

MERIT SYSTEM PROTECTION BOARD 1985 ANNUAL REPORT

Montgomery County Government
Merit System Protection Board
Rockville, MD

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1985
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 1985 were:

Sandra M. King-Shaw - Chairwoman (appointed 4/83)
Fernando Bren - Vice Chairman (reappointed 1/84)
Richard S. McKernon - Associate Member
(reappointed 1/85)

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."

"(d) Personnel Regulations Review. The Merit System Protection Board shall meet and confer with the CAO and employees and their organizations from time to time to review the need to amend these Regulations."

"(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 DURING 1985

Hearing and reviewing appeals continued to require a majority of the Board's time and effort in 1985, as 478 appeals were received. 370 were on the same issue and handled as a class action appeal, leaving a total of 109 cases for review and decision. The 109 appeals represented a 25% increase over 1984, when 86 appeals were received, and decisions continued to be issued timely, despite a 1/3 reduction in the Board's staff.

The Board also held its Annual Public Forum and continued its policy of meeting with all interested parties, - - such as the County Council, Personnel Director, County Attorney, et al. as a means of improving communication and enhancing administration and understanding of the Merit System.

Two Employee Attitude Surveys were developed and conducted in August 1985 and the results, along with the Board's conclusions and recommendations, will be released in early 1986.

The Board prepared and released a Request for Proposal to conduct an audit of the Classification System and expects to complete this task in mid-1986. The issues of pay equity/comparability and validity of the QES factors will be reviewed during this audit, as well as a random check of the accuracy of grade level assignments.

These activities required the Board to hold 24 hearings, conduct 36 work sessions, hold 4 telephone conferences and meet in special session on seven occasions.

CLASSIFICATION ACTIVITY

CLASSIFICATION ACTIVITY

POSITION ACTIVITY

1985 saw another large increase in the number of positions reclassified/reallocated - - almost 300% over 1984 and over 1000% higher than 1983. 65% of the up-gradings occurred in one Department - - the Department of Transportation - - while 80% of the downgrades occurred in the Department of Liquor Control.

The number of actions during the last two years appear to be unusually high and will be looked at more closely during the Board's audit of the County's Classification Plan in 1986.

CLASSIFICATION DATA

POSITION ACTIVITY	1981	1982	1983	1984	1985
Positions Up-graded	201	61	115	465	1263
Average Grade Increase	2.1	1.8	2.1	2.5	1.5
Positions Downgraded	20	15	7	34	210
Average Grade Decrease	2.1	2.5	3.7	2.4	2.0

CLASS ACTIVITY

Classes Reallocated					
Upward	23	3	13	9	40
Downward	1	1	1	1	20
New Classes Created	28	10	13	7	19
Classes Abolished	54	26	26	28	48
Total Number of Classes	655	639	626	605	576

INDIVIDUAL POSITION RECLASSIFICATIONS/REALLOCATIONS

<u>DEPARTMENT/OFFICE/AGENCY</u>	<u>NO. OF POSITIONS CHANGED</u>	
	<u>UPWARD</u>	<u>DOWNWARD</u>
Animal Control	1	0
Commission for Women	2	0
Community Use of Schools	3	0
Correction & Rehabilitation	2	0
County Attorney	2	2
County Council	26	6
County Executive/CAO	5	0
Economic Development	3	1
Environmental Protection	7	1
Facilities & Services	35	1
Family Resources	14	0
Finance	8	3
Fire/Rescue Services	5	1
Health	48	3
Housing & Community Develop.	10	1
Human Relations Commission	3	0
Libraries	238	2
Liquor Control	4	160
Management & Budget	4	0
Personnel	2	2
Police	5	0
Recreation	9	0
Sheriff	1	0
Social Services	1	0
State Affairs	1	0
Transportation	824	27
TOTALS	1263	210

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 Personnel 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. In cases involving suspension or dismissal, at least two weeks advance notice of the hearing is required, with thirty days notice required in all other cases. Upon completion of the hearing, the Board prepares and issues a written decision 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 has ten work days to respond. The Board then provides the appellant an additional five workdays to respond to or comment on the County's submission. The case is then placed on the Board's agenda. A copy of all documentation is provided to each Board member and the Board discusses the case at the next work session. 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, it either requests the information in writing or schedules a hearing for the purpose of receiving oral testimony. If the decision is issued based on the written record, it is prepared and released within three weeks of the work session. If a hearing is granted, all parties are provided at least thirty days notice, and a written decision is released within three weeks of completing the hearing.

SUMMARIES OF DECISIONS ON APPEALS

CLASSIFICATION

CASE NO. 85-17

Several employees in the Office of the County Council appealed from the decision of the Personnel Director on the classification of their positions, alleging the action violated established procedures for the classification of positions; that the appellants were entitled to a hearing because the action constituted a demotion; and that the Personnel Director lacked authority to take such action. The County argued that the Board had no jurisdiction until the classification was resolved and that the appellants had not exhausted the administrative grievance process for alleged procedural violations.

On several previous occasions, the Board ruled that appeals under Section 7.10 Appeal of Decision on Classification of the Personnel Regulations should be filed directly with the Board. The Personnel Regulations give the authority for classification decisions to the Chief Administrative Officer, who has delegated that authority to the Personnel Director. The Board had stated before that it was only reasonable that the complaint should be filed at the level above the one being complained about, as it cannot be resolved at a lower level. In cases of this nature, the decision of the Personnel Director on classification questions is a decision by the Chief Administrative Officer, and the next level of review would be the Board.

Appeals to the Board are limited to alleged violations of procedure and/or denial of due process (Section 7.10 of the Personnel Regulations). A merit system employee has the right to appeal an alleged procedural violation at any point in the process, and in fact, must do so if the timeliness requirements are to be met. In the judgment of the Board, it was far better to resolve a procedural question immediately as it may negate the need for further administrative action.

Based on the foregoing, it was the judgment of the Board that the appeal was filed properly and in accordance with established procedures and that the Board did have jurisdiction with respect to the procedural questions.

The appellants raised a question as to the authority of the Personnel Director to take such action. The Board reviewed Section 2-75(a) Career Appointments of Council Staff Director, Secretary of the Council and Employees contained in the Montgomery County Code; Section 402 Personnel Administration of the Charter of Montgomery County, Maryland; and the Merit System Law.

CASE NO. 85-17 (continued)

It was quite clear that the intent of the County Council was to establish a merit system applicable to both branches of government, and, to assure consistency of application, delegated the responsibility to act on behalf of the Council on all merit system matters to the Chief Administrative Officer. It was the judgment of the Board that the authority to act on classification matters had been properly delegated to the Chief Administrative Officer, who subsequently delegated it to the Personnel Director.

The appellants had requested a hearing because of the demotion action. In this case, the appellants were notified that the grade level assignment of their present occupational classes would be changed, but they had not been moved to another position or occupational class. Therefore, it was the judgment of the Board that the action, while called a demotion, was not a demotion under the law and the appellants did not have a right to a hearing before the Board.

After review of the record, and the requirements of Section 7 of the Personnel Regulations, it was the judgment of the Board that the County had provided the appellants proper and adequate due process and had followed and met the requirements of the Personnel Regulations in conducting the study. The area of disagreement appeared to be with the interpretation of the data obtained and evaluation of the various factors, which resulted in the reallocation. This disagreement clearly is covered by the separate classification appeal process, and comes under the review and jurisdiction of the Classification Review Committee. Based on the foregoing, it was the decision of the Board that the appeal be denied.

CASE NO. 85-18

An Administrative Aide filed an appeal, alleging the County failed to follow established procedures in Sections 7.1, 7.5 and 7.6 of the Personnel Regulations when reviewing the classification of her position.

The County raised a question of the Board's jurisdiction and contended the appeal should have been filed as a grievance under Section 22 of the Personnel Regulations. In filing grievances, it is proper to file with the level above the one being complained about. In this instance, the Personnel Office, acting on a delegation of authority from the Chief Administrative Officer, took an action. Therefore, the complaint was actually against the highest level administrative authority and the next level of review would be the Merit System Protection Board. It was the judgment of the Board that the appeal had been filed properly and that the Board had jurisdiction.

CASE NO. 85-18 (continued)

With respect to whether the proper procedure was followed, the Board found that:

1. The position in question, was reviewed in late 1984-early 1985.
2. On February 25, 1985, when the appellant requested a copy of the QES evaluation, she was informed by the Personnel Office that QES was not applied to clerical positions and that none had been done on her position
3. The County had not submitted any documentation or evidence to show the study was conducted properly.

Section 7.1 sets forth the County's compensation philosophy to be adhered to, but does not delineate specific procedures to be followed. Therefore, the Board did not find any violation of procedure related to this section.

The Chief Administrative Officer had issued the Administrative Procedure required by Section 7.6, but had failed to establish a quantitative job evaluation system for use in classifying and/or reallocating all classes and/or positions in the County's merit system, which had been required since March 1980. In the absence of such a plan, the Board found that the County had violated Sections 7.5 and 7.6 of the Personnel Regulations. The County was directed to:

1. Rescind the classification action taken and return the appellant to the prior grade and class held, and remove all documentation from her personnel file related to the downgrading.
2. Conduct a new classification study in accordance with established procedures, with an effective date of implementation consistent with what it would have been had the study been conducted properly.
3. Complete the new study within sixty days of the date of the decision.

CASE NO. 85-389

A group of Police Officers appealed to the Board alleging denial of due process and violation of established procedures in the conduct of a Classification Study. Pursuant to Section 33-12 Appeals of Disciplinary Actions: Grievance Procedures of the Montgomery County Code and Section 23.3 Hearing Officer of the Personnel Regulations, the Merit System Protection Board directed that this case be referred to the Office of the Hearing Examiner for further investigation/hearing to determine the facts and for recommended action thereon.

CASE NO. 85-389 (continued)

The issues to be resolved by the Hearing Examiner were whether the appellants were denied due process and if the established procedures of Section 7 Classification of the Personnel Regulations had been followed.

APPEALED TO COURT BY THE COUNTY - This case was subsequently settled out of Court and the appeal was dismissed.

CASE NO. 85-446

The Community Health Nurses appealed from the decision of the Personnel Office on their grievance concerning classification of the Community Health Nurse Series. The issues involved the grade level assignment and the effective date of reallocations of their positions.

The determination of the proper level of the Quantitative Evaluation System factors, in the judgment of the Board, was a classification issue rather than one of procedure. Therefore, the Board found no basis for jurisdiction on an appeal of this issue and it was dismissed.

The effective date of an action was related to established procedures and fell within the purview of the Board under Section 7.10 Appeal of Decision on Classification.

The record showed that the Community Health Nurse Classes were created in 1975 and there was no indication of a review or change until 1985.

The Personnel Director approved the final classification action on the Nurse series on June 28, 1985, with an implementation date of December 30, 1984 - six-months after alleged start of the study (June 1984).

The Personnel Office officially requested information needed to study the Nurse series on August 3, 1979, and the necessary position descriptions were submitted in mid 1980. Despite receipt of this data, and a commitment to conduct a study, the Personnel Office did not take any action until hiring a consultant in mid 1982. Once this study was completed, it was not acted on for over 18 months, and then rejected and the task was given to a Joint Committee.

CASE NO. 85-446 (continued)

The general guideline of six-months, established in Section 7.6 of the Personnel Regulations, in the Board's judgment, was a reasonable period of time to complete a classification study. If longer periods are taken to complete a study, the data collected at the outset would have to be updated as continued validity would be subject to question, particularly in the area of position duties and responsibilities and salary comparisons. Management has a duty and responsibility to provide prompt response and action on studies of this nature, especially since the Personnel Regulations require all classes be reviewed once every five years.

The Board did not believe County employees should be penalized or have to suffer because of the inability of the Personnel Office to act in a fair and timely fashion. Therefore, retroactivity beyond December 30, 1984, was required.

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 Health 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 judgment of the Board that the law and the doctrine of fairness required use of the 1980 policy to determine the effective date for implementation of the Nurse Series 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 mid 1980, and the six-month period would have elapsed on or about January 1, 1981. Therefore, it was the decision of the Board that the effective date for implementation of the Nurse series study should be the beginning of the first full pay period in January 1981. All records were to be changed and all employees reimbursed accordingly.

CASE NO. 85-450

A Community Health Nurse appealed from the decision of the Personnel Director on the classification of her position. The County raised the question of the Board's jurisdiction in this case.

CASE NO. 85-450 (continued)

On the issue of jurisdiction, the Board had pointed out in several prior cases that appeals under Section 7.10 of the Personnel Regulations come directly to the Board, and are not subject to the County's grievance procedure. Based on this, the Board found it did have jurisdiction.

The appellant alleged her position was improperly classified and argument was set forth to justify a higher classification assignment. Section 7.10 of the Personnel Regulations allows appeal to the Board in two instances; i.e., alleged denial of due process and/or violation of established procedures. A review of the record did not reveal evidence of either. Therefore, finding no basis for the appeal, it was dismissed.

CASE NO. 85-456

A manager appealed the decision of the Personnel Office that a grievance concerning the effective date of a classification action was not filed in a timely manner.

