the County knew it was going to proceed with the promotional process at the time it denied the grievance, "in consideration of pending litigation", and then failed to provide the Board with proper information concerning that situation, in the judgment of the Board, was highly irregular and inappropriate. Therefore, the Board found the request to be reasonable and reconsidered.

CASE NO 84-66 Request for Reconsideration Continued

It was the judgment of the Board that the County's recent actions of certifying an eligible list with no minorities in the highest rating category and then promoting five white males from that list, completely negated and overrode their reason for denying the grievance in September 1984. Based on the fact that a vacancy existed prior to abolishment of the prior eligible list; the appellant was next in line to be promoted; the Department of Police had followed the practice of promoting in numerical order; and the Department of Police had indicated on several occasions the necessity for filling vacancies promptly to assure proper coverage and safety for the citizens, it was the judgment of the Merit System Protection Board that the decision of November 21, 1984 be reversed.

The County was directed to promote the appellant to the next available Sergeant vacancy, with an effective date retroactive to April 7, 1985, the date the first promotions were made from the new list, and reimburse him the additional salary monies due as the result of that action.

CASE NO. 84-70

A Planning Technician appealed from the decision of the Chief Administrative Officer on a grievance, denying her request for a non-competitive promotion.

Since December 1979, the appellant had served in the lead capacity for a Unit and provided day to day supervision and leadership. In April 1984, the appellant completed a position description detailing the tasks she had been performing, with the hope that her position would be reclassified to a level commensurate with the duties and responsibilities assigned.

The Department Head subsequently requested approval to create a higher level supervisory position for the Unit. The position description filed with the Personnel Office for this new position was the same one completed by the appellant, with minor revisions in the supervisory responsibilities.

The appellant submitted a request for a non-competitive promotion to the new position based on the fact that she had been doing the job for several years, and the highly specialized nature of the task.

While the County has an upward mobility program, there was no indication of any effort by management to place the appellant in a training position (Public Administration Intern), or to provide any assistance or courses to prepare her for promotion. The class specification for the new position allowed substitution of experience for the educational requirements.

After consideration of the record, and review of the Personnel Regulations, it was the decision of the Merit System Protection Board that the action taken was a prerogative of management and there was insufficient evidence to show that it was an arbitrary or capricious decision. While the Board may not have reached the same conclusion, or have taken action in the same manner, the Board cannot substitute its judgment for that of management when taking a discretionary action. In the Board's judgment, management could have placed the appellant in the Public Administration Intern position on a non-competitive basis as part of its upward mobility program, but such action was at the discretion of management and they decided not to do so. Based on this, it was the Board's judgment that the decision to deny the request for a non-competitive promotion should be affirmed. However, the record showed that the appellant was worked out of her class for a period of approximately five years and equity required that she be reimbursed accordingly.

CASE NO 84-70 cont.

Therefore, the County was directed to reimburse her an additional 5% in salary or the minimum salary for a Program Assistant I, Grade 18, whichever was greater, for the period from December 1979 to November 1984 when the new employee reported for duty and assumed the supervisory duties. Further, the appellant was to be given a new written work plan consistent with the assigned class specification to eliminate any future misunderstandings as to duties and responsibilities to be performed.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 84-72

An Office Assistant appealed from the decision of the Chief Administrative Officer on her grievance concerning the promotional procedure used for the Accounting Assistant position. The issues to be resolved were whether the test used, properly reflected and measured the required skills and if it was graded properly.

The record showed that:

1. The position (or class) involved was Accounting Assistant. The class Specification for this class contains the following:

"DEFINITION OF CLASS: This is accounting work posting entries to and maintaining accounting journals and ledgers, calculating and preparing monthly billings, and assisting an accounting supervisor and accountants by verifying figures and proofing special financial reports.

Employees in this class are responsible for accounting tasks involved in maintaining journals, ledgers and other financial records. Work requires the application of accounting knowledge for processing of financial reports and work is performed according to established procedures and instructions received from supervisor. Work is reviewed primarily through checks of journals, ledgers and periodic reports."

"EXAMPLES OF DUTIES: Prepares journal entries to record accounts receivable such as rents, charges for services, reimbursements to County, and other miscellaneous charges.
Prepares and calculates monthly billings as assigned by accountant.
Audits the pseudo codes and amount of the journal entries prepared by County departments and agencies and prepares vouchers for payment by Accounts Payable.
Analyzes various accounts as assigned by supervisor on a monthly basis.
Assists accountants in preparing and proofing monthly-yearly financial statements.
Analyzes computer runs in order to verify financial data.
Performs related duties as required."

