

Merit System Protection Board 1987 Annual Report

Montgomery County Government
Merit System Protection Board
51 Monroe Street, Suite 1707
Rockville, Maryland
279-1693

April 1988

TABLE OF CONTENTS

	<u>PAGE NO.</u>
Composition of Merit System Protection Board	1
Duties and Responsibilities of the Board	1
Audit of Montgomery County's Classification and Compensation Plan and Procedures	4
Appeal Process	8
Summaries of Decisions on Appeals	9
Classification	10
Compensation	15
Demotion	19
Dismissal	22
Grievability/Timeliness	24
Miscellaneous	32
Recruitment/Selection/Promotion	40
Retirement	60
Suspension	69
Termination	70
Transfer	73

1987
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 1987 were:

Richard S. McKernon - Chairman
(reappointed 1/85)
Sandra M. King-Shaw - Vice-Chairwoman
(reappointed 1/86)
Fernando Bren - Associate Member
(reappointed 1/87)

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 T-12, Merit System Protection Board of the Montgomery County Personnel Regulations, 1986.

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 Board 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 1-12, (b) Audits, Investigations and Inquiries, of the Montgomery County Personnel Regulations, 1986 states:

"The Merit Board shall have the responsibility and authority to conduct audits, investigations or inquiries 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 for corrective action necessary."

AUDIT OF MONTGOMERY COUNTY'S CLASSIFICATION

AND

COMPENSATION PLAN AND PROCEDURES

In March 1987, the Board submitted its audit report to the County Council, County Executive and the Chief Administrative Officer. The general findings and conclusions were that a point factor job evaluation system - such as the County's Quantitative Evaluation System (QES) - was the most common type of system in use today and had received general acceptance. The County's plan was found to be in compliance with all laws and regulations, reasonably accepted by employees, an appropriate evaluation method for the County and competitive. It was determined that the plan was generally as good as those used in other jurisdictions, but that the County did have some minor problems and inequities that needed to be addressed.

The main findings and conclusions were:

1. Class specifications were generally accurate and the information was job related, but they lacked information concerning the level and complexity of supervision, physical demands and working conditions. The absence of this information had an adverse effect on QES factor ratings when jobs were reviewed.
2. The County did not have a clear definition of what a supervisor was and lacked guidelines as to the difference between a lead worker and a supervisor. In many cases, there was a wide disparity in supervisory responsibilities among incumbents within the same job class.
3. The use of generic classes had resulted in the elimination of many classes, and there were still many areas in which such classes could be used. However, some jobs with very distinct characteristics had been included in generic classes and needed to be pulled out in order to obtain a fair evaluation.

4. There were no standards or guidelines for designating budget level classes, and the class specifications for series containing such classes did not generally reflect a distinct difference or change in the level or type of duties and responsibilities assigned to the various classes. Promotions in such series were usually made after a specific length of time, on a non-competitive basis, without any evidence of performance standards or proficiency tests.

5. The Personnel Office had not met the five year review requirement of Section 7.1, as only 40% of the classes were reviewed in the initial five year period. A review of all classes every five years was deemed to be necessary if the County wanted to maintain a fair and equitable system.

6. The QES was producing reasonable job ranking results and the factors being used were job related. The weights assigned to the various factors had deviated from the original intent and needed to be revised. Specific problems were found with the factors involving Knowledge Required; Physical Demands, Working Conditions and Supervision.

7. The County did not have a written policy setting forth its goal or objective concerning salary competitiveness in the labor market.

8. The average pay for those classes studied ranged from 7% - 31% above market levels. The pay ranges (35 - 55% from minimum to maximum salary) for Grades 1 - 31 were consistent with normal practices, while the declining ranges (down to 28.5%) for Grades 32-40 could create pay equity problems if not adjusted.

9. Managers and employees knowledge of Standard Operating Procedures on classification and compensation were severely limited and the communications between the parties and the Personnel Office were found to be inadequate. These factors could adversely affect Personnel Office effectiveness, employee satisfaction and morale, and cause frivolous, unrealistic requests for reclassification.

10. While technically sufficient, there was limited supporting documentation or rationale for classification decisions in the files, which made a third party review very difficult. In cases where a Personnel Specialist recommendation was modified by a higher level authority, there was no explanation or documentation to support or justify the action.

11. The Personnel Office did not have written minimum qualifications, performance standards, workload allocation guidelines, assurances of independence or rotation of case assignment requirements for consultants hired to review classification appeals.