The record clearly supported the ruling of the Personnel Office that the grievance was not filed within the time period for such action. Therefore, it was the judgment of the Board that the appeal be denied. However, pursuant to the Board's responsibility, and authority to assure the fair and proper administration of the merit system, under Section 1.2 Audits Investigations and Inquiries of the Personnel Regulations, the Board found that an error had occurred in the classification action taken. The appellant's position was changed from an Associate Director to a Division Chief, with a different class title and grade level assignment. In the Board's judgment, the action constituted creation of a new class at a higher grade level, and not a reallocation of the Associate Director class, as alleged by the Personnel Office. Therefore, the appellant should have received the same retroactivity as granted to the other employees similarly affected. Accordingly, the board recommended that the County take appropriate action necessary to give the appellant retroactivity consistent with the treatment afforded other employees.

CASE NO. 85-469

A Department of Transportation employee appealed from the decision of the Personnel Director that his request for an Open Door Review would not be accepted for processing, as it involved an issue covered under another appeal procedure.

CASE NO. 85-469 (continued)

The complaint concerned the classification of his position, and the County has a separate appeal process (Administrative Procedure 4-2) for review of such matters. Further, Section 7.10 of the Personnel Regulations limits appeals to the Merit System Protection Board "only if there is a violation of established procedure or due process. . ." The disagreement was with the grade level assignment and the Board found no evidence of a violation of procedure or denial of due process.

Therefore, it was the judgment of the Board that the decision of the Personnel Director was correct and the appeal was denied.

CASE NO. 85-470

A Community Health Nurse appealed alleging violation of the classification process. The County subsequently challenged the timeliness of the appeal.

The County had conducted a periodic study of the Nurse classes, which included a random sampling of desk audits, and the appellant's position was not one of those selected for an audit. The Personnel Office is not required to review every position when conducting a periodic study of an occupational class. Further, the appellant did not submit any specific evidence of a violation of procedure. Based on this, and the fact that she did not file the appeal until over three months after being notified of the action, it was the judgment of the Board that the appeal lacked merit and was not filed timely. Accordingly, it was denied.

CASE NO. 85-473

A Health Department supervisor filed an appeal alleging the County had violated established procedures in reviewing the classification assignment of her position by using the wrong Administrative Procedure.

A review of the documentation showed that the appellant's appeal of the classification assignment to the Classification Review Committee was processed under Administrative Procedure 4-2, that was effective July 22, 1980, and not under the interim AP 4-2, dated July 1, 1985. The appellant's position was reviewed in 1984-85 and the decision had been implemented prior to July 1, 1985. The interim AP had not been issued at the time of the decision, and could not be applicable in this case. Therefore, finding no violation of procedure, it was the judgment of the Board that the appeal be denied.

CASE NO. 85-479

The Recreation Outreach Workers filed an appeal alleging that the classification procedures had been violated, in that they had been denied due process.

The record showed that:

1. Department of Recreation officials submitted a request for a classification study on December 13, 1984.
2. The Personnel Office study was completed and approved on May 29, 1985, and sent to the Department of Recreation on June 10, 1985.
3. The Department notified the affected employees of the recommendation on June 13, 1985, and provided them with detailed information.
4. On September 5, 1985, the employees submitted their response to the recommendation.
5. On November 14, 1985, the Personnel Office informed the employees that, after consideration of the record, the original recommendation had been approved and would be implemented.

The appellants reviewed the relevant data during the process and were given an opportunity for input, as required. Therefore, it was the judgment of the Board that there had been no violation of due process, and the appeal was denied.

SPECIAL NOTE: Case Numbers 85-445 and 85-449 were still pending, as they related to another case presently on appeal in Circuit Court and could be resolved by the Court's decision.

COMPENSATION

CASE NO. 85-9

A Mechanic's Helper appealed from the decision on his grievance concerning additional compensation for working outside of his assigned classification.

Prior to Board action, the back pay in question had been awarded and the appellant withdrew the appeal.

CASE NO. 85-25

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on a grievance concerning payment for the December 25, 1984 holiday.

The appellant had requested and received advance approval to be on annual leave on December 25, 1984, and did not work that day, which was a normally scheduled workday for him. The appellant normally worked a 24 hour shift, which, under Fire Service Regulations was compensated on the basis of 16 hours pay or 16 hours of leave used. For December 25, 1984, the appellant was given 8 hours of holiday pay and was charged 8 hours of annual leave.

The compensation paid for December 25, 1984 was in accordance with the Personnel Regulations and the December 18, 1984 interpretation of those regulations. Therefore, the decision of the Personnel Director was sustained.

CASE NO. 85-29

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on a grievance concerning an increase in his Educational Salary Differential (ESD) from 5% to 10%. The record showed that:

1. The Fire and Rescue Services had an approved ESD plan from 1972 until September 1977.
2. In 1977, the ESD plan was discontinued and all employees then receiving an ESD payment were allowed to retain the percentage being paid at that time, for the remainder of their careers.

CASE NO. 85-29 (continued)

3. The appellant had been promoted to Captain in 1972 and received a 5% ESD in 1973, in accordance with the policy then in effect.

4. Nine other individuals are presently receiving 10% ESD. These nine individuals all earned the 10% ESD while employed in lower ranks, and the awards were all in accordance with the policy in effect at time earned. Those persons were allowed to retain the 10% ESD, pursuant to the "grandfathering" clause.

It was the finding of the Board that the ESD's presently included in the Fire and Rescue Service pay plan are the result of the agreement to "grandfather" such benefit in 1977, and not from misapplication of the plan prior to that date. Therefore, it was the judgment of the Merit System Protection Board that the appellant was receiving the proper ESD benefit to which entitled. Accordingly, the appeal was denied.

CASE NOS. 85-30-137, 85-139-292, 85-294-315, 85-317-387,
85-391-397, 85-400, 85-402, 85-404, 85-407, 85-408,
85-414, 85-415, and 85-416

368 paid employees of the Independent Fire and Rescue Corporations of Montgomery County, Maryland and 2 employees of the Department of Fire and Rescue Services of Montgomery County, Maryland appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) that their grievances were not filed in a timely manner and would not be accepted for processing.

In late 1982, a group of paid firefighters filed grievances requesting additional compensation for all overtime worked, retroactive to date of hire or date permitted by statutes of limitation. The grievances were denied at each level of the administrative process, but on September 25, 1984, the Court of Special Appeals overturned that decision.

The 370 appellants filed grievances in October 1984, stating they had become aware of the Court of Special Appeals oral decision on September 25, 1984.

CASE NOS. 85-30-137, 85-139-292, 85-294-315, 85-317-387,
85-391-397, 85-400, 85-402, 85-404, 85-407, 85-408,
85-414, 85-415, and 85-416 (continued)

It was the judgment of the Board that the issue of timeliness in filing grievances was moot. The appeal to Circuit Court in January 1983 was clearly a class action appeal, covering all paid firefighters of the Independent Fire and Rescue Corporations of Montgomery County, Maryland during the period of time in question. However, during the lengthy and complicated appeal process, this point was "lost" or not directly addressed at various levels. It was clear to the Board that the intent of the appeal and the decision of the Court of Special Appeals was to apply relief to all incumbents of the affected class. Therefore, it was the judgment of the Merit System Protection Board that the appellants, and all other covered paid firefighters, were entitled to retroactive pay for overtime worked consistent with the Court decision, without necessity of filing additional grievances.

In consideration of Section 29 Limitations on Actions and Relief of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County and Section 5-101 Courts and Judicial Proceedings Article of the Annotated Code of Maryland, the appellants were awarded additional overtime pay, consistent with the Court of Special Appeals decision, for the period of February 1, 1980 to November 8, 1982. This period was based on three years retroactive from the January 31, 1983 date of the class action appeal to Circuit Court.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 85-411

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning eligibility for additional Educational Salary Differential (ESD) compensation.

The appellant began taking fire science classes in 1976 to qualify for ESD. At that time, ESD up to 10% of base earnings was permitted. In 1976, the ESD policy was changed to permit a maximum of 5% additional salary for all degree levels reached after Mid-1977. Upon receipt of an A.A. Degree in 1979, the appellant received a 5% ESD, but believes it should have been 10%.

CASE NO. 85-411 (continued)

The Personnel Director's disposition was consistent with the established procedures. Therefore, it was the judgment of the Board that the decision be sustained.

APPEALED TO COURT BY THE APPELLANT

CASE NO. 85-429

A Firefighter appealed from the decision of the Personnel Director on his grievance concerning additional compensation for eight holidays in 1984-85, when he was off-duty. The appellant had been reimbursed eight hours (one shift) for the holidays in question, and was seeking an additional eight hours to compensate him for the entire twenty-four hour day (two shifts) he was normally scheduled to work.

Many Fire Departments adopted the twenty-four hours on forty-eight hours off work schedule, which necessitated modification of personnel practices to assure fairness and consistency. This change had resulted in a two or three day work week of twenty-four hour shifts each (considered as two shifts), instead of the prior 4 or 5 day work week of 8-14 hour shifts each. Holiday pay had always been paid for one shift, or eight hours of compensation for all employees to assure equity of benefits, and the appellant had been reimbursed in accordance with established procedures. Even though the appellant normally worked a "double shift" (twenty-four hours), it was the Board's judgment that he was only entitled to one shift or day (eight hours) of holiday pay, as provided for in the Personnel Regulations. Accordingly, the appeal was denied.

CASE NO. 85-474

A Fire Department employee appealed from the decision of the Personnel Director that his grievance was not filed in a timely manner. The appellant filed a grievance in mid-1985 concerning two promotions that had been made in 1984.

After due consideration, and in light of the dates of the promotions involved, it was the judgment of the Board that the decision of the Personnel Director was reasonable and appropriate. Accordingly, the decision was sustained and the appeal was denied.

CASE NO. 85-475

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning charging of annual leave for July 4, 1985.

The record showed that:

1. The appellant normally worked a 24 hour shift and was scheduled to work on July 4, 1985.
2. Prior to July 4, 1985, he requested, and received permission, to be on annual leave that day.
3. The appellant received eight hours holiday pay and was charged eight hours of annual leave for the July 4 holiday.
4. Section A22(a) (9) Basis for Computing Holiday Pay or Holiday Leave Credits of the Appendix to the Personnel Regulations for the Fire Services, states:
"Holiday pay or leave credits shall be based upon an eight hour work day for each full day holiday. . ."
5. On December 18, 1984, the Board issued an interpretation of the Fire Services Personnel Regulations, which stated that "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(a)(3) and (4)".
6. Section 27 Computation of Leave Usage of the Appendix to the Fire Services Personnel Regulations states that "an employee working a 24 hour shift shall be charged a maximum of 16 hours of leave.
7. The Personnel Director ruled that the appellant had been charged with the proper amount of leave (8 hours) and had denied the grievance.

It was the judgment of the Board that the payment of eight hours holiday pay and the charge of eight hours of annual leave for voluntary absence from work on July 4, 1985, was proper and in accordance with established procedures. Accordingly, the appeal was denied.

DEMOTION

CASE NO. 85-138

An Office Assistant appealed a demotion that resulted from a classification action. The County challenged her right of appeal and the Board's jurisdiction in this case.

Section 7.10 Appeal of Decision on Classification of the Personnel Regulations allows an employee to appeal to the Board if it is believed there has been a violation of established procedure or due process, while Section 404 of the Charter provides for a hearing before the Board if an employee is demoted.

The appellant alleged that she had been arbitrarily denied the opportunity to perform the duties of her position, was assigned lesser responsibilities and duties and then downgraded because she wasn't performing at the higher level. It was the judgment of the Board that this was a valid procedural question and that it was appealable under Section 7.10. Further, since the resulting action was a demotion, the Board found the appellant was entitled to a hearing.

The record showed that the appellant had experienced personal difficulties, underwent treatment and was getting progressively better and able to perform more complex tasks. There was no question as to her knowledge and skill and her supervisors were satisfied with her work performance.

The evidence showed that there was little change in the job, and that management did not assign or allow her to perform the prior supervisory duties. Instead, the supervisory duties were assigned to other employees and used to justify upgrading those positions. The record showed the classification action was based on the appellant's medical condition and continued inability to work full-time, rather than on an actual change in level or complexity of duties, as required by the Personnel Regulations.

There was no evidence to show that the County made any effort to make reasonable accommodations to assure the appellant's continued employment. There was no effort made by the County, to pursue a job sharing offer it made in June 1983. Further, the stated position that supervision could not be done on a part-time or job share basis was not based on, or supported by, any factual data or reasonable conclusion.

CASE NO. 138 (continued)

The Department's position that the classification action occurred as the result of a reorganization was refuted by the evidence. The appellant was informed in September 1984 that her position was being downgraded, two months before the reorganization request was officially submitted to the Personnel Office, which indicated an arbitrary, pre-meditated act by management. The classification decision by the Personnel Office was made in November 1984, one month prior to any action concerning reorganization was submitted for consideration, and approval of the Office Assistant III level was not received until after the appellant had been downgraded. Based on this, there was no doubt that the two actions were totally independent and the reorganization could not have formed the basis for reclassification of the appellant, as alleged by the County.