CASE NO. 84-72 Continued

2. On February 2, 1984, the Personnel Office and the Department of Finance agreed to use the AICPA Level I examination to test applicants:
 - a. Knowledge of the theories, principles and practices of accounting.
 - b. Ability to maintain general and subsidiary ledgers and journals.
 - c. Ability to communicate effectively both orally and in writing.
 - d. Ability to perform numerical computations accurately and efficiently.
3. Information provided by AICPA stated that the testing program was a service provided for ". . . accounting firms and business organizations. . ." There was no indication or evidence to show that it was designed or relevant to governmental accounting.
4. The content outline for the Level I Achievement Test provided by AICPA indicates many of the questions were related solely to corporate accounting and not governmental accounting, yet the County only deleted four of the questions.
5. The County knew the four questions were going to be deleted prior to administration of the examination, but did not announce it and applicants were required to answer all of the questions at time of the examination. Subsequently, all applicants were given credit for the four questions considered irrelevant and scores were changed accordingly.
6. Section 5.6 Examinations of the Personnel Regulations states"

"Examinations. Examinations shall be given for the purpose of establishing eligible lists for employment and promotion. Examinations may be written, oral, a demonstration of physical ability or skill, an evaluation of experience and/or education (or a combination thereof) or any other professionally acceptable selection instrument, which shall fairly appraise and determine the qualifications, fitness and ability of competitors. Such examinations shall:

CASE NO. 84-72 continued

- (a) Relate to the duties and responsibilities assigned to a position.
 - (b) Be a fair and valid measurement of required skills and knowledges.
 - (c) Be administered in good faith and without discrimination.
 - (d) Be properly and accurately evaluated.
7. Section 5.8 Invalidation of Examinations. "The Chief Administrative Officer shall invalidate an examination in whole or in part if it is determined that there has been any impropriety in the examination process, or that the examination was not job-related or was discriminatory."
8. Section 5.9 Rating of Examinations and Eligible Lists. "The Chief Administrative Officer shall develop procedures for scoring and rating of examinations and the establishment of eligible lists for each position. These procedures shall be announced prior to the examination."

The Board was well aware of the fact that there are major differences between corporate accounting and government accounting and that the position in question; functions as an assistant to an accountant with specific guidelines and instructions. With this in mind, and after reviewing the examination, the Board questioned the job relevancy of questions: #6, 7, 9, 10, 12, 15, 17, 21, 22, 24, 25, 27, 29, 31, 32, 33, and 34 to the Accounting Assistant position. Additionally, the written test did not appear to measure an individual's ability to communicate or to perform numerical computations accurately and efficiently.

It was quite clear from the record that Section 5.9 of the Personnel Regulations had been violated as the scoring procedures (credit for deleted questions) were not announced prior to the examination. The Board also questioned the fairness or propriety of giving everybody credit for the four questions and basing ratings on all 38, rather than deleting the four and basing ratings on only 34 questions.

CASE No. 84-72 continued

After careful consideration, it was the judgment of the Merit System Protection Board that the test did not sufficiently relate to the duties and responsibilities of the position and was not a fair measurement of required skills and knowledges, both in violation of Section 5.6 of the Personnel Regulations. It was the further judgment of this Board that these violations (Section 5.9 and 5.6) were serious enough to warrant invalidation of the examination procedure for this class. Therefore, the Board directed the County to invalidate the examination process, to abolish the eligible list created as a result of the examination, and to refrain from use of the eligible list for any promotions, effective after the date of this decision.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 84-76

A Mechanic Helper appealed from the decision of the Chief Administrative Officer on his grievance concerning promotion to the position of Mechanic II. The unresolved issues to be addressed were:

1. Did the appellant continue to work out of class after November 21, 1984?
2. Has the appellant been denied a promotion improperly for failure to give him veteran's credit?
3. Has the appellant been the subject of harassment and retaliation by his supervisors?
4. Should attorney's fees be paid by the County?

The types of duties performed by the appellant from November 21 to December 11, 1984 appeared to be those usually performed by a Mechanic, while duties after that date appear to be of a general maintenance nature. The Chief Administrative Officer's decision was issued on November 21, 1984 and actual implementation, with resulting change in duties, was affected several weeks later. Based on this, it was the judgment of the Merit System Protection Board that reimbursement for Mechanic II work should cover the period from May 9, 1983 (date established by the Chief Administrative Officer) to December 11, 1984 (the date the Chief Administrative Officer's decision was implemented). The Department of Transportation was directed to reimburse the appellant additional salary monies due for this period.

With respect to the promotion issue, the appellant was in the "well-qualified" rating category on the eligible list for Mechanic II, and all promotions and/or appointments had been made from that category. The appellant argued that he had not received appropriate Veteran's Credit and that as a current County employee, County law required he receive priority consideration over outside applicants to assure compliance with Section 16.2 of the Personnel Regulations.