Based on the knowledge and experience of the members of the Board, the foregoing findings and conclusions accurately reflected the present status of the County's Classification and Compensation Plan and provided an excellent base for developing changes and improvements. The Board recommended that:

1. All classes should be evaluated using QES, as quickly as possible, and a schedule established to assure future adherence to the requirements of Section 7.1.
2. Information contained in Class Specifications should be expanded to include additional job characteristics that affect QES, i.e., Supervision, Physical Demands and Working Conditions.
3. The QES factor definitions and guides, and the weights assigned thereto, should be analyzed and adjusted to assure equity and fairness.
4. The County should consider whether a written compensation policy/philosophy, that outlined the County's goal or objective with respect to salary competitiveness in the labor market, would be beneficial to the County Government.
5. The County should review the present pay plan with consideration of reducing the number of grades, correcting pay range inequities and creating a separate executive schedule.
6. The County should develop a plan to educate managers and employees on the processes and procedures involved in classification matters and to keep them properly informed of activities.
7. The County should consider elimination of budget level classes, or in the alternative, develop criteria, control and monitoring functions to assure proper use and administration.
8. The County should consider elimination of proficiency advancement in favor of a merit based salary program.

9. The County should develop and implement procedures and requirements to assure proper and adequate documentation of decisions.

10. The County should develop and implement procedures for use of consultants in the classification appeal process.

It was the judgment of the Board that QES was an acceptable and workable plan, and that it would properly meet the needs of the County once the adjustments and corrections suggested had been implemented.

APPEALS PROCESS

The Personnel Regulations provide an opportunity for Merit System employees and applicants to file appeals with the Merit System Protection Board. Once the notice of appeal has been filed, the appellant has ten work days to submit additional information required by Section 29.4 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. 87-27

A clerical employee filed an appeal alleging violation of the established classification procedure. The appellant alleged that he was not provided an opportunity to submit written comments, as required by Section 7.5 Administrative Review of the Montgomery County Personnel Regulations, 1986, and that he did not receive notice prior to the effective date, as required by that same section.

Section 7.5 states: "Prior to rendering a final classification decision on their position all incumbents and their supervisors must be given an opportunity to provide written comments. . ." That section also states that an employee may file a request for a review ". . .within 10 days of receipt of notice of the proposed action. . ."

The record showed that the appellant received information on the classification study in March and June 1986, and on both occasions was told and encouraged to submit written comments, if desired. He did not do so. Further, while the Personnel Regulations set forth a time limit for appeals, that statement did not mandate that the notice of action be received prior to the effective date.

It was the judgment of the Board that the requirements of Section 7.5 had not been violated, and the appeal was denied.

CASE NO. 87-29

A Senior Management Specialist appealed from the decision of the Chief Administrative Officer on his grievance concerning the effective date for implementation of a classification decision affecting his prior position. The relief requested was rotation back to the prior position of Community Services Center Director, Grade 31 or reallocation to Grade 31 in his present position, with the effective date determined in accordance with Section 7-3(i) of the Montgomery County Personnel Regulations, 1986.

CASE NO 87-29 (Continued)

The sole issue to be resolved by the Board was the correct date for implementation of the classification decision and its applicability to the appellant, if any. The Board noted that:

1. The occupational class of Director, Community Services Center was created on August 25, 1976 and assigned to Grade 28. The appellant was laterally transferred to a position in that class on April 20, 1979.

2. On August 19, 1978, the Personnel Director notified all Department Heads that he had "initiated a classification maintenance program to review major occupational groups once every four years."

3. On March 28, 1980, County Council Resolution #9-701 was approved and amended Section 2 Classification of the Personnel Regulations to read:

"(a) General Policy. . . .Each occupational class in the Classification Plan shall be reviewed at least once every five years to insure proper classification and pay grade assignment." This same wording was included in Section 7.1 of the December 2, 1980 Personnel Regulations. Section 7-1 of the July 1, 1986 Personnel Regulations also contains this language, except the word "shall" was changed to "must".

4. On May 14, 1984, the Chief Administrative Officer issued a policy memorandum stating in part:

". . .III. Five Year Classification/Compensation Maintenance Review Program. As specified in Section 7.1 of the Personnel Regulations, occupational classes. . .are to be studied at least once every five years to ensure proper classification and pay grade assignment. . .A retroactive effective date for upward reallocation. . .has a significant monetary impact. Therefore, . . .the effective date of such action shall be the beginning of the first pay period following. . .approval of the recommended reallocations."