It was the judgment of the Merit System Protection Board that the action taken was an improper classification action, in violation of Section 7.4(b), 7.5 and 7.6 of the Personnel Regulations, and that the County failed to meet the requirements of Section 5.12 by failing to take steps to determine if reasonable accommodation was possible and/or feasible. Accordingly, the County was directed to:

1. Rescind the classification action and reinstate the appellant to her prior position, retroactive to March 10, 1985.
2. Remove all documentation related to the downgrading from the appellant's personnel records.
3. Correct the appellant's personnel records to reflect any changes required based on eligibility for cost-of-living adjustments or service increments since March 10, 1985.
4. Reimburse the appellant for additional salary monies due, if any, as the result of the changes in #3 above.
5. Reimburse the appellant for reasonable attorney's fees incurred in pursuing the appeal.

SPECIAL NOTE: Case No. 85-419 required extensive hearings and was still on-going at year-end.

DISMISSAL

CASE NO. 85-07

An Equipment Operator II appealed his dismissal for alleged violation of established procedures and reckless driving.

The appellant failed to follow Board procedures on two occasions, failed to appear for a scheduled hearing and failed to respond to a Board inquiry.

It was the decision of the Merit System Protection Board that the appeal be dismissed for failure to follow proper procedures.

CASE NO. 85-16

A Bus Operator appealed his dismissal.

Prior to the hearing, the dismissal action had been rescinded and the appellant resigned from County employment. In light of this action, the appeal of dismissal was rendered moot.

CASE NO. 85-409

A Bus Operator appealed her dismissal.

In August 1984, the appellant was involved in a verbal confrontation with a passenger and was counseled on how to handle future situations of this nature. In September 1984, the appellant was involved in another confrontation with a passenger and was counseled as to proper procedures. In November 1984, the appellant was involved in an argument, while on duty, and chased the other party with a knife. In December 1984, the appellant was again involved in an argument, which she allegedly incited, requiring intervention of a supervisor.

In March 1985, the appellant picked-up two passengers, who immediately began to harass her. The appellant "had words" with the passengers, which aggravated the situation, and the two passengers threatened her. The appellant did not seek help, or call the dispatcher, as counseled and instructed to do, but continued on her run. When the appellant reached the two passengers' bus stop, one of them hit her and a fight ensued.

CASE NO. 85-409 (continued)

Subsequent to the incident, the appellant took the bus off route, with at least one passenger on board, to follow the persons who attacked her, which could have jeopardized the passenger's safety and well-being.

A professional bus operator must know how to deal with problems and must exhibit patience and be courteous at all times. The appellant was given adequate guidance and counseling, but continued to react inappropriately in situations, resulting in confrontations. The final violent confrontation in March 1985, in the Board's judgment was clear evidence that the only alternative for the County was separation. Accordingly, the appeal was denied and the dismissal was sustained.

CASE NO. 85-424

A Bus Operator appealed his dismissal for alleged violation of an established policy or procedure and failure to perform duties in a competent or acceptable manner.

On June 1, 1977, the Department of Transportation issued and posted a Departmental Policy for Bus Operators. On September 30, 1983, a revised policy was issued and posted, and required Bus Operators to "report, in writing, any citations or points they receive on their driving record and the reason for same. They must also report any suspension. . .of their. . . driver's license." The policy also stated that failure to comply could result in dismissal.

On November 15, 1983, the appellant received a traffic ticket while off duty, and failed to report it to his supervisors. He testified that he did not know he had to report it and that he sent a check to pay for the ticket before the Court date, but the check "bounced". The appellant stated he did not know the check bounced or that his license had been suspended. Because of his failure to pay the fine, and/or appear in Court, his license had been suspended from April 9, 1984 to September 4, 1984. The appellant drove a County bus on a regular basis during the period of April 9, 1984 to September 4, 1984.

On September 1, 1984, while off-duty, the appellant was stopped by the Police, charged with driving under the influence (DUI) and was informed his license had been suspended for some time. He subsequently pleaded guilty to the charges, but failed to notify his supervisors of the events. On October 9, 1984, November 9, 1984, January 14, 1985 and February 27, 1985, the appellant was involved in minor incidents that constituted violation of established procedures.

CASE NO. 85-424 (continued)

In February 1985, when doing an annual review of work performance, the appellant's supervisor discovered the period of suspension in Mid-1984, and an indication there may be other problems. When confronted, the appellant denied any knowledge of the policy requiring reporting of traffic violations/suspensions. Even after being made aware of the policy, he failed to tell his supervisor about the DUI incident, which was revealed after subsequent investigation.

The appellant had been a professional driver for the County for almost eight years and, as such, had the responsibility for knowing applicable policies and maintaining a valid operator's license at all times. The record showed that he failed to do either, and that such failure resulted in very serious violations of both County procedures and Maryland Motor Vehicle Laws.

It was the Board's judgment that the County had met its burden of proof on these serious charges and had shown a series of progressive disciplinary actions. Accordingly, the dismissal was sustained.

CASE NO. 85-432

A Ride-On employee appealed his dismissal for alleged theft of County property/funds.

The appeal was withdrawn by the appellant prior to the scheduled hearing date.

CASE NO. 85-434

A Code Enforcement Inspector appealed his dismissal.

The appellant was dismissed for four specific reasons:

I. Unauthorized Absence or Chronic Tardiness

This charge involved two dates of alleged AWOL in February 1985; unauthorized absence from duty on four dates in March 1985; and AWOL on four dates in May 1985.

The record showed that management approved use of annual leave for both dates in February and that there was no formal leave policy until February 13, 1985. Based on the fact that the leave was approved by management, it was the Board's judgment that the AWOL charge and subsequent Written Reprimands for the February dates, were unwarranted and improper actions by management.

CASE NO. 85-434 (continued)

The charge of unauthorized absence on four dates in March, was unsupported by the evidence.

The absences in May occurred when management ordered the appellant to leave the premises and not return until he complied with an oral request for a doctor's certificate for leave used. The appellant had requested, and received approval, to use four hours of annual leave to keep a scheduled doctor's appointment. Based on the fact that management approved use of annual leave, it was the Board's judgment that the period of AWOL in May occurred as the result of management's failure to properly understand the type of leave used. Therefore, the appellant should not have been charged AWOL for this period.

As none of the individual charges had been sustained, the charge of Unauthorized Absence or Chronic Tardiness was dismissed.

II. Failure to Perform Duties in a Competent or Acceptable Manner

This charge included alleged failure to properly investigate and close cases; failure to show improvement in filing written reports timely, and visiting an off-duty Inspector and discussing a case with him in violation of established procedures.

There was insufficient evidence to show that he failed to properly investigate cases or that he failed to close cases, as charged. The statistical data submitted was inaccurate and there was no standard or comparable performance data available on other employees, which would sustain this conclusion.

Several factors concerned the Board. First, there were no guidelines as to what constituted "timely" filing of reports. Second, there was an indication that this was a general problem with all but one Inspector. Third, management failed to provide the appellant with assistance and a detailed plan of action to improve this situation, after telling him it would do so in a prior work performance evaluation. Finally, while saying his report writing was unsatisfactory, management continually gave him "met requirements" ratings, in this area, on his annual performance ratings.

CASE NO. 85-434 (continued)

There were no established procedures concerning discussing cases with other Inspectors, whether on or off duty, and the County failed to prove that any information provided by the appellant was "confidential". The information allegedly released was, in the Board's judgment, public information available to any citizen who inquired.

III. Insubordinate Behavior by Failure to Obey Lawful Directions Given by a Supervisor

This charge involved alleged failure to provide a written account of his whereabouts on four days in March; failure to provide reports on three cases; failure to respond to a supervisor's request for doctor's certificate; and failure to respond to Director's request for the same doctor's certificate.

As stated in the first section of this decision, the alleged unauthorized absences in March were totally unsupported and based on assumption. Therefore, an order to document unfounded charges, in the judgment of the Board, was improper and inappropriate.

The failure to provide written reports, as requested upon return to duty, was complicated by several factors, and the Board was satisfied that the appellant made a good faith effort to comply with the requests. Due to circumstances beyond his control, he was unable to provide the completed material. Therefore, the charge that he was insubordinate in this situation was without merit.

The charges of insubordination were all found to be without merit, and, therefore, it was the judgment of the Board that the charge be dismissed.

IV. Negligence or Carelessness in the Performance of Duties

There were serious conflicts and gaps in the evidence concerning one event. The Department failed to investigate the situation properly to ascertain when the incident occurred and who was responsible, and there was insufficient evidence to prove the appellant's responsibility or involvement.

The lateness in filing a loss claim could have been averted, had management reviewed the appellant's caseload during his extended absence, and reassigned priority cases to other Inspectors. The County failed to submit any documentation or testimony to show that this was a negligent act or that it had a detrimental impact on the Department.

CASE NO. 85-434 (continued)

There was no evidence that the appellant was negligent or careless in either of these cases. Therefore, it was the judgment of the Board that the charge be dismissed.

DECISION

It was the judgment of the Board that the dismissal action was unjustified and resulted from management's overreaction to, and misunderstanding of several of the incidents, as well as inappropriate action after approving leave requests.

Based on the foregoing, it was ordered that the County:

1. Rescind the dismissal action.
2. Suspend the appellant for three days - June 11, 12, and 13, 1985 - without pay, for continued failure to submit written reports on all closed cases.
3. Rescind the two Written Reprimands for AWOL.
4. Refrain from implementing the 5% Within-Grade Reduction for Six Months for alleged failure to account for his whereabouts in March 1985.
5. Reimburse the appellant for the 35 1/2 hours of AWOL charged on May 9, 12, 13, 14, and 15, 1985.
6. Recredit the appellant for all sick leave used for the period of April 22 to May 8, 1985, and place him on Administrative Leave for that period, pursuant to Section 13.2(b) of the Personnel Regulations.
7. Reimburse the appellant for full normal salary due for the period of June 14, 1985 to date of reinstatement, less any money earned in other employment during that time.
8. Adjust the appellant's leave account consistent with the foregoing actions.
9. Reimburse the appellant for 75% of reasonable attorney's fees incurred, based on only one of four charges being sustained.
10. Reinstatement the appellant to his prior position or a position of comparable grade and status.

CASE NO. 85-454

A Bus Operator appealed from his dismissal.

The appellant was charged with three violations:

1. Failure to perform duties in a competent or acceptable manner.
2. Failure to report an incident immediately and preventing others from doing so.
3. Sexual harassment of a female employee.

This situation involved a personal problem between two employees, which both allowed to escalate while on the job. The appellant failed to discontinue the conversation when asked to do so by the female employee, and in the Board's judgment, she had a responsibility to try to avoid further confrontation and could have done so by simply walking off the bus. Instead, she inflamed the situation by shaking water on him, causing further physical contact. Based on the testimony, the Board believed the striking of the female employee by the appellant was, while very unfortunate, accidental, and not a willful or malicious act. The behavior of both employees was inappropriate, improper and unacceptable and, in the Board's judgment should have resulted in severe disciplinary action against both.

The appellant returned to the depot immediately following the incident and reported it to his supervisors. There was no question that the appellant interfered with the attempts of others to call on the radio while at the station. The charge that he jammed transmissions was totally unsupported by the evidence, and the County failed to use data readily available to prove which bus interfered with radio transmissions.

The charge of sexual harassment, in the Board's judgment, was totally without basis or foundation. While the appellant may have bothered the female employee when she didn't want to be bothered, there was absolutely no evidence of sexual advancement, intimidation or harassment. It was simply a personal disagreement between two persons that resulted in a physical confrontation of a violent nature without any sexual overtones or connotations.

CASE NO. 85-454 (continued)

The Board recognized and understood the seriousness of the appellant's actions in this incident; particularly, the fact that it occurred on the job and in public surroundings. In light of this, and despite the fact that the other participant was not disciplined, the appellant's behavior was inappropriate and unacceptable and cannot be ignored or condoned. Therefore, it was the judgment of the majority of the Board that the appellant's behavior constituted a serious violation of policy and showed a total lack of responsibility and reliability, which required termination of employment. Accordingly, the dismissal was sustained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY APPELLANT

CASE NO. 85-466

A Bus Operator appealed his dismissal.

The appeal was subsequently withdrawn prior to the scheduled hearing date.

GRIEVABILITY/TIMELINESS

CASE NO. 85-1

A Bus Operator appealed from the decision of the Personnel Office that his grievance had not been filed in a timely manner.

The record showed that the appellant had been injured on the job, and had been retained in pay status on disability leave pending possible alternative placement or clearance for return to duty.

The appellant was notified orally, in either August or September 1984 that disability leave was going to be discontinued, but also received a copy of a September 26, 1984 memorandum of his supervisor requesting he be retained on disability leave pending resolution of the disability retirement issue. This request was never acted on or responded to by Department of Transportation officials.

The appellant's supervisors were unsuccessful in correcting the situation, which they had been telling him not to worry about, so, he filed a grievance on December 13, 1984. It was received by both the Department of Transportation and the Personnel Office on December 14, 1984.

The Board recognized that the County encouraged employees to resolve problems informally with immediate supervisors (see Section 2.0 of Administrative Procedure 4-4), and the appellant attempted to do so in this situation, in good faith. The action of the supervisor on September 26, 1984, must be construed as informal resolution of the problem at that time, as it had not been formally rejected by management. The time period for appeal would not begin until management formally responded to that request. Therefore, the Board found the issue of timeliness to be moot, as management still had not taken proper action required to resolve the issue. Based on this oversight, the appeal was dismissed and the Department of Transportation was directed to formally respond to the September 26, 1984 request, with proper notification to the appellant.