A review of the law relevant to Veteran's Credit, showed that it applied to appointment of persons to merit system positions, but not necessarily to promotions. The Board considered the fact that in certain circumstances, this could result in a discriminatory affect. However, that had not occurred in this case, as there was no evidence to show that Veteran's Credit was considered in the selection of other candidates, or that giving the appellant such credit would have placed him in a higher rating category. Based on this, the Board found the Veteran's Credit issue irrelevant.

CASE NO. 84-76 Continued

Absent specific showing of favoritism, discrimination or consideration of other non-merit factors, the selection and appointment of persons to merit system positions is the responsibility and prerogative of the appointment authority, pursuant to Section 6.3 of the Personnel Regulations. The Personnel Regulations allow an appointing authority to select, ". . . any individual from the highest rating category. . ." In this case, all appointments and/or promotions had been made from the highest rating category (well-qualified) and the validity of the examination or determination of ratings had not been challenged. While the Board recognized the appellant's desire to favor promotion from within to enhance career advancement opportunities, and while this would appear to be a reasonable and sound practice when all applicants are equally qualified, the law specifically gives the appointing authority latitude in decision making. The Board found no evidence of violation of procedure or law, so the selection decisions were sustained.

The Board carefully reviewed all documentation in considering the harassment and retaliation charges. It was quite evident, that with the numerous levels of supervision in this organization, communications often were unclear and inadequate and the organization was slow to respond to or implement corrective action. While some of the alleged comments of supervisors may have been suspect, and gave the appearance of being retaliatory in nature, there was insufficient evidence to support a finding that it had occurred in violation of the law.

On the final point, it was the judgment of the Board that the request for attorney's fees be denied as the appellant had not prevailed.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 84-77

An Administrative Aide appealed from the decision of the Chief Administrative Officer on her grievance concerning the promotional procedure for the position of Administrative Assistant I.

The primary issues in this case were whether the County had the right to expand eligible lists once they have been certified and did the County have an obligation to promote from within to enhance career advancement.

The Personnel Regulations set forth certain procedures for extending or abolishing an eligible list, but are silent on expanding such list. It was the judgment of the Board that good management practices require certain flexibilities, so long as they do not infringe upon the rights of other parties, and that the ability to add to a list to broaden the pool of applicants is fair and reasonable. An action of this nature does not deny others the right to compete or to be considered for a job. Therefore, the Board found that the County had the prerogative to reopen recruitment efforts and to add names to eligible lists as long as all other procedural requirements were adhered to.

The County has established programs to foster career development and upward mobility, as well as to meet affirmative action goals, and the Board endorses and encourages such activity. When persons, put forth time and effort to improve career potential by participating in the Education Tuition Assistant Program, and completing college degree requirements needed for advancement, it is reasonable to expect priority consideration for present employees found to be well-qualified for a promotion. While denial of such an opportunity may be disheartening to employees, and while the Board may have reached a different conclusion, selection of employees remains a prerogative of management. Failing to find a specific violation of established procedures, it was the judgment of the Board that the appeal be, denied.

RECRUITMENT

CASE NO. 83-99

An applicant appealed from the "Not Acceptable" medical rating received for the position of Police Officer Candidate with the Montgomery County Department of Police. The record showed that the appellant was notified by the Employee Medical Examiner that he failed to meet established medical standards because he had spondylolisthesis, which placed him, "more at risk of developing back pain with time and also with heavy physical activity."

Section 5.12 Medical Requirements for Employees/Applicants of the Personnel Regulations states, "Each individual must be of sufficient good health to perform the duties and responsibilities assigned to a position. To determine this, the Chief Administrative Officer shall establish a system of medical examinations and standards for employees/applicants. . .Whenever an employee/applicant is found to have a defect or condition that would impair satisfactory performance of duties, or may jeopardize the health or safety of his/her self, or others, the Chief Administrative Officer may declare such applicant ineligible for appointment. . ."

On January 15, 1979, the Chief Administrative Officer approved Administrative Procedure 4-13, Medical Standards. Section 6.0 Specific Medical Standards for Medical Group I are applicable to Police Officer positions. Subsection Q.1 Spine and Sacroiliac Joints of Section 6.0 states in part: ". . .(H) Spondylolysis or spondylolisthesis that is symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations." may serve as the basis for rejection for employment.

The issue before the Board was whether the decision to disqualify was reasonable or was arbitrary and capricious. The Board note the medical standard allowed disqualification for three reasons for spondylolisthesis:

1. If it is symptomatic.
2. If it is likely to interfere with performance of duty.
3. If it is likely to require assignment limitations.

The appellant was asymptomatic, and, therefore, was not disqualified by the first requirement. With respect to the latter two requirements, the majority of orthopedic surgeons clearly agreed there was a high probability that the spondylolisthesis would eventually interfere with job performance and/or require assignment limitations. This was clearly a judgment matter, and, when the evidence supports such a decision in a reasonable manner, the Board may not substitute its judgment for that of management, whether the Board would reach the same conclusion or not.