5. A classification study of the occupational class of Director, Community Services Center was begun by the Personnel Office in September 1985 and the appellant was involuntarily transferred out of that class on December 14, 1985.

CASE NO. 87-29 (Continued)

6. On July 1, 1986, the Personnel Regulations were amended to add certain new requirements. One addition was Section 7-3(i), which states:

"When the review of an occupational class is not completed in the 5 years required by Section 7-1 of these Regulations, employee salary adjustments under Section 9-18 must be made retroactive to the expiration of the 5 year period."

Another addition was Section 9-18 which states:

"The salary of an employee whose position is reclassified or reallocated to a higher grade must be increased by 5%, except that an employee's salary must be at least the minimum but not more than the maximum for the new grade."

7. On November 19, 1986, the Chief Administrative Officer approved the upward reallocation of the Community Services Center Director class from Grade 28 to Grade 31, effective November 9, 1986.

The appellant argued that Section 7-3(i) of the July 1, 1986 Personnel Regulations was applicable as it was silent on the effective date for retroactivity, and therefore, should be applied to all decisions after that date. The County argued that the July 1, 1986 Personnel Regulations were only applicable to classification studies started after that date.

It was the judgment of the Board that the July 1, 1986 Personnel Regulations must be applied prospectively, as argued by the County. Further, while the five year requirement of the 1980 Personnel Regulations was clearly violated, those regulations did not provide for mandatory pay increases and retroactive effective dates. It was also important to note that the appellant was not an incumbent of the occupational class at the time of the reallocation. Based on the foregoing, the Board agreed with the decision of the Chief Administrative Officer and it was sustained.

CASE NO. 87-33

Four Senior Supply Clerks appealed from the decision of the Chief Administrative Officer (CAO) on their appeal of a classification action. The issues before the Board were the effective date of the action; the applicability to incumbents; and the proper class and grade level for one appellant.

This case involved the occupational class of Senior Supply Clerk which had been assigned to Grade 15, but was upgraded to Grade 17 by the CAO. Changing a grade level was clearly a reallocation under the County's Personnel Regulations, as reclassification required movement to a totally different class. The Personnel Regulations provide for mandatory retroactivity under certain circumstances when a position is reclassified, but not for reallocation, and the Courts have ruled that there is a clear and distinct difference between the two. It was the judgment of the Board that the CAO had discretionary authority in setting the effective date and the date of August 25, 1985 appeared to be reasonable. Therefore, the effective date of the action was sustained.

The appellants requested that the reallocation not be applied to four persons who were not part of the appeal. Under the County Personnel Regulations, when a class is reallocated, that action is applicable to all incumbents of the class. The four additional individuals affected were assigned to the Senior Supply Clerk class, and therefore, were properly included in the upgrading action.

One appellant was assigned to the Senior Supply Clerk class, and because of the impending abolishment of his position, the County decided not to create a separate class for him, but gave him a pay adjustment and retained him at the Grade 15 level. It was the judgment of the Board that such action was improper and in violation of the Personnel Regulations. The appellant was the incumbent of a Senior Supply Clerk position, and upon reallocation of that class, should have been placed in Grade 17, the same as all other incumbents. Accordingly, the County was directed to revise his personnel records to reflect reallocation to Grade 17, effective August 25, 1985. All personnel actions subsequent to that date were to be revised and he was to be reimbursed any additional salary monies due, if any, as the result of these changes.

On the issue of payment of attorney's fees, it was the judgment of the Board that the appellants be reimbursed one-third of costs incurred in this case.

CASE NO. 87-35

A Department of Finance employee appealed from the decision of the Personnel Director on his request for an administrative review of a classification study of his position. The County denied the request based on its interpretation of Section 7-5 of the Personnel Regulations for Montgomery County, 1986.

Section 33-11(a) Classification of the Montgomery County Code states in part:

"(1). . .the Chief Administrative Officer shall be responsible for . . .establishment of an administrative review procedure for handling objections by affected employees. . ."

When developing and implementing new Personnel Regulations in 1986, the County provided for an administrative review under limited circumstances only, and based on its interpretation in this case, had not provided for administrative review for all affected employees. It was the judgment of the Board that Section 33-11(a) of the Montgomery County Code takes precedence over Section 7-5 of the Personnel Regulations, and that Section 33-11 required an administrative review be provided for all merit system employees. Therefore, the decision of the Personnel Director was reversed and the County was directed to provide the appellant with an administrative review in accordance with established procedures. It was the further judgment of the Board that the County reimburse the appellant for reasonable attorney's fees incurred in this matter.