CASE NO. 85-13

A Health Technician appealed from the decision of the Personnel Director that her grievance concerning annual leave accrual, had not been filed timely and would not be accepted for processing.

The record showed that the appellant had received written notification of the error in computation of annual leave earned on September 27, 1984, and discussed the problem with the Personnel and Payroll Offices in October and November 1984. The appellant filed the grievance on January 31, 1985. The County's grievance procedure requires an individual file a written complaint within ten calendar days from the date of the occurrence or knowledge of the problem.

Based on the fact that the appellant was aware of the problem in September 1984, and did not file the grievance until approximately four months later, it was the judgment of the Board that the grievance was not filed timely. Accordingly, the decision of the Personnel Director was sustained.

CASE NO. 85-15

A Bus Operator appealed from the decision of the Personnel Director that two grievances, on the same issue, would be handled as a Request for Open Door Review, rather than as a grievance.

The grievances questioned the implementation and application of a new leave policy for the Department of Transportation, which the appellant believed was inequitable and unfair. Section 22 Grievances Subsection 22.2 Definition of the Personnel Regulations states in part: "A grievance is a formal written complaint by an employee arising out of a misunderstanding or disagreement between a merit system employee and supervisor, which expresses the employee's dissatisfaction concerning a term or condition of employment or treatment by management, supervisors, or other employees. A grievance may be filed if an employee believes he/she has been adversely affected by an alleged:

"(a) . . .improper application of . . .procedures or policies. . .

CASE NO. 85-15 (continued)

(d) Improper, inequitable or unfair application of the compensation policy and employee benefits, which may include. . . leave. . ."

Based on the foregoing, it was the judgment of the Board that the issues raised in the complaints were grievable under the County's Grievance Procedure. The Personnel Office was directed to accept the grievances and to process them in accordance with established procedures.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 85-388

A Police Officer appealed from the decision of the Personnel Director that his grievance was not filed in a timely manner.

The record showed that the appellant was a probationary employee and was involved in an incident on January 25 that became the subject of an Internal Affairs investigation on the date his probationary period was scheduled to end - January 29. As a result of the pending investigation, the Department of Police decided to extend the probationary period for six months. The appellant filed his grievance on March 7, 1985.

Under the County's grievance procedure - Administrative Procedure 4-4 - an employee is required to file a grievance within ten calendar days of the incident or knowledge of same.

The appellant clearly did not file his grievance within the time period allowed. Therefore, it was the judgment of the Board that the decision of the Personnel Director be sustained.

The Board also pointed out that, even if the grievance had been filed timely, the issue involved was not grievable or appealable, as the Personnel Regulations do not provide for appeal of such status or provide other appeal rights until merit system status has been attained. Therefore, the appellant had no right of appeal from the extension of his probationary period, rendering the grievance moot.

CASE NO. 85-398

A group of Firefighters appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) that their grievance would not be accepted for processing as the issue was not grievable.

The incident in question did not involve the appellants and occurred subsequent to the decision on a prior appeal of the appellants from a disciplinary action. Therefore, there was no relationship between the two incidents and the appellants had not been adversely affected by the incident in question.

It was the judgment of the Board that the ruling of the Personnel Director was correct and it was sustained.

CASE NO. 85-406

An employee appealed from the decision of the Personnel Director that a grievance filed concerning the purchase of retirement service credits was not submitted timely.

The appellant had been notified in 1974 of the cost and time limits for purchase of retirement service credits, but elected not to pursue the matter. In 1984, the appellant decided to purchase the retirement service credits, but found the new cost prohibitive and believed he should be allowed to pay the cost calculated in 1974. This request was denied and the appellant noted a grievance.

It was the judgment of the Board that the grievance was not filed within the established time limits for such action, and the cost was calculated in accordance with the requirements of the Retirement Law. Accordingly, the decision of the Personnel Director, was sustained.

CASE NO. 85-421 & 428

A Mechanic Helper filed two appeals from the decisions of the Personnel Director that two grievances/open door reviews were not filed timely.

In late March 1985, the appellant met with a representative of the Department of Transportation to discuss career opportunities with the County. At that time, the appellant contended she first learned that she may have been working out of her class during prior years.

CASE NO. 85-421 & 428 (continued)

She filed an Open Door Review Form on April 9, 1985. The Personnel Office subsequently changed the designation to "Grievance" and on April 23, 1985 denied it as not being filed timely. The grievance filed on May 3, 1985 was not accepted for processing because it was found to be based on the same issues as the prior grievance.

Administrative Procedure 4-4, in the judgment of the Board, allows an employee to file complaints of this nature either as a grievance or a request for open door review, and the latter does not have a specified time limit for filing. The appellant originally filed the complaint as a Request for Open Door Review, which in the Board's judgment was her prerogative, under the County's established procedures. Accordingly, the Personnel Director's decision was overturned and the case was remanded to the Personnel Office for processing in accordance with established Open Door Review procedures. The appellant's request for reimbursement of legal fees was also approved.

CASE NO. 85-423

A Stock Clerk appealed from the decision of the Personnel Office not to accept his grievance for processing as it involved a classification question, which was covered by another appeal process.

The issue was whether the appellant was, and had been working outside of his class and should be reimbursed accordingly, retroactive to December 1980. This clearly was a question of proper job classification and the Personnel Office was presently conducting a study of the appellant's position, as well as all other Stock Clerks. Once a classification study is completed, the County's procedures provide for proper implementation and retroactivity may be granted by the Chief Administrative Officer.

Therefore, it was the judgment of the Board that the appeal be denied as it was premature and there was no evidence of violation of procedures.

CASE NO 85-433

Two Stock Clerks appealed from the decision of the Personnel Office not to accept their grievances for processing as they involved a classification question, which was covered by another appeal process.

The issue was whether the appellants had been working outside of their class and should be reimbursed accordingly, retroactive to the date they began performing the higher level duties. The Board found this was clearly a question of proper job classification, and, the Personnel Office was presently conducting a study of their positions, as well as all other Stock Clerks. Once a classification study was completed, the County's procedures provided for proper implementation, and retroactivity may be granted by the Chief Administrative Officer.

Therefore, it was the judgment of the Board that the appeal be denied as it was premature, and there was no evidence of violation of procedures.

CASE NO. 85-442

A Police Officer appealed from the decision of the Personnel Office that his grievance would not be accepted for processing as the issue concerned the classification of his position, which must be reviewed under another process.

The major issues raised involved the proper classification of the position occupied, and retroactive compensation for allegedly working out of the assigned occupational class. Resolution of this problem required a study of the position to determine proper classification, which had not been done and was not planned in the announced study of Police classes. The issue of proper compensation could not be addressed until the factual information was developed on the level of assigned duties and responsibilities.

In light of the present circumstances, the Board agreed that the issue was not grievable. However, rather than simply deny the grievance, it was the judgment of the Board that the County had an obligation and responsibility to address the issues raised, pursuant to established procedures. The grievance was filed on June 7, 1985, during the month in which individual classification review requests are accepted, and it should have been handled as such a request, instead of as a grievance. Therefore, the Personnel Office and the Department of Police were notified that the request for a classification review was to be processed and completed in accordance with established procedures.

CASE NO. 85-460

An Office Assistant appealed from the decision of the Personnel Office that his Grievance/Open Door Review would not be accepted for processing. The questions raised concerned the type of duties to be performed, by whom, when and in what manner.

It was the Board's judgment that decisions in matters of this nature are the duty and responsibility of management and are not grievable unless there is an adverse impact/affect on an employee. In this case, the appellant's supervisor clearly and properly responded to all of his questions, and assured him that prior notification of any changes in duties would be given and that he would not be assigned any duties that were inconsistent with his task-assignment. Based on that response, it was the judgment of the Board that the Grievance/Open Door Review was resolved, in the only way possible, at the supervisory level and all subsequent reviews were meaningless. Therefore, the issue of grievability at the Personnel Office level was moot and the appeal was dismissed.

CASE NO. 85-472

An Assistant Liquor Store Manager filed an appeal concerning the assignment of Managers and conduct of a promotional process in the Department of Liquor Control

The Board found that the assignment of employees and the filling of vacant positions was the prerogative of management. In this case, the appellant was continued in an acting capacity longer than permitted due to an oversight by Department officials. However, as soon as the oversight was noted, proper corrective action was taken and he was properly reimbursed for all time worked in the acting capacity. It was the Board's judgment that this action was reasonable and appropriate.

Filling of vacant, authorized positions is the responsibility of management, based on organizational and operational needs. There was no indication that the absence of an eligible list since July 1984 had adversely affected the operational efficiency of the Department. Further, failure to conduct a promotional examination is not a violation of the Personnel Regulations, and there is no requirement that employees must be provided promotional opportunities within any given time or based on a specific set of circumstances.

CASE NO. 85-472 (continued)

Finding no violation of the Personnel Regulations, or established procedures, it was the judgment of the Board that the appeal be denied.

CASE NO 85-476

An Administrative Aide appealed from the Personnel Office ruling that her grievance would be processed as an Open Door Review, instead of as a grievance.

The issues were resolved administratively and the appeal was withdrawn.

CASE NO. 85-477

A Correctional Officer appealed from the decision of the Personnel Office that his grievance would not be accepted as it did not involve a grievable issue. The Board noted that the Personnel Office had failed to respond to the appeal, as required by Section 23.6 of the Personnel Regulations, and based its decision on the information submitted by the appellant. By failing to respond timely, the County had forfeited its right to submit records or argument on the question.

The grievance concerned the lack of a formal reasonable accommodation procedure or re-training program for County employees who are/were injured on-the-job and unable to return to their prior positions. The County Council and the Board have long endorsed the philosophy of re-training and/or alternative placement for employees injured on-the-job, and the Personnel Regulations provide the tools needed to accomplish that goal. Specifically, Section 5.11 allows the Chief Administrative Officer to authorize establishment of a special eligible list to facilitate placement of such employees; Section 5.12 requires the Chief Administrative Officer to determine if reasonable accommodation could be made before taking any other personnel action; Section 15.2(f) allows transfer of such employees; and Section 16.3 allows the non-competitive promotion of such employees to facilitate placement.

CASE NO. 85-477

However, despite all of these provisions, there was no legal requirement, to the Board's knowledge, that mandated establishment of a formal program. Therefore, absent a legal requirement, the Board lacked the authority to order any action and sustained the decision that the issue was not grievable.

The Board believed the County had a moral obligation to actively pursue alternative placement, as recommended by the Director, Department of Correction and Rehabilitation, and urged and encouraged the County to initiate an active campaign to return the appellant to a fully productive status as a County employee.

MISCELLANEOUS

CASE NO. 85-2

An Office Assistant appealed from the decision of the Chief Administrative Officer on her grievance concerning direct contact with her doctor.

The appellant was injured on the job and was off work for an extended period. The supervisor contacted the appellant's doctor directly to obtain a status report to aid in planning coverage of work load. The appellant alleged that this constituted harassment and violation of her right to privacy.

After careful consideration, it was the judgment of the Board that the actions of the supervisor were reasonable and within his authority and responsibility. In fact, the supervisor's action saved the appellant the problem of obtaining the information while confined, and the Board found no evidence that this adversely affected her job or working conditions in any manner. Based on this, the Board sustained the decision of the Chief Administrative Officer and the appeal was denied.

CASE NO. 85-5

A Bus Operator appealed the termination of her employment during a probationary period for alleged failure to attain a satisfactory level of attendance. The County questioned the appellant's right of appeal.

The Board reviewed Section 18 Termination, Section 18.3 Appeals, Section 3.3 Merit System Employee, Section 6.5 Merit System Status of the Personnel Regulations; Section 33-12 Appeals of Disciplinary Actions: Grievance Procedures of the Montgomery County Code; and Section 404 Duties of the Merit System Protection Board of the Charter of Montgomery County, Maryland.

The law clearly showed 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. Also, Court decisions have generally held that there is a valid distinction between a probationary employee's status and that of an employee who has satisfied the probationary period requirement. Therefore, it was the judgment of the Merit System Protection Board that the appellant did not have a right of appeal; that the termination must be sustained; and the appeal was dismissed for lack of jurisdiction.

CASE NO. 85-10

An Equipment Operator appealed his Delay of Service Increment.

Prior to Board action, the Department of Transportation rescinded the action and granted the increment in question.

CASE NO. 85-11

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning recrediting of sick leave.

The appellant was given a special physical examination on June 4, 1984 and was subsequently allowed to continue full duties pending receipt of information from his personal physician. On August 17, 1984, the Department of Transportation relieved him of duty as a Bus Operator and placed him on sick leave pending a decision regarding reasonable accommodation. On August 29, 1984, the appellant was called and told to report to work on August 30, 1984, as a Motor Pool Attendant. He declined the offer, and on September 16, 1984, was returned to duty as a full-time Bus Operator, but assigned to work a split shift to limit time required to drive without a break.

It was the judgment of the Board that the appellant should have been placed on administrative leave for the period of August 17 through August 29, 1984 and sick leave for the remaining time, after he refused to accept an alternative position. The County was directed to correct the appellant's leave records to reflect this change and to recredit him with 72 hours of sick leave charged for this period.

CASE NO. 85-14, 85-24, 85-26, 85-28, 85-293, 85-401, 85-405, 85-412

Firefighters appealed from the decision of the Personnel Director to deny grievances concerning retroactive application of a Board interpretation.