CASE NO. 83-99 continued

Based on the medical evidence, the potential risk to the appellant and others, and the possible expense to the taxpayers, should the appellant be employed as a Police Officer, it was the judgment of the Merit System Protection Board that the decision to disqualify him from further consideration for the position of Police Officer Candidate because of spondylolisthesis, as evidenced on the x-ray was reasonable and was sustained.

CASE NO. 84-25

An applicant appealed from the decision of the Personnel Director that he was medically unacceptable for the position of Bus Operator because of prior surgery and disability to his lower back.

The appellant had a disc removed from his back in 1972, which resulted in a 10% permanent, partial disability rating. In 1976, the appellant sustained a myocardial infarction, and subsequently retired from his position as a Firefighter.

The appellant had been employed in recent years in a position which required as much as six hours of driving a day, and indicated that there had been no problems with respect to his health.

The Board noted that the two physicians who have followed the appellant's progress, subsequent to the medical problems, believed that it was possible for him to perform the duties of a Bus Operator. The County was concerned about the possible risk to the appellant and to others should a problem arise. In addition to the back problem, the Board noted the myocardial infarction in 1976, which subsequently led to retirement from the Firefighter position, and some subsequent chest/arm pains in November 1983, with continued use of medication to the present time. The County has a responsibility to provide the safest possible transit system for its citizens. There was no question that with the medical history documented in the file, the appellant presented a greater risk to himself and others. It was the judgment of the Board that he did not satisfactorily meet the medical standards for the position of Bus Operator. The decision of the Personnel Director to disqualify him from consideration for appointment was sustained.

CASE NO. 84-14

An applicant appealed from the "not acceptable" medical rating received for the position of substitute Bus Operator.

The appellant had sustained a compression fracture of his back many years ago, had fully recovered, and had been employed as a Bus Operator in another jurisdiction for approximately ten years.

The specialist who examined the appellant for the County stated that the compression fracture should not cause any difficulty in driving a bus, that he did not pose a safety risk, but that the appellant was more at risk for back complaints and therefore, should not be employed.

The approved Medical Standards, contained in Administrative Procedure 4-13, dated January 15, 1979 stated:

"The causes for rejection for appointment shall be:

. . .(f) Healed Fracture of the Spine or Pelvic Bones with associated symptoms which have prevented the individual from following a physically active vocation, or which preclude the satisfactory performance of duties. . .

(h) Spondylolysis Or Spondylolisthesis that is symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations."

After careful review of the record and the medical standards, the Board did not find any evidence to show that the appellant did not meet the medical standards, as written. While the Board recognized the County's desire to minimize its exposure to possible job-related injuries, decisions of this nature must be based on the medical evidence and the written standards, and disqualification cannot be solely on the basis that a person may be "more at risk" than another person. It is incumbent on the County to show that a person cannot perform the duties assigned without modification or limitation, or that performing such duties will definitely result in injury to the person or present a safety risk. Therefore, the "not acceptable" medical rating was overturned, and the County was directed to continue processing the appellant's application for employment in accordance with established procedures.

CASE NO. 84-29A

An applicant appealed from the "not acceptable" medical rating received for the position of Firefighter.

The record showed that at the time of a medical examination, the County physician noted a scar from back surgery and the appellant was asked to have the surgeon submit an evaluation of his condition.

The surgeon subsequently reported, ". . .his back is supple in all planes of movement and no objective motor, sensory or reflex deficits are present in the lower extremities. . .For the past 6 years, he has served as a volunteer firefighter. . .On the basis of my history, clinical and x-ray examination, I . . .see no reason why he will not be able to fulfill all the duties of a firefighter. . ."

X-rays, as interpreted by the Medical Section's Radiologist, indicated "1 Spondylolisthesis of L5 with bilateral spondylolysis and narrowing of the L4-5 disc space."

The Fire and Rescue Commission uses the N.F.P.A. 1001 Medical Standards for entrance examinations. On February 11, 1982, the Commission issued Administrative Procedure 8-2, which modified certain provisions of the N.F.P.A. 1001. Section 2.2.15.1 Spine and Sacroiliac Joints was amended to read as follows:

"The causes for rejection for appointment shall be . . .(h) Spondylolisthesis. . ."

The appellant had passed the medical examination required when he became a volunteer Firefighter with a Montgomery County Fire Department, and had been an active volunteer Firefighter for six years without any problems.