It was the Board's judgment that interpretations are issued to clarify application and/or intent of the Personnel Regulations. If new guidelines are provided, they apply only to occurrences or incidents that occur after the date of the interpretation. Therefore, the decision of the Personnel Director to deny retroactive application was correct, and it was affirmed.

CASE NO. 85-417 & 418

Two Firefighters appealed from the decision of the Fire and Rescue Commission to deny two additional paramedic positions for a Fire Department.

The appellants had been reimbursed for working out of their class in the past and the Fire Department had been ordered to discontinue such duty assignments in the future. The issue in this case was the creation, or designation, of two positions, as paramedics so the appellants could be assigned such duties full-time. It was the Board's judgment that this issue was one of budgetary constraints and not a personnel matter. Therefore, the appeal was denied for lack of jurisdiction.

APPEALED TO CIRCUIT COURT BY THE APPELLANTS, BUT WITHDRAWN WITHOUT COURT ACTION

CASE NO. 85-420

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance related to transfer from the Police Academy to the Patrol Division.

The issue before the Board was whether the transfer of the appellant was an appropriate personnel action, or one that was arbitrary, capricious and/or discriminatory.

When the Police Career Development Plan was developed and implemented in 1977, it included a Master Police Officer (MPO) series to be used for career enhancement purposes for those officers who did not want to be supervisors, but who were interested in and/or had exceptional knowledge and skills in a specialized area of police work. On September 29, 1982, the Chief of Police identified two separate categories of MPO's, with nine career tracks in Patrol and Investigation, and eight career tracks in specialized areas. The Patrol and Investigation categories were designated as Type I positions and the remaining categories as Type II positions.

Police Officers were provided with extensive information on the Police Career Development Plan during the development stage and subsequent to implementation, which clearly suggested and encouraged use of the career ladder concept in making decisions related to future employment possibilities. Based on this material and his interests and skills, the appellant chose to enter the Training Career Ladder, fully believing he would remain therein as long as desired if his performance was satisfactory.

CASE NO. 85-420 (continued)

The documentation showed that it was never the intent of the Police Department to adhere to the stated career commitment opportunities in the Training area, and it had failed to live up to the promises held out to its officers. This was further supported by the fact that the examination for promotion of Type I MPO was not conducted until 1983, six years after implementation of the plan, and the examination for promotion to Type II MPO was never conducted. The Chief Administrative Officer, despite prior commitments and plans, stated that there are no Type II MPO positions.

The Board recognized the freedom of managers and administrators to make personnel decisions in the best interest of the County, but believed such actions must be taken in a fair and responsible manner. There is merit to the rotation of employees, and even though it has or will impact adversely on career decisions of Police Officers, the Board respected that prerogative of management, and lacked the authority to overturn it.

The recommendation of the Fact-Finder that the appellant be allowed to return to the Training Academy should have been implemented. While the Board could not order such action, it strongly urged management to take this step to help repair the damage it had done to the appellant's career plans.

It was the Board's further judgment that the Chief Administrative Officer had denied those officers waiting for the Type II promotional examination an equal opportunity to compete for future promotional opportunities, whether in specialized areas or in Patrol and Investigation, and had given the officers on the present eligible list for Type I positions an unfair opportunity for promotion to any MPO vacancy. Therefore, it was the judgment of the Board that all promotions to MPO vacancies be stayed, effective immediately; the present eligible list due to expire on October 23, 1985 be allowed to do so, and may not be extended; and the County was ordered to conduct a new examination for all MPO I vacancies within a reasonable period of time, not to exceed six months.

APPEALED TO COURT BY THE APPELLANT

CASE NO. 85-422

An employee appealed from the decision of the Chief Administrative Officer denying the request for reimbursement of legal expenses incurred for individual representation during a Board investigation into the validity of allegations of merit system violations.

CASE NO. 85-422 (continued)

The appellant had been asked to give a deposition (and was required to do so under Section 33-7(g) of the Montgomery County Code) and was informed that Special Counsel for Montgomery County would be present to represent him in his capacity as a County employee. He chose to have personal Counsel, as well, and was seeking reimbursement for that expense.

The Board's authority for awarding attorney's fees is contained in Section 33-14(c) Decisions of the Montgomery County Code. This section limits such awards to cases involving appeals, and then, only as part of a final decision on an appeal. In the absence of any appeal and/or final decision, it was the judgment of the Board that the decision of the Chief Administrative Officer was correct and, it was sustained

CASE NO. 85-427

A supervisor noted an appeal concerning alleged procedural violations in the preparation of his EPPE.

The Personnel Director requested the case be remanded for processing in accordance with established procedures, as it had not been filed with the Personnel Office first. The appeal was remanded to the Personnel Office to be processed as a timely grievance, and the County was directed to process the grievance within the established time limits without extension of any deadlines, unless agreed to in writing, by the appellant.

CASE NO. 85-444

A physician appealed from the Chief Administrative Officer's decision on a grievance concerning a reduction-in-force.

The reduction-in-force, which resulted in the abolishment of the appellant's position, was caused by a budgetary action by the County Council. There was no evidence of any violation of the Personnel Regulations in carrying out that action, and the Board lacked authority to overturn a budget decision of the County Council. Therefore, it was the judgment of the Board that the decision of the Chief Administrative Officer be sustained. Accordingly, the appeal was denied.

Case 85-457

A Fire Captain appealed the Personnel Director's decision (on behalf of the Fire and Rescue Commission) on his grievance concerning payment of legal fees when the Chief Administrative Officer is the party taking the appeal of a Board decision. The Personnel Office ruled that the issue was not grievable, but went on to deny the grievance on its merits.

The role of the Chief Administrative Officer had been included in Chapter 21 of the Montgomery County Code, the County provides services to the Fire Corporations and the Chief Administrative Officer has been given certain rights of appeal therein. The Chief Administrative Officer may appeal decisions, on Fire Corporation cases, on behalf of the County. Therefore, it was only reasonable and fair to conclude that the County was part of the overall employment system and actions of the Chief Administrative Officer that affect Fire Corporation employees are grievable/appealable. Accordingly, the Board found the issue was a grievable matter, and since it had been denied by the County, addressed the merits of the issue.

It was the County's position that Section 33-15(c) of the Montgomery County Code did not apply to Fire Corporation employees, as they are not members of the County's merit system, and that section applies to County employees only.

In light of the Laws and Regulations on the subject, the Board believed the County's position in this matter was inappropriate, unreasonable and discriminatory. It had been the long standing position of the County that Fire Corporation employees should be treated in a manner similar to County employees, yet the County refused to do so in this circumstance. One factor, not addressed by the County, was that there are two merit systems and the Chief Administrative Officer has certain responsibilities and rights in both. In the Board's judgment, the amendment of Section 33-15(a) to include Fire Corporations and their employees, required and mandated that Section 33-15(c) be applicable to an employee of either merit system. To do otherwise gave the County an unfair advantage, based on the unlimited legal resources available to it.

Therefore, it was the judgment of the Board that the County must reimburse Fire Corporation Merit System employees for reasonable legal fees incurred when the County is the appealing party, pursuant to Section 33-15(c) of the Montgomery County Code.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 85-461

An Engineer Technician appealed from the decision of the Personnel Director that his grievance would not be accepted for processing as the issue was not grievable. The issue concerned the validity of a Department of Transportation attendance policy.

The record showed that:

1. Section 22.2 Definition of the Personnel Regulations defined a grievance as, ". . . a formal written complaint by an employee arising out of a . . . disagreement between a merit system employee and supervisor, which expresses the employee's dissatisfaction concerning a term or condition of employment. . ."
2. The appellant had filed both a Grievance and a Request for an Open Door Review on the validity of the attendance policy.
3. The Personnel Office notified the appellant that it would respond under the Open Door Review procedure and not under the Grievance procedure, based on definitions contained in Administrative Procedure 4-4.

In the judgment of the Board, the issue involved a disagreement with a term or condition of employment and should have been processed as a grievance. Therefore, the decision of the Personnel Office to change the designation of the complaint was overturned and the complaint was classified as a grievance. Normally, the Board would have remanded the case for further processing under the grievance procedure. However, a thorough review had been conducted by the Special Investigator and neither party disagreed with or disputed the facts of the case. Based on this, a remand would serve no useful purpose, so the Board addressed the merits of the appeal.

The Special Investigator recommended:

1. Rescission of the attendance policy.
2. Development of a County-wide policy by the Chief Administrative Officer.
3. Appointment of a Task Force to develop the policy.
4. Rescission of all disciplinary actions related to use of the policy.

CASE NO. 85-461 (continued)

The Chief Administrative Officer acknowledged the absence of County-wide policy required by the Personnel Regulations and that he had the authority to develop such policy. Since December 2, 1980, the Chief Administrative Officer had the responsibility to develop procedures/guidelines for use of earned leave (Section 9.7 and 10.7 of the Personnel Regulations), had failed to develop such procedures and had specifically retained that authority. Absent a delegation of authority, it was the judgment of the Board, that the Director, Department of Transportation lacked authority to implement the policy.

The Chief Administrative Officer modified the policy by eliminating consideration of absences prior to implementation of the policy, when taking disciplinary action. He also denied the request for rescission of all disciplinary actions related to the policy, on the grounds that affected employees had right of appeal of such actions, and if an appeal had not been taken, the action was deemed final.

Accordingly, the decision of the Chief Administrative Officer was modified, and the County was directed to rescind the policy immediately. The Board agreed with the Chief Administrative Officer's position on specific personnel actions and development of a County-wide policy and affirmed that part of the decision.

CASE NO. 85-465

A Firefighter appealed the decision of the Fire and Rescue Commission on his grievance concerning an accident in 1983. Relief sought was the expunging of all documents from the Departmental files and a new independent investigation of the accident.

The Fire and Rescue Commission had ordered the expunging of the record, and while it may not have been accomplished timely, it had been done. Therefore, the first issue had been resolved.

The investigation of an accident or injury is an internal matter to be handled by the Independent Fire Corporation, and is not covered by the Personnel Regulations. Further, the injury was subject to the State of Maryland Worker's Compensation Law and would, therefore, not come under the jurisdiction of the Merit System Protection Board. Accordingly, lacking jurisdiction, that issue was dismissed by the Board.

CASE NO. 85-465 (continued)

Based on the foregoing, the appellant had received all possible relief available under the Personnel Regulations and the appeal was ruled resolved.

CASE NO. 85-467

An employee of the Assessments Office appealed from the County's ruling that certain employees of the State Department of Assessments and Taxation would no longer be eligible for free parking on County property.

State law, covering the affected employees, specifically stated that any such employee "who elects to remain in a local system shall be entitled to receive the benefits of that system". The appellants had elected to remain in the County system when the function was transferred to the State, as permitted by law. In light of this, and the fact that the County had continuously provided free parking for all County employees in the Rockville complex, it was the judgment of the Board that the appellants were entitled to continue enjoying the same benefits as provided previously.

Accordingly, the decision of the Personnel Director was rescinded and the County was directed to reinstate the parking privileges immediately.

CASE NO. 85-478

A Fire Department employee appealed from the decision of the Personnel Director that his grievance concerning the proposed amendment of Chapter 29 of the Personnel Regulations for the Fire Services would not be accepted as a grievable matter. While disagreeing with the substance of the change, the appellant's complaint related to the procedure followed in approving the amendment, which is a legal process set forth in the Montgomery County Code.

It was the judgment of the Board that the complaint did not involve an interpretation or application of the Personnel Regulations, or a term or condition of employment. Therefore, it was not a grievable issue, and the decision of the Personnel Director was sustained.

PROMOTION

CASE NO. 85-6

A Bus Operator appealed from the decision to bypass him for promotion to the position of Transit Controller II.

The record showed that:

1. On March 2, 1984, an eligible list for Transit Controller I was certified and contained five names in the "Outstanding" category, seven names in the "Well-Qualified" category and nine names in the "Qualified" category. The appellant was one of the five rated "Outstanding".

2. All persons in the "Outstanding" category, except the appellant, were promoted to Transit Controller II, as were three persons from the "Well-Qualified" category.

3. Section 6.3 Selection Procedures of the Personnel Regulations states:

"When a position is to be filled, the appointing authority shall be provided an eligible list that has been certified by the Personnel Office. Subject to Affirmative Action objectives, the appointing authority shall be free to choose any individual from the highest rating category based on that persons' overall rating, character, knowledge, skill, ability and physical fitness for the job as well as possible future advancement. If an individual from a lower rating category is selected, the appointing authority must submit written justification for such action, which must then be approved by the Chief Administrative Officer and made a part of the selection record."

4 On December 7, 1984, the Director, Department of Transportation sent a memorandum to the Chief Administrative Officer stating:

"The Transit Controller II list, established March 2, 1984 and will expire in January 1985 contains four white males and one black male in the "Outstanding" category and one black female, five black males, and one asian in the "Well-Qualified" category. For reasons of Affirmative Action, we should like to bypass the "Outstanding" category, so that appointments can be made from the "Well-Qualified" category.

Verbal approval had been given previously, but the Department would like written approval for the record."

CASE NO. 85-6 (continued)

This request was approved by the Chief Administrative Officer and two promotions were made from the "Well-Qualified" category on December 30, 1984.

The written request for by-pass approval (dated December 7, 1984), in the judgment of the Board, did not contain proper justification for the action, as it lacked any statistical evidence to support the alleged deficiency. In fact, data provided by the appellant refuted the need for the by-pass. Further, it was the Board's judgment that Section 6.3 required specific information related to each "individual" to be promoted and the "blanket approval" given by the Chief Administrative Officer in signing the December 7, 1984 request violated the intent and requirements of the Personnel Regulations.

The purpose of a merit system is to assure appointment and promotion of the best qualified candidates in compliance with established procedures. In light of the appellant's "Outstanding" rating and the County's violation of procedures, it was the judgment of the Board that the appellant be promoted to the next Transit Controller II vacancy in the Department of Transportation, with an effective date and compensation retroactive to December 30, 1984, and that he be reimbursed for reasonable attorney's fees incurred.

CASE NO. 85-431

A Firefighter appealed from the decision of the Personnel Director on a grievance concerning the selection process for Technician duty assignments by the Rockville Volunteer Fire Department.

The record included the following facts:

1. Fire Technician is a special duty assignment for Firefighters, with 5% additional compensation paid while performing such duties. Selection for such duties is a prerogative of management, and is not appealable (Section 15.4 of the Personnel Regulations).

2. On February 9, 1983, the appellant was informed of specific requirements to be met prior to consideration for Technician. One of the requirements was to be qualified to operate Truck #3. The appellant stated in his appeal that he still had not qualified on Truck #3.

CASE NO. 85-431 (continued)

3. The announced scoring procedure for the 1983 examination was changed without notification to the applicants and after the written and practical testing had been completed.

4. The eligible list was initially prepared in numerical order, as announced in the examination bulletin, but posted in alphabetical order.

5. The 1983 eligible list expired on September 30, 1984, yet on February 18, 1985, the Fire Chief announced it was being extended until February 28, 1985. Subsequently, on March 28, 1985, the Fire Chief announced two persons were being "upgraded" to Technician (from the 1983 list), effective retroactive to February 24, 1985.

There was no question that several errors occurred during this process. First, the change in scoring was handled inappropriately, but there was no indication that it adversely affected the overall ratings. Secondly, the eligible list should have been posted in numerical order, as announced. However, again this had no impact on the overall process or ratings. Third, the extension of the eligible list in February 1985 was invalid, as it had expired five months previously. It was the judgment of the Board that once an eligible list had expired, it may not be reactivated retroactively. Finally, even if the list had been extended, it had expired again on February 28, 1985 and subsequent selections, even though made retroactively, were invalid.

Despite these errors, it was the judgment of the Board that corrective action should not be ordered because the appellant had not been adversely affected, as he failed to meet the established criteria for such assignment. Accordingly, the appeal was denied.

CASE NO. 85-435

An Engineer appealed the selection of another individual for the position of Engineer III in the Division of Traffic Engineering, Department of Transportation. The County raised the issue of timeliness in filing the appeal.

The record showed that:

1. The position vacancy was announced with a closing date for receipt of applications being September 28, 1984.

CASE NO. 85-435 (continued)

2. The Personnel Director, on the recommendation of an Assistant County Attorney and the County's EEO Officer, accepted an application for the vacancy on October 26, 1984, one month after the closing date.

3. In January 1985, a three member interview panel was convened, and, after personal interviews with the candidates, recommended the appellant for promotion to the position of Engineer III.

4. On April 8, 1985, the appellant was notified that another person had been selected for appointment.

There was no question that the County improperly accepted an application for promotion after the announced closing date, in violation of Section 5.3 of the Personnel Regulations, and that the work of the interview panel was totally ignored in making the appointment. Both of these actions clearly contradicted the County's stated Merit System principle of promoting the best qualified candidate, and were, in the Board's judgment, unacceptable and inappropriate personnel actions.

Despite these violations, the Board had to agree that the appellant did not file the appeal timely. The latest time that could have been considered as "starting the clock" on an appeal would have been when the appellant was notified of the promotion in April 1985, and he did not note an appeal until two months later. Therefore, it was the judgment of the Board that the appeal was not filed timely and it was dismissed.

The Board's findings were submitted to the County Council, County Executive and the Chief Administrative Officer with the recommendation that appropriate corrective action be taken against the persons who violated the law and that the entire promotional process for the Engineer III vacancy be invalidated and redone in accordance with proper procedures.

CASE NO. 85-437

A Fire Department appealed from the decision of the Fire and Rescue Commission to deny their request to promote from a lower rating category. The appeal was noted pursuant to Section 21-4m(c) of the Montgomery County Code.

The Fire Department requested, and was denied, approval to deviate from the normal practice so that they could take a personnel action. Lacking any action to review, Section 21-4m(c) was not applicable and the Corporation had no right of appeal thereunder.

CASE NO. 85-437 (continued)

A review of the Personnel Regulations for Fire Service employees revealed that there was no provision for appeal by a Corporation from a Fire and Rescue Commission decision (Section 6.3); that appeals of promotional actions are provided for merit system employees only (Section 16.6); and that appeals to the Board are limited to applicants and employees only (Sections 22.1, 22.2, 23.1, 23.2 and 23.4). Based on this, it was the judgment of the Board that the Fire Department did not have a right of appeal of this decision. Accordingly, the appeal was dismissed.

CASE NO. 85-458

A County Council employee appealed the decision on her grievance concerning promotion and retroactive pay.

Two of the issues raised - the recruitment for an authorized position and non-competitive promotion - were clearly discretionary prerogatives of management, and are not mandated by law or an entitlement of the employee. Further, the appellant had not been deprived of any right to compete for the vacancy. In fact, the Board had previously directed certain actions to assure compliance with the Personnel Regulations and to protect the competitive rights of all possible applicants. Based on this, it was the Board's judgment that the appellant's rights had not been violated and she did not have an entitlement to the non-competitive promotion requested.

On the issue of retroactive pay, the Board found no evidence to show that she had officially been placed in an acting capacity during the period in question. The appellant received additional compensation for her duties subsequent to being placed in an "Acting" capacity. With the payment of this compensation, the Board agreed with the Personnel Director that the grievance should have been filed at that time and was not timely. Accordingly, that decision was sustained.

The Board had previously suggested recruitment efforts be initiated promptly, and again urged that action be taken. Additionally, while the Board had not directed payment of any additional compensation, due to the lack of timeliness, it recommended that the County Council review the situation and take appropriate action to assure fair and equitable treatment, if it was determined that the appellant had worked out of her class during the period in question.

CASE NO. 85-459

A Fire Lieutenant requested a ruling on the applicability of the Board's decision in Case #84-17 to the filling of a Fire Captain vacancy at the PSTA.

The County raised a question concerning alleged failure to make the Department of Fire and Rescue Services a party to the decision (or case) in question. The County Government, through the Personnel Office, the Fire and Rescue Commission and the County Attorney's Office had been parties in both Case #84-17 and Case #83-15, at all levels, including Court appeals. For the County to argue that the Department of Fire and Rescue Services was not a party and could not be required to comply with those decisions (both sustained by the Circuit Court) was totally unrealistic and illogical.

The County, in the Board's judgment, had admitted by its actions that it was covered by the decision in question. The Assistant Chief vacancy at the Rockville Volunteer Fire Department (one of the positions ordered filled from the 1982 eligible list) was filled by the lateral transfer of an employee of the Department of Fire and Rescue Services. Additionally, the same examination process and eligible lists are used by both the County and the independent Fire Corporations for personnel moves in the Fire and Rescue Services, with complete freedom of movement between the various entities, thereby creating a single personnel system for transfers and promotions.

Based on this, it was the judgment of the Board that the Fire Captain vacancy at the PSTA, created by the promotion of the prior incumbent to the Assistant Chief vacancy that was created by the lateral transfer of a Department of Fire and Rescue Services employee to the Rockville Volunteer Fire Department vacancy, was a "trickle down" position covered by the July 18, 1984 decision in Case #84-17. The County was directed to fill the vacancy from the 1982 eligible list.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 85-462

A Correctional Officer appealed from the decision of the Personnel Office that his grievance was not filed in a timely manner. The issues raised in the grievance were related to the establishment of an eligible list for Correctional Officer III in January 1985.

CASE NO. 85-462 (continued)

Announcement of the examination process, including the composition and scoring of the written examination and use of work performance ratings, was made in the Fall of 1984. The announced procedures were followed in developing and certifying the eligible list for Correctional Officer III, and in the Board's judgment, the process was in full compliance with the requirements of the Personnel Regulations. The burden of proving adverse impact, in cases of this nature, rests with the appealing party, and the Board found insufficient evidence to support the appellant's allegations.

Therefore, based on the dates of the various actions and the nature of those actions, it was the judgment of the Merit System Protection Board that the appeal was not filed timely and that proper procedures had been followed. Accordingly, the appeal was denied.

RECRUITMENT SELECTION

CASE NO. 85-12

An applicant appealed the Personnel Director's decision to disqualify him from further consideration for the position of Bus Operator for failure to meet established medical standards.

The record showed that the appellant had been given a pre-employment medical examination by the Employee Medical Section. According to the examining physician, there was a ". . . history of triple coronary bypass surgery, old inferior wall myocardial infarction, functional Class II findings on stress testing, diabetes mellitus and obesity. . ."

The Board was satisfied from the evidence and review of the Medical Standards, that the "not acceptable" rating assigned after the January 8, 1985 examination was reasonable and appropriate. Accordingly, the appeal was denied.

CASE NO. 85-390

An applicant for the position of Firefighter appealed from the decision to remove his name from the eligible list for the position of entry level Firefighter for failure to provide the required documents.

Subsequent to noting the appeal, the documents were received by the County and his name was placed on the eligible list, rendering the appeal moot.

CASE NO. 85-403

An applicant appealed the medical rating received as a result of the pre-employment medical examination.

The appellant failed to submit the information required by Section 23.4. Therefore, it was the judgment of the Board that the appeal be dismissed for failure to comply with established procedures, as provided for in Section 23.5 Dismissal of an Appeal of the Personnel Regulations.

CASE NO. 85-410

An applicant appealed from the "Not Acceptable" medical rating received for the position of Mechanic II. The record showed that the class specification for Mechanic II showed the job had been placed in Medical Group II, but the County had failed to develop and implement standards for that group.

CASE NO. 85-410 (continued)

The medical rating of "Not Acceptable" given to the appellant was based on improper application of approved medical standards, as there were no standards for Medical Group II. Therefore, it was the judgment of the Board that the medical rating be rescinded. Further, the County was notified that appointments to any positions classified as Medical Group II were stayed until such time as the necessary medical standards were approved, implemented and applicants re-examined based on those standards. Upon implementation of the standards for Medical Group II, the County was directed to re-examine the appellant and to assign a new rating consistent with those standards.

CASE NO. 85-426

An applicant appealed from the "Not Acceptable" medical rating received for the position of Firefighter.

The "Not Acceptable" medical rating was based on a "confirmed diagnosis of Sarcoidosis", which was clearly not supported by the evidence of record. The County and the appellant's personal physicians had found the appellant's current condition as normal and there was no indication of sarcoidosis. The record simply "suggested" that sarcoidosis may have been present in 1984, but there was no confirmation or indication of same at this time. Therefore, it was the judgment of the Board that the "Not Acceptable" medical rating be rescinded, and the County was directed to issue a new medical rating consistent with the medical evidence of record. The appellant's request for award of attorney's fees, was granted.

The Board pointed out a possible conflict with Section 2.4 of the Personnel Regulations and questioned the validity of the job offer involved.

APPEALED TO COURT BY APPELLANT, BUT WAS SUBSEQUENTLY WITHDRAWN

CASE NO. 85-438

An applicant appealed from the "Not Acceptable" medical rating received for the position of Bus Operator.

CASE NO. 85-438 (continued)

The record showed that the Employee Medical Examiner recommended a "Not Acceptable" medical rating because of failure to meet driving standards due to "current clinical diagnosis of a cardiovascular problem. The appellant had sustained a posterior wall myocardial infarction in December 1980, and according to his doctor, "the underlying coronary heart disease was corrected by by-pass surgery on 4-21-81".

The Board recognized and shared the County's concern for the present physical condition of its Bus Operators as a means of protecting the public. However, it was the judgment of the Board that the medical standard was misinterpreted and/or misapplied in this case, as there clearly was no "current clinical diagnosis" of a cardiovascular problem.

The Board found (in Case #85-410) that the County had failed to approve any medical standards for Medical Group II. Based on that order, upon implementation of the medical standards for Medical Group II, the County was directed to re-examine the appellant and to assign a new rating consistent with those standards.

CASE NO. 85-441

An applicant appealed the examination process utilized for the vacancy of Legislative Oversight Program Evaluator.

When applying for a job, the applicant has the burden of showing that he/she meets the qualifications for the job and the responsibility to do so in the manner set forth by the employer. Likewise, the employer has the responsibility to treat all applicants alike and to exercise proper and reasonable judgment in evaluating and rating the applicants.

The appellant stated that the sample of writing submitted was not one of his better efforts and that he did not answer part of the third requirement because, "I elected to disregard the scheduling part of the answer as the least possible evil in answering that question fully.". Both of these items could have affected the final rating he received.

It was the judgment of the Board that the County exercised its prerogative as to the method to be followed in recruiting for the position; that the examination process was reasonable and job related; that the examination was a fair and valid measurement of skills and knowledges required; and it was properly evaluated and/or weighted.