The Board readily understood the appellants frustration with a system that allowed him to function fully as a volunteer Firefighter, yet rejected his application for a paid position because of being medically, "not acceptable". Nonetheless, the Fire and Rescue Commission has the responsibility and authority to establish and enforce uniform requirements for paid firefighters in Montgomery County, and the adoption of the modified N.F.P.A. 1001 Medical Standards was accomplished in the proper manner and it had been applied to all applicants equally. Therefore, finding that the appellant did not meet the approved medical standards, the Board had no alternative, but to deny the appeal.

An applicant appealed from the decision of the Fire and Rescue Commission to remove his name from the eligible list for the position of Firefighter for failure to meet the established medical standards.

The appellant contended that he was fully capable of performing the duties of a Firefighter and that the change in the County's medical standards related to Spondylolisthesis was arbitrary and resulted in discrimination against him as an applicant. The record showed that:

1. Chapter 2 Entrance Requirements of the NFPA 1001 standards contained in the 1976 Personnel Regulations stated in part, ". . .2:2.15.1 Spine and Sacroiliac Joints (see also 2-2.6). The cause for rejection for appointment shall be: . . .
(c) Deviation or Curvature of spine from normal alignment, structure, or function (scoliosis, syphosis, or lordosis, spina bifida acculta, spondylolysis, etc.) if -
 - (1) Mobility and weight-bearing power is poor.
 - (2) More than moderate restriction of normal physical activities is required.
 - (3) Of a degree which will interfere with the wearing of fire equipment.
 - (4) Symptomatic, associated with positive physical finding(s) demonstrable by x-ray. . .
(h) Spondylolysis or spondylolisthesis that is symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations."
2. The NFPA 1001 Standards were reviewed and updated in 1981 by the National Fire Protection Association. Section 2:2.15.1 was not modified or changed in any manner.
3. On February 9, 1982, the Employee Medical Examiner recommended to the Fire and Rescue Commission that Section 2:2.15.1 of the NFPA 1001 Standard be revised to read: ". . .(h) Spondylolisthesis. (i) Spondylolysis as evidenced by x-ray findings would require evaluation by orthopedic surgeon to determine whether this condition is likely to interfere with performance of duty or is likely to require assignment limitations."

There was no explanation provided for the recommended change. The Fire and Rescue Commission approved the change at its meeting on February 11, 1982.

4. On April 12, 1984, the Fire and Rescue Commission amended Section 2:2.15.1(i) to read: Spondylosis as evidenced by x-ray findings." No reason or explanation was provided for this change.
5. The appellant was examined by a specialist for the County, who reported his findings as: ". . . This patient has a 1st degree spondylolisthesis, and statistically he will have back trouble in the future. It is my opinion. . . that he would not be able to perform these duties for the entire anticipated time of employment."
6. The appellant was examined by another specialist who reported: ". . .his neurological examination including strength sensation and reflexes in the lower extremities is normal. . .there was a unilateral defect in the Pars interarticularis on one side. . .I think there is nothing in this man's physical examination or history to suggest that he is any worse a risk for injuring his back than were this defect not present."
7. The appellant had been employed in heavy labor and truck driving positions and had been a volunteer Firefighter in Montgomery County for approximately 6 1/2 of the last 10 years.
8. In response to questions concerning Section 2:2.15.1 of NFPA 1001, Dr. Carl W. Irwin, Chairman of the Firefighter Professional Qualifications Committee of the National Fire Protection Association, stated: ". . .Essentially, the Committee felt the limitation as described is appropriate, and that further limitation would be discriminatory. This went through all of the review channels described and demanded for a consensus standard, with full approval. This review occurred for the original edition, and was repeated for the 1981 Edition. . .After reviewing the available medical reports, I do not believe that [redacted] is at any increased risk of disability related to his lower back. It is now fairly - generally accepted that simple x-ray findings, as in this case, have little value in pre-employment evaluation. This is supported strongly by the American Occupational Medical Association, and is noted in the recent Medical Standards Project of the County of San Bernadino . . . It is my opinion that such isolated x-ray evidence constitutes only a perceived rather than a real disability under the Rehabilitation Act of 1973 definitions. . . "

CASE NO 84-51 Cont.

9. The Court of Special Appeals of Maryland, in a Ruling in the case of Baltimore and Ohio Railroad Company v. Bowen, stated that the mere showing by an employer, that a possibility of future hazard exists, does not suffice to rebut a prima facie case that the individual is physically able to perform the duties required by the position denied to that person.

The evidence of record showed that the appellant was capable of performing all duties of a Firefighter, and his rejection was based completely on possible future risk and cost to the employer. Absent any justification for the changes to the Medical Standards, and in light of the information from the NFPA, it was the judgment of the Board that the changes to the standards were arbitrary, capricious and resulted in discriminatory treatment towards the appellant. Therefore, it was the decision of the Board that his name be reinstated to the eligible list immediately, that he be allowed to complete the pre-employment testing, and that he was to be offered the next available Firefighter vacancy if he satisfactorily passes all requirements.