CASE NO. 85-441 (continued)

Based on the foregoing, it was the judgment of the Board that the examination process used for the vacancy of Legislative Oversight Program Evaluator was valid and was conducted in accordance with the requirements of the Personnel Regulations. Accordingly, the appeal was denied.

APPEALED TO COURT BY THE APPELLANT

CASE NO. 85-447

An applicant appealed the "Not Acceptable" medical rating received for the position of Bus Operator.

The record showed that the applicant had sustained an injury to his left knee in 1973, with subsequent need for surgery in 1976, and had received a disability retirement from the D. C. Department of Police, because of the injury. Medical evidence showed a continuing problem with the left knee, which may become progressively worse with time. However, the evidence showed the appellant had been driving vehicles with automatic transmissions without any problems, and there was no indication of immediate danger (within the next few years), requiring limitation of use.

Based on this, and in consideration of the medical standards for Bus Operators, it was the judgment of the Board that the appellant met the established medical standards, with the understanding that the County uses vehicles with automatic transmissions. The medical evidence supported disqualification for driving a vehicle with standard transmission on a regular and ongoing basis.

Subject to this limitation, the Board directed the medical rating be changed to "acceptable" and the appellant's name be placed on the eligible list for Bus Operator, in accordance with established procedures.

CASE NO. 85-452

An applicant appealed from the decision to remove his name from the Firefighter eligible list for failure to pass the physical agility test. The two issues raised concerned the legality of the requirement and the refusal to allow a retest.

CASE NO. 85-452 (continued)

The Personnel Regulations for Fire and Rescue Corporation Employees were implemented on April 1, 1981. Under Section 5.12 Medical Requirements for Employees/Applicants, the Fire and Rescue Commission was required to, "establish a system of medical examinations and standards for employees/applicants". The approved class specification for Firefighter contained the requirement for meeting the NFPA 1001 medical standards for employment, and, on June 25, 1981, the Fire and Rescue Commission approved the present physical agility testing procedure. Additionally, all applicants were informed of this requirement and given ample opportunity to prepare for the examination. Use of the NFPA 1001 standards and the physical agility test were a long standing practice in the Fire and Rescue Services and had been ruled job-related in prior cases. Based on all of the information, it was the judgment of the Board that the medical requirements had been properly established and implemented.

The appellant took the physical agility test in June 1985, and failed to complete it. Subsequently a Fire Department requested permission to have him retested, based on information from his doctor that showed a possible physical problem on the day of the test. This request was denied by the Fire and Rescue Commission, as exceptions were not usually granted. The Board fully understood that applicants could not be given unlimited opportunities to take the physical agility test because of the time and costs involved. However, it appeared to be fairer and less expensive to allow an applicant to retake the test for good cause shown, i.e., illness, faulty equipment, etc. The evidence in this case, in the Board's judgment, required that the appellant be allowed to retake the physical agility test. Accordingly, the Board directed the Fire and Rescue Commission to schedule a retest for him and to take appropriate follow-up action based on the results of that test.

CASE NO. 85-453

An applicant appealed the selection of another person to fill a full-time Firefighter position.

The record showed that an individual who was employed as a part-time, substitute Firefighter in the Emergency Operating Center, was transferred to a full-time position when it became vacant. This individual was not on the current eligible list for Firefighter, but had been hired originally, in 1982, from an approved eligible list and met the qualifications for the position.

CASE NO. 85-453 (continued)

The action, in this case, was clearly the transfer of an individual from part-time to full-time status and, in the Board's judgment, was the prerogative of management. Finding no violation of established procedures, the appeal was denied.

CASE NO. 85-455

An applicant for the position of Firefighter appealed a "Not Acceptable" medical rating.

The medical record indicated a spinal column problem, and the Board requested detailed clarification from the doctors.

After due consideration of their reports, and the prior record, it was the judgment of the Board that the "Not Acceptable" medical rating was correct, as the appellant's physical condition was likely to interfere with the performance of duties and require assignment limitations. Therefore, the rating was sustained and the appeal was denied.

CASE NO. 85-471

An applicant appealed the decision to deny her request to be allowed to re-take the physical agility test for the position of Firefighter. The record showed that:

1. The appellant was notified on September 19, 1985 that the physical agility test, required as part of the pre-employment examination, was scheduled for October 1, 1985. She was also informed that the test was given twice a month, and what the procedure would be for rescheduling the test.
2. The appellant did not request a delay or rescheduling of the test prior to taking it on October 1, 1985.
3. The appellant failed to pass the test on October 1, 1985, because of exhaustion.
4. The appellant subsequently requested an opportunity to retake the test because she was exhausted on the day of the original test, as the result of working two jobs and attending classes.

CASE NO. 85-471 (continued)

After consideration of the evidence, it was the judgment of the Board that the decision to deny a re-take of the test be sustained. In seeking employment, it is the responsibility of the appellant to meet the requirements set forth by the employer. The appellant knew the nature of the test, the date scheduled and her physical condition. Therefore, it was her responsibility to request rescheduling prior to taking the test, and failure to do so was insufficient grounds to require the County to deviate from established procedures. Accordingly, the appeal was denied.

RETIREMENT

CASE NO. 85-4

Two retirees appealed from the decision of the Chief Administrative Officer on questions related to retirement.

ISSUE #1. - Were the Appellants Entitled to Severance Pay?

On December 7, 1970, the Personnel Regulations for Montgomery County were amended to include payment of administrative leave if an individual was retired administratively.

On December 2, 1980, the Personnel Regulations underwent a major revision. The severance pay provisions were deleted entirely and there has been no provision for severance pay since that date. Both individuals retired after December 2, 1980.

It was the judgment of the Merit System Protection Board that the appellants were not entitled to severance pay as there had been no provision for such payment since December 2, 1980.

ISSUE #2. - Were the Appellants Entitled to a One Percent Service Recognition Factor?

On June 2, 1972, the Employee's Retirement System for Montgomery County was amended to include a service recognition factor for persons retired under Section 94-69(c) (subsequently renumbered 33-45(c)) of that law. This service recognition factor was deleted from the Retirement Law on August 27, 1974.

The service recognition factor was included in the Retirement Law for a period of two years only. Eligibility for this benefit was based on the occurrence of a specific event and there were no vested or accrual rights attached thereto, as is the case for normal retirement benefits. Therefore, it was the judgment of the Board that the appellants were not entitled to a service recognition factor.

ISSUE #3. - Had the Appellants' Benefits been Calculated Properly?

Section 33-45(c), which was effective August 27, 1974, set forth the method for calculation of benefits.

CASE NO. 85-4(continued)

On October 21, 1983, the Personnel Office informed the appellants that both would receive 50% of final earnings, as required by the Law. It was the judgment of the Board that both benefits had been calculated properly.

ISSUE #4. - Were the Appellants entitled to a Refund of the Money Paid in for Purchase of Retirement Credit for Military Service?

The Board was unable to find any provision in the Retirement Law that would permit refund of such monies and no other member had been given such a refund. Accordingly, it was the judgment of the Board that the appellants were not entitled to such refund.

ISSUE #5. - Was One Appellant Entitled to Receive a Refund of Additional Contributions Made as a Group E Member, or Should He be Given Additional Service Credit For that Period of Time?

The appellant was transferred from Group A to Group E as the result of a change in the Retirement Law that mandated such change. The Retirement Law has always forbidden the refund of additional contributions (Section 94-61 and 94-62(b)(2), effective June 1, 1972; Section 33-37(g)(2), effective July 1, 1978) when transferring between retirement groups. In 1978-79, five individuals were transferred from Group E to Group A and were given a refund of additional contributions while in Group E, which the County subsequently found were in violation of the law. Even though persons have received refunds, such payments were improper and may not be considered as precedent. Based on the law, it was the Board's judgment that the appellant was not entitled to a refund of additional contributions as a Group E member.

Section 33-37(g)(2) of the Retirement Law (effective July 1, 1978) provides for ". . . 1.25 years of service for each full year of service as a member of Group E." if a member is transferred to Group A and is not eligible for early retirement. Therefore, he was ineligible for such additional credit.

Based on the foregoing, it was the judgment of the Merit System Protection Board that the appeal be denied.

CASE NO. 85-8

An Office Assistant appealed from the decision of the Disability Retirement Hearing Board.

CASE NO. 85-8 (continued)

Prior to Board action, the Personnel Office notified the Board that the Disability Retirement Hearing Board had realized an error had been made, and would be rescinding the decision and scheduling a hearing on the appellant's application for a service connected disability retirement. This rendered the appeal moot.

CASE NO. 85-20

A Fire Department appealed from the decision of the Disability Retirement Hearing Board on one of its employees.

The Board did not find any provision in the law that gave a Department/Agency the right to appeal a decision on a member's (employee's) case before the Disability Retirement Hearing Board.

Therefore, it was the judgment of the Board that the Fire Department did not have right of appeal, and the appeal was dismissed.

CASE NO. 85-21

A Fire Department 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 had ruled that the employer was estopped from denying the appellant a job because they retained him in light duty status for five years, and ordered the Fire Department to accommodate his disability. Alternative placement and/or reasonable accommodation are highly desirable and the Board agrees with such efforts. However, in deciding cases, it was the judgment of the Board that neither the Disability Retirement Hearing Board or the Merit System Protection Board had the authority to order or dictate staffing levels or specific positions when management had clearly stated they could no longer accommodate the individual.

The case was remanded to the Disability Retirement Hearing Board for further action deemed necessary for rendering a decision on the issue of disability.

CASE NO. 85-23 & 85-27

Two Police Officers appealed from the decision of the Disability Retirement Hearing Board.

CASE NO. 85-23 & 85-27 (continued)

The Merit System Protection Board did not make any findings or issue a decision in either case, as they were resolved administratively.

CASE NO. 85-413

A Firefighter appealed from the decision of the Disability Retirement Hearing Board on the administrative application for service-connected disability retirement submitted by the Fire Department. The record showed that the appellant had been employed in several County agencies, had sustained on the job injuries prior to employment as a Firefighter, but had passed all of the physical requirements for a Firefighter. The appellant sustained an on the job injury after beginning employment with the Fire Department.

The Medical Review Committee concluded that he was totally and permanently disabled as a Firefighter, and the injury was job related. The Fire Department did not have a permanent sedentary position in which the appellant could be placed.

After setting forth the medical and employment history, including the Medical Review Committee report, the Disability Retirement Hearing Board ruled that ". . .the permanency of any job related injury has not been established and the application for service connected disability retirement is denied. . .".

Section 33-43(c)(1) of the Employees' Retirement System of Montgomery County states ". . .In extenuating circumstances, the Disability Retirement Hearing Board may waive the requirement that a member's incapacity is likely to be permanent and may approve a temporary disability retirement for one or more one year periods until the incapacity is either removed or it become apparent that it is likely to be permanent. . .". Section 33-43(c)(3) allows an employee to be retired on a disability retirement if "The member is unable to perform the duties of the occupational classification to which assigned. . .".

It was the judgment of the Board that the decision of the Disability Retirement Hearing Board was inconsistent with the medical findings and the appellant's inability to be employed as a Firefighter. Further, if there was doubt as to permanency, Section 33-43(c)(1) provided the proper remedy. Accordingly, the decision of the Disability Retirement Hearing Board was rescinded and the appellant was granted a service connected disability retirement for a period of one year and was to be re-examined and re-evaluated before the end of that year, pursuant to Section 33-43(d) of the Employees' Retirement System of Montgomery County. The appellant's request for attorney's fees was also approved.

A Bus Operator appealed from the decision of the Chief Administrative Officer on his grievance concerning an alleged violation of the County's Retirement Law. The record showed that:

1. The appellant was injured on-the-job on April 16, 1984 and had not been allowed to return to work as a Bus Operator since that date.
2. The appellant received disability leave and/or Workers' Compensation benefits from April 16, 1984 to August 18, 1984, after which he was placed on involuntary sick, annual and compensatory leave, until all accrued leave was used on December 21, 1984. He was placed on leave without pay after that date.
3. On October 30, 1984, the Director, Department of Transportation initiated a request for a service connected disability retirement for the appellant, but never notified him of this action, until December 29, 1984.
4. On May 21, 1985, the Chief Administrative Officer directed the Personnel Office, to stop processing the disability retirement application submitted by the Department of Transportation, and directed the appellant to file an applicatin within fifteen days.
5. The appellant complied with the directive, and requested he be reinstated to the payroll for the period of August 18, 1984 to May 25, 1985, and carried on sick leave status after that date, until the retirement process could be completed.

The Board believed management had the responsibility to take personnel actions timely and in accordance with established procedures. In this case, there was no question that the requirements of the law were not met, even though management was well aware of what had to be done. Further, to keep an employee in a state of uncertainty for such an extended period of time was unfair and unreasonable. As soon as it was determined that the appellant could not return to the job as a Bus Operator, the County should have made an immediate concerted effort to find alternative placement and/or expedite the retirement process in the proper manner. There was no evidence that a reasonable effort was made in either area. The County also failed to meet the established time limits in responding to the grievance at both the Personnel Director and the Chief Administrative Officer levels.