It was further ordered that the Fire and Rescue Commission reimburse the appellant for reasonable legal fees incurred.

CASE NO. 84-79

An applicant appealed from the "Not Acceptable" medical rating received for the position of Bus Operator. The record showed that:

1. Section F.2.1 of the County's Medical Standards (Administrative Procedures #4-13) requires an individual to have at least 90 degrees flexion of the hip.
2. The appellant's left hip was injured and fused in 1978 and he presently had flexion of only 50-60 degrees, with a peri-articular bony ankylosis of the left hip.
3. Because of the fused hip, the doctor stated that it would place more strain to the lumbar area, which would inhibit sitting in the seat for prolonged periods or assisting passengers, if needed.
4. X-rays revealed myositis ossificans of the left hip with some narrowing of the joint space and degenerative arthritis of the entire lumbar area with disc space narrowing and spurring.

Based on the evidence of record, it was the judgment of the Merit System Protection Board that the appellant did not meet the established medical standards for a Bus Operator. Accordingly, the medical rating was sustained and the appeal was denied.

CASE NO. 84-81

An applicant appealed from the "medically not acceptable" rating received for the position of Bus Operator. The record showed that:

On October 30, 1984, the appellant was disqualified from further consideration as a Bus Operator because of the presence of spondylolisthesis, which placed him in a higher risk group for back problems. The County Medical Standards, Section 6.0, Q.1 Spine and Sacroiliac Joints states in part:

. .The causes for rejection for appointment shall be:

. . .(c) Deviation or Curvature of Spine from normal alignment, structure, or function (scoliosis, kyphosis, or lordosis, spina bifida occulta, spondylolysis, etc.) if:"

- "1. Mobility and weight-bearing power is poor.
2. Restriction of normal physical activities is required.
3. Of a degree which will interfere with the wearing of equipment.
4. Symptomatic, associated with positive physical finding(s) demonstrable by x-ray. . .

(h) Spondylolysis or spondylolisthesis that is symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations."

In response to a Board inquiry, the County Medical Examiner stated that:

- "1. Symptoms have not been reported.
2. Jarring, jolting, repeated strain, moderate heavy lifting or job accident experienced during the mechanical operation of an omnibus could aggravate the appellant's lower back and thus interfere with performance of duty and/or require assignment limitations. It is difficult to predict when this could be the case.
3. The appellant's lower back abnormality could be considered a fact, factor or circumstance which could contribute to further medical problems regarding the lumbosacral spine.

CASE NO. 84-81 continued

4. Disability might be imminent in this case because of the abnormalities of the appellant's lumbo-sacral spine and the nature of the job in question (Bus Operator)."

In a recent decision, the Court of Special Appeals of Maryland held that a mere showing that a possibility of future hazard exists does not suffice to rebut the fact that the person was physically able to perform the duties required by the position denied that person.

The County's Medical Standards provide for disqualification for spondylolysis or spondylolisthesis if, it "is symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations". There was no evidence in the record to show that any of these requirements had been met. Therefore it was the judgment of the Board that the "medically not acceptable" rating be reversed, and the County was directed to reinstate the appellant's name to the eligible list and continue processing him for employment in accordance with established procedures.

RESIGNATION/TERMINATION

CASE NO. 84-32

A Bus Operator appealed from the decision of the Chief Administrative Officer to disallow rescission of his resignation.

The appellant withdrew the appeal prior to the scheduled hearing.

CASE NO. 84-58

An Administrative Aide, still in probationary status, appealed a termination and the County took the position that a probationary employee did not have the right of appeal.

Section 18 Termination of the Personnel Regulations provides for such action and Section 18.3 Appeals limits appeals to "a merit system employee".

Section 404 Duties of the Merit System Protection Board of the Charter of Montgomery County, Maryland states: "Any employee under the merit system who is removed. . . shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board. . ."

Section 3 Definitions, Subsection 3.3 Merit System Employees of the Personnel Regulations states: "All persons who are employed by the County . . . who have satisfactorily completed the required probationary period."

Section 6.5 Merit System Status of the Personnel Regulations states: "A full-time. . . employee attains merit system status after satisfactory completion of the required probationary period, and is then entitled to certain rights and benefits as provided for in these regulations."

Section 33-12 A eals of Disciplinary Actions: Grievance Procedures of the Montgomery County Code states: " a Appeals of Certain Disciplinary Actions. Any merit system employee, excluding those in probationary status, who has been notified of impending removal. . . shall be entitled to file an appeal to the Board. . ."

Several prior Court decisions supported the County's position that there, "was a valid distinction between a probationary employee's status and that of an employee who had satisfied the probationary period."

Based on the foregoing, it was the judgment of the Merit System Protection Board that a probationary employee does not come under the merit system and is not afforded appeal rights for a termination for failure to attain a satisfactory level of work performance. Therefore, the Motion to Dismiss was granted and the appeal dismissed for lack of jurisdiction.

APPEALED TO CIRCUIT COURT BY THE APPELLANT.
THE COURT AFFIRMED THE BOARD'S DECISION

SUSPENSION

CASE NO. 84-10

A Bus Operator appealed his suspension.

The Merit System Protection Board met to conduct the hearing on the appeal, but the appellant failed to appear. The appellant was sent a letter asking him to explain why he failed to appear for the scheduled hearing, but he did not respond as requested.

Based on the foregoing, it was the decision of the Merit System Protection Board that the appeal be dismissed for failure to comply with established procedures.

CASE NO. 84-31

A Firefighter appealed a suspension without pay for two weeks for alleged theft of property belonging to the Fire Department.

On October 14, 1983, the Fire Department held an oyster and shrimp party for their members, with all expenses paid by the Department. The appellant arrived at the party late in the evening and testified that at the time of the incident in question, he may have been inebriated. The appellant stated that he asked an Officer if he could have the leftover oysters, and that the Officer said, yes. However, the appellant believed there may have been a misunderstanding, as he meant the uncooked oysters and the Officer may have meant the cooked oysters that were on the grill.

The appellant and another person took a box and a half of uncooked oysters and put them in the trunk of the appellant's car. They later left the party, drove to a church parking lot several blocks away, divided up the oysters and went home.

Based on the evidence and testimony, it was the judgment of the Board that the appellant knowingly removed the oysters without permission and was less than candid with his superiors when questioned at a later date. While this may have resulted from his intoxicated state on the date in question, it in no way excused his conduct. Because of the nature of the fire service, an employee's honesty and integrity must be above reproach, and lapses in this area must be considered serious as they could be very detrimental to the public's perception of the Department. The Board believed a suspension without pay, in lieu of a lesser penalty, is wholly justified, and in light of the misappropriation of property, the two week suspension without pay was not unreasonable. Accordingly, the action was sustained.

CASE NO. 84-28

A Bus Operator appealed a three-day suspension for alleged insubordination, failure to perform in a competent or acceptable manner and violation of an established policy or procedure.

A citizen called the Montgomery County Police to report an alleged hit and run accident with a Ride-On bus. After an investigation, the Police Officer determined the car had been hit from the rear, and obtained a description of the driver and bus number from the citizen.

A check of the records showed the bus that would have been in the area of the accident at the time reported, had been operated by the appellant. He was contacted and told to report to the supervisor's office before leaving work that afternoon. He did not report to the supervisor's office as directed, because he was tired and wanted to go home. He made no effort to see the supervisor the next day.

The Ride-On Bus Operator's Training and Operating Manual contains the requirement for drivers to report all accidents and/or incidents to the controller immediately, and to file a written report before going off-duty that same day.

Approximately two weeks later, the appellant was interviewed by the Police and was ordered to prepare and submit an accident report. Two days later, the appellant was again ordered to submit an accident report. He did not complete an accident report either time because he did not believe an accident had occurred.

A week later, the appellant met with a supervisor to discuss his failure to file the report, and it was agreed that an incident report would be acceptable. He allegedly turned the incident report in to an "unidentified" controller, but the office had no record of its receipt and nobody remembered receiving the report.

The Accident Review Committee met with the appellant and noting the absence of a written report from him, requested a copy of the one he had allegedly filed. He allegedly gave another copy to an "unidentified" controller, but again there is no record of its receipt.

The Board was satisfied that the charges against the appellant had been fully documented and sustained. However, the Board was deeply concerned with management's failure to act effectively and timely in apprising him of the situation, in completing the review and in taking disciplinary action. Therefore, by majority decision, it was the judgment of the Board that the suspension be reduced from three days to two days and the appellant was to be reimbursed all salary monies lost for the third day of the suspension.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 84-36

A Stock Clerk appealed his suspension without pay for one week for an alleged altercation that occurred in the warehouse.

The alleged altercation occurred on a Friday afternoon and no action or review was undertaken by management until the following Monday. The appellant worked all day that Monday, and late in the afternoon was given a Statement of Charges and immediately suspended for five working days. The Department officials never talked to the appellant about the incident prior to issuing the charges. The appellant's written response was reviewed along with information obtained from other witnesses and the Department Head subsequently issued a Notice of Disciplinary Action. The notice was issued approximately two weeks after the incident and one week after the appellant had been returned to duty following serving the suspension.

Upon conclusion of presentation of the County's case, the appellant moved for dismissal for failure to present sufficient evidence to sustain the charges and failure to show a health or safety risk to justify the action being taken prior to assuring due process rights of the appellant.