CASE NO. 85-430 (continued)

The Board agreed that an employee should not be penalized or adversely affected by the failure of management to carry out its responsibilities properly and timely. Therefore, it was the judgment of the Merit System Protection Board that:

1. The appellant be returned to the active payroll for the period of August 18, 1984 through May 25, 1985 and be reimbursed all salary monies due as the result of the reinstatement.
2. The appellant be reccredited with all sick, annual, and compensatory leave used involuntarily during this same period.
3. The appellant be credited with all additional sick and annual leave that would have been earned during this period had he been in pay status.
4. The appellant be placed on sick leave, effective May 26, 1985, pending action on the retirement application.

CASE NO. 85-439

A Police Services Aide appealed from the decision of the Disability Retirement Hearing Board on her application for a service connected disability retirement. The appellant had Multiple Sclerosis and contended that her work had aggravated her condition, causing her to be unable to continue employment.

After extensive discussion and consideration of the evidence and arguments put forth by the parties, it was the judgment of the Board that the decision was reasonable and supported by the facts. The Board concurred with the position that the disability had been caused by the degenerative nature of the disease and not by the appellant's employment. Accordingly, the decision was affirmed and the appeal was denied.

CASE NO. 85-443

A Firefighter appealed from the decision of the Disability Retirement Hearing Board. The appellant had been granted a non-service connected disability retirement, with re-evaluation in one year, but believed it should have been a service connected disability retirement, because of alleged aggravation of his condition caused by the job.

CASE NO. 85-443 (continued)

The medical evidence was extensive and the doctors generally agreed that the disability was the result of a personality disorder, with the majority believing it was not work related or aggravated, or unable to definitively state any specific work relationship. Based on the record, it was the judgment of the majority of the Board that the decision of the Disability Retirement Hearing Board was reasonable, fair and consistent with the evidence presented. Accordingly, the decision was affirmed and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 85-451

A School Crossing Guard appealed from the decision of the Disability Retirement Hearing Board on her application for a service connected disability retirement.

The record showed that the appellant had osteoarthritis, which was degenerative in nature. The majority of the doctors did not find any work relationship or aggravation of the problem by her job, and the record showed the condition would probably have occurred under any circumstances because of its degenerative nature.

Therefore, it was the judgment of the Board that the decision of the Disability Retirement Hearing Board was reasonable and supported by the evidence, and it was sustained.

CASE NO. 85-463

A Bus Operator appealed from the decision of the Disability Retirement Hearing Board, denying his application for a service connected disability retirement.

The record showed that the appellant had been involved in two incidents on-the-job that caused minor back problems, and had continued to work as a Bus Operator subsequent to that time. In early 1985, the appellant was involved in two serious accidents, off-the-job, which required hospitalization and caused severe back problems. While the Medical Review Committee found evidence of injury, it reported that the prognosis for full recovery was good and that the appellant was not disabled from being employed as a Bus Operator.

CASE NO. 85-463 (Continued)

Based on the record, it was the judgment of the Board that serious injuries, if any, were the result of off-duty accidents and the decision of the Disability Retirement Hearing Board was clearly consistent with, and supported by, the evidence and testimony considered. Accordingly, that decision was sustained and the appeal was denied.

CASE NO. 85-468

A Bus Operator appealed from the decision of the Disability Retirement Hearing Board, denying his application for a service connected disability retirement. The record showed that:

1. The County contended that the appellant was unable to function as a Bus Operator because of an injury that occurred on-the-job (in April 1984), and had been ruled compensable.
2. The Chief Administrative Officer directed the appellant to file the application for a service connected disability retirement, and he did so on June 6, 1985.
3. The appellant had not been examined by any of the reporting physicians since five months before the application was filed.
4. The physicians indicated there was a serious loss of grip strength, yet the final consensus was that the appellant was not disabled. The report did not specify if he was not disabled from any gainful employment or not disabled as a Bus Operator. Further, on September 20, 1984, the County's Employee Medical Section found the appellant unacceptable for continued employment as a Bus Operator, and, on February 14, 1985, another doctor reported that the appellant was permanently and totally disabled from performing Bus Operator duties, yet went on to state that he was able to continue as a Bus Operator.

5. Section 33-43(c) Service Connected Disability Retirement of the Employees' Retirement System for Montgomery County states that a Member may be retired on a service connected disability retirement if, "(1) The member is . . . partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring. . . or condition aggravated while in the actual performance of duty . . . (3) The member is unable to perform the duties of the occupational classification to which assigned . . . or a position of comparable status within the same department. . ."

The Board was concerned with the absence of any current medical documentation and the lack of clarity and information on the appellant's loss of left hand strength as the result of the injury of April 1984. Further, there was a lack of information as to the risks (to both the appellant and the County) or safety hazards if he was allowed to continue as a Bus Operator. Based on these gaps in the record, it was the judgment of the Board that the case be remanded to the Disability Retirement Hearing Board for further development of the record consistent with questions raised herein, and issuance of a new decision after consideration of the total record obtained.

The Board was also concerned about possible financial harm to the appellant, as he had exhausted all sick leave on August 12, 1985, and was in a leave without pay status, through no fault of his own. Since the appellant was directed by the County to file for a disability retirement, it was the judgment of the Board that he be returned to full pay status, retroactive to August 12, 1985, and continued in that status until a new decision was issued by the Disability Retirement Hearing Board.

Based on the circumstances of this case, it was the judgment of the Merit System Protection Board that the request for attorney's fees was reasonable and it was granted.

SUSPENSION

CASE NO. 85-19

A Mechanic noted an appeal of his suspension, but failed to meet the requirements of Section 23.4 Appeal Period of the Personnel Regulations. He subsequently was given two opportunities to comply with Section 23.4, but failed to respond as required by the Personnel Regulations.

Therefore, it was the judgment of the Merit System Protection Board that the appeal be dismissed for failure to follow proper procedures.

CASE NO. 85-425

A Liquor Store Clerk appealed a suspension, but the Board raised a question as to right of appeal.

The appellant was hired as a Temporary/Substitute Liquor Store Clerk I in 1981, and had worked from 8 to 40 hours a week, except when ill, since the date of employment. The County Employee Certification Form showed the appellant as a "Code 250" type employee, which at the time of employment was defined as a "Merit Non-Career, Non-Career Substitute, Minimum salary grade" employee.

The Board ruled that, as a temporary employee, the appellant did not have appeal rights to the Board and dismissed the appeal. The Board noted that Section 21.6 did give the appellant appeal rights through the grievance process. Therefore, the appeal was remanded to the Personnel Office for processing in accordance with established procedures.

CASE NO. 85-436

An Equipment Operator appealed his suspension.

The case was resolved by mutual agreement of the parties and no action was required.

WITHIN-GRADE REDUCTION

CASE NO. 85-316

A Liquor Store Clerk appealed from a 5% Within-Grade Reduction for 20 work days. The only issue to be resolved was the severity of the penalty.

Section 21 Disciplinary Actions of the Personnel Regulations requires progressive disciplinary action, except in cases of serious violation of policy or procedure that creates a health or safety risk. The Department of Liquor Control has had an established policy forbidding sale of alcoholic beverages to minors for many years, and that policy contained the disciplinary action that would be taken for violations. The appellant was aware of that policy; had violated that policy; and the violation could have resulted in a health or safety risk to the individual or the public. Further, the schedule of disciplinary actions contained in the policy was consistent with guidelines provided by the Board in previous cases involving similar circumstances.

Therefore, it was the judgment of the Board that the action was reasonable and appropriate, and it was sustained.

CASE NO. 85-399

A Liquor Store Clerk appealed from a 5% Within-Grade Reduction for 20 days, for alleged violation of Section 21.2(h) of the Personnel Regulations; Section 26 of the Store Operations Manual; and Departmental Memorandum, dated September 28, 1984.

In January 1985, a 17 year old female Explorer Scout was sent into the County Liquor Store to attempt to purchase alcoholic beverages. The individual purchased a bottle of wine from the appellant and the appellant did not request identification. The Police immediately informed the appellant of what occurred and filed a written report, which was subsequently given to the Department of Liquor Control. The appellant was never charged with any violation of State or County law as the result of this incident.

CASE NO. 85-399 (continued)

The policy of the Department of Liquor Control mandated that no one under the age of 20 would be allowed to purchase alcoholic beverages at the time of this incident. The policy further provided that ". . .any person who appears to be under the age of twenty-five. . .and there is reason to believe the person is under age. . .", must be required to show proof of age. Based on this, an employee's judgment was relied on to determine when to ask for proof of age, and as long as human judgment is involved, mistakes or errors will be made. The Board recognized the seriousness of the charges, and the fact that the County had the burden to prove the judgment used was incorrect or improper. Recognizing that an individual can be made to look older by make-up and dress, and that some persons look much older than they actually are, and lacking any evidence to show that the appellant's judgment was unreasonable or inappropriate in this situation, it was the judgment of the Board that the County had failed to meet its burden of proof. Therefore, the 5% Within-Grade Reduction was rescinded, and the County was directed to reimburse the appellant all the salary monies lost as the result of that action and to correct the personnel records in accordance with established procedures.

APPEALED TO COURT BY THE COUNTY

WRITTEN REPRIMAND

CASE NO. 85-3

A professional level employee appealed from the decision of the Chief Administrative Officer on her grievance concerning a written reprimand for alleged unsatisfactory work performance.

The determination of what constitutes an acceptable level of work performance is a judgmental matter for supervisors and managers. The record clearly supported the action in this case and there was no evidence that the decision was arbitrary or capricious. Further, the appellant had been counseled, was aware of what was expected and the action had been taken in accordance with established procedures.

It was the judgment of the Merit System Protection Board that the appeal be denied.

CASE NO. 85-440 & 85-448

A Program Assistant appealed decisions on grievances concerning a written reprimand for alleged insubordination; denial of an annual leave request; denial of request to participate in the PACE Program; denial of request for outside employment; and alleged harassment and retaliation by her supervisors.

The appellant had served in the lead capacity for her unit for approximately five years. She was denied a non-competitive promotion to the supervisory position in 1984, but had been awarded additional compensation for the five year period in a previous case. (The Board's decision in that case was appealed to Circuit Court by the County and was still pending.) The appellant was informed that another person, with better qualifications, had been selected for appointment to the supervisory position. The working relationship among the parties had been tense and strained since the time it was decided to fill the supervisory position on a competitive basis.

The following issues were addressed individually by the Board.

I. Written Reprimand

The record showed that the Department Head issued a Written Reprimand for Insubordination for alleged "refusal to respond to questions concerning procedures for the updating and maintenance of the file as directed". The incidents involved occurred during the time period of April 26 to May 3, 1985, and there was no disagreement as to the factual data.

CASE NO. 85-440 & 85-448 (Continued)

There was a difference of opinion as to the definition of training vs sharing technical knowledge. The appellant's refusal to supply information to her supervisor was done on the advice of Counsel. Counsel for the appellant contended the request involved training of a higher level employee, which is an improper task assignment for a person in the appellant's position. The County insisted it was simply sharing of job knowledge. The appellant's Counsel had notified the County of his position on April 24, 1985, two days before the confrontation, which resulted in this action, occurred.

It was the judgment of the majority of the Board, that management did have the right and authority to issue the order, and failure to comply, even though done on the advice of Counsel, constituted insubordination. Therefore, the written reprimand was sustained.

II. Denial of Annual Leave Request

The appellant submitted a timely request for annual leave, which was denied by her supervisor because of, "your recent conduct, which is having a deleterious effect on the output

It was the judgment of the Board that the denial of annual leave was inappropriate. The appellant had already received a Written Reprimand for her conduct, and this action amounted to additional disciplinary action.

III. Denial of Request to Participate in the PACE Program

The appellant requested permission to participate in the PACE Program, and was notified that she could proceed with working out a plan to do so. However, after doing so, her Department Head informed her that, "I must emphasize that PACE is not normally used as a way of resolving conduct problems in the work place and that you will have to demonstrate substantial improvement on your personal demeanor before I would be willing to authorize your participation in a PACE Program." After careful analysis of the record, the Board found the denial to be an unreasonable and inappropriate action. It was the judgment of the Board that the reasons cited for the denial were invalid and that this action was a veiled effort to penalize the appellant again for the same behavior that resulted in the Written Reprimand. Therefore, the appellant was to be allowed to participate in the PACE Program without further interference by her supervisors.

IV. Denial of Request for Outside Employment

This issue had been rendered moot by the action of the Ethics Commission, which approved the request.

V. Alleged Harassment and Retaliation

The written record revealed a working situation and/or environment that was totally unacceptable, intolerable and counter productive for all parties. The sequence and timing of events could easily be construed as an effort at harassment and/or retaliation, but such a finding or conclusion could not be made by the Board without a long, drawn out adversarial confrontation of the parties. The Board believed such a process to be unnecessary and not in the best interest of the County or the parties, as there was a logical, less combative, less costly, and less time consuming way to resolve the issue.

In the Board's judgment, the parties had reached a point where continued contact in the work place was impractical and unwise. Therefore, it was directed that:

1. The County take immediate steps to place the appellant in another position of comparable status in another Department or Office, whether it be under the PACE Program, a lateral transfer or a promotion.
2. The appellant be removed from her present work assignment within two weeks and retained in full pay status pending alternative placement (i.e., Administrative Leave).
3. The appellant was to be reimbursed 75% of reasonable legal fees incurred in pursuing these grievances. It was the Board's judgment that 25% not be paid to offset the costs associated with the Written Reprimand that was affirmed.