The Board noted that the County did not present any eye witness testimony that could be considered conclusive proof of the allegations, and the other party to the incident was not summonsed and did not appear.

The Board was not convinced that a serious safety risk existed, to justify the action taken, and further, if time was needed to investigate, Personnel Regulations allow for suspension pending investigation (Section 21.3 (e)). The suspension of the appellant without notice and without obtaining his side of the story, and then not notifying him of the final decision until eight days after the penalty had already been completed, was clearly a denial of due process. Based on the foregoing, the Motion to Dismiss was granted, and the Board directed the County to:

1. Rescind the suspension action and remove all documentation related thereto from the appellant's Personnel File.
2. Reimburse the appellant for all salary monies lost as the result of the five-day suspension.
3. Reimburse the appellant for reasonable attorney's fees incurred as the result of this action.

CASE NO. 84-68

A Bus Operator appealed a one day suspension without pay.

In a memorandum dated September 25, 1984, the Director, Department of Transportation notified him that he was being suspended for alleged tardiness on five specific dates and failure to follow established procedures for reporting absences on those same dates.

The Department of Transportation had an established policy that required employees to call their supervisor prior to report time if they were going to be late or absent. Bus Operators were usually scheduled to report for work 10-15 minutes before departure time and were allowed a two minute grace period on the report time before being considered tardy.

On June 27, 1984, and June 9, 1984, the appellant was scheduled to report for work at 3:56 p.m. and did not arrive until 3:59 p.m. He did not call his supervisor on either date.

On July 17, 1984, the appellant was scheduled to report at 6:26 a.m. and did not arrive until 6:42 a.m. He did not call in on this date, and on July 24, 1984, the appellant was scheduled to report at 3:56 p.m. and did not report.

On August 8, 1984, the appellant was scheduled to report at 6:26 a.m., and did not arrive for that shift. He testified that he overslept, as his alarm did not go off because of a power outage. He did not call his supervisor until 2 p.m. that date.

The appellant testified that he usually went to bed between 9-11 p.m., and on 8/7, the power was not off when he went to bed. PEPCO provided information showing power outage in that area from 8:09 p.m. on August 7 to 6:19 a.m. on August 8, 1984.

The record showed the appellant had been warned and disciplined previously for the same problem - tardiness. Further, the appellant did not refute the tardiness on June 27, July 9 or July 17 and, in the Board's judgment, had not provided a satisfactory explanation or justification for the absences on July 24 and August 8. In fact, his testimony that the power was on when he went to bed on August 7 conflicted with the information from PEPCO.

Based on the record and testimony, it was the decision of the Merit System Protection Board that the appellant had been tardy or absent without leave on the days in question, and, he failed to follow established procedures for reporting his absences. Therefore, a disciplinary action was fully justified, and in light of the prior action, a one day suspension was a reasonable penalty for the infractions. Accordingly, the one day suspension was affirmed.

CASE NO. 84-86

A Bus Operator appealed a five-day suspension for alleged tardiness and unauthorized absences. The appellant resigned and withdrew the appeal prior to the scheduled hearing date.

WRITTEN REPRIMAND

CASE NO. 84-06

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning a written reprimand received for violation of established procedures.

The issue in this case was a difference of opinion as to the proper action that should have been taken as there was no disagreement with the facts.

After due consideration, it was the judgment of the Merit System Protection Board that the written reprimand was a reasonable and justified personnel action. The Board specifically noted the fact that in addition to written instructions issued in January 1983, the appellant had been orally warned and instructed as to the proper procedures to follow for lay-over on the day before the incident in question.

In light of the fact that the appellant had been warned the preceding day, the Board found that the decision of the Chief Administrative Officer in sustaining the written reprimand was proper and in accordance with established procedures. The appeal was denied.

CASE NO. 84-35

A Liquor Store Assistant Manager appealed from the decision of the Chief Administrative Officer on his grievance concerning issuance of a written reprimand. The issue before the Board was the severity of the disciplinary action as there was no disagreement on the facts involved.

The appellant had been employed by the County for approximately ten years, and there was no record of prior disciplinary action. The appellant was acting in the capacity of Manager on the day in question. The appellant violated a check cashing policy and was required to refund the money lost in the transaction (the amount was in excess of the sale), and was given a written reprimand. The appellant contended that each of these actions constituted a separate disciplinary action, and he should only be subject to one of them. The County argued that the only disciplinary action was the written reprimand.

The Board agreed with the County that the only disciplinary action was the written reprimand, and, in light of the appellant's position as Assistant Manager, the action was considered reasonable and appropriate. As a part of management, the appellant had the responsibility to set an example for lower level employees by enforcing and personally adhering to established policy and procedures. Failure to do so was cause for disciplinary action. The appeal was denied.