COMPENSATION

CASE NO. 87-23

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning retroactive pay for allegedly working out of his class. The facts of the case were undisputed and the only issue to be resolved was the length of the period of retroactivity.

Section 29 Limitations on Actions and Relief of the Personnel Regulations for Fire and Rescue Corporations was amended, effective August 8, 1985, to limit retroactivity to one year from the date of filing an action. Prior to that date, there was a three year limitation. The record showed that the amendment to the Personnel Regulations was processed and approved in accordance with established procedures. There was no widespread distribution of the change and the appellant was not aware of it at the time he filed the grievance.

The Board understood the frustration with what the appellant believed was an unfair application of a change in the law that he was not aware of when he filed the grievance. However, the change was made in accordance with legal requirements and was in effect prior to the filing of the grievance. Therefore, it was the judgment of the Board that the decision of the Personnel Director was correct and consistent with the law. Accordingly, the decision of the Personnel Director was sustained and the appeal was denied.

CASE NO. 87-53

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) that his grievance concerning the change of his increment date was not filed in a timely manner. The record showed that:

1. The appellant began employment with the Fire Department on September 1, 1967 and his annual increment date was designated as September 1. He subsequently received 5% increments on September 1 in both 1968 and 1969.

2. On July 1, 1970, the Fire Department instituted a new pay scale and changed all employees' increment dates to July 1. As a result of this change, the appellant received a 16% increase in pay on July 1, 1970.

CASE NO. 87-53 (Continued)

3. The appellant's increment date remained July 1 from 1970 to 1985.

4. On November 22, 1985, the County pay system was revised, and to assure equity most increment dates were advanced one week. The appellant's increment date then became June 24, instead of July 1.

5. In approving the pay schedule for Fiscal Year 1988, the County Council established July 5, 1987 as the new effective date. The reason for this date was to make the new pay schedule effective at the beginning of a pay period, rather than in the middle, to simplify administration.

6. Section 4 Service Increments; Service Increment Dates of the Appendix to the Personnel Regulations for Fire and Rescue Service Employees of the Independent Fire and Rescue Corporations of Montgomery County, dated April 1, 1981, contained the following:

" . . .(f) Increment Dates of Present Career Employees. Each career employee. . .presently employed by a corporation who has been assigned an increment date shall retain the increment date assigned. . ."

"(i) Reassignment of Increment Dates. A corporation may reassign an employee's increment date to prevent or resolve pay inequities and for disciplinary or other reasons. In such cases, the same type of procedures and appeal privileges contained in this section shall apply. Increment dates may also be reassigned by a corporation for reasons deemed to be in the best interest of the service, when such action would not adversely affect an employee. Any increment date reassigned must be reviewed by the Office of Personnel before it becomes effective."

"Service Increment Dates. The effective date of any pay change resulting from approved service increment awards shall be the first day of the pay period in which the employee becomes eligible for such awards."

CASE NO. 87-53 (Continued)

7. The new pay plan also changed the amount of annual service increment from 2% to 3 1/2%. Because the appellant's increment date was June 24, he received a 2% increment on June 21, the beginning of the pay period in which he became eligible for an increment, and was not eligible for a 3 1/2% increment until June 1988.

The appellant's concern was that employees hired subsequent to July 1, 1970 had been assigned increment dates based on hire date, which had made them eligible to receive the 3 1/2% increment before him. The appellant believed this had adversely affected him, as individuals with less seniority would be receiving a higher salary than he for as much as eleven months before he became eligible for the 3 1/2% increment. The County's position was that the grievance was not filed timely, as the changes to the increment date occurred in 1970 and 1985, respectively.

It was the judgment of the Board that the actions taken were in full compliance with established procedures. The Board noted that both changes to the appellant's increment date advanced the effective date for increments and did not adversely affect him at that time. It was the further judgment of the Board that he was not adversely affected by the July 1987 action, as he would be eligible for the 3 1/2% increment in FY 88, the same as all other employees. Additionally, the Board concurred with the Personnel Office and found the grievance was not filed timely. Accordingly, the Board denied the appeal.

CASE NO. 87-54

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) denying his grievance concerning the change of his increment date. The record showed that:

1. The appellant began employment in the Fire Services on June 30, 1966, and his annual increment date had been designated as July 1.

CASE NO. 87-54 (Continued)

2. On November 22, 1985, the County pay system was revised and, to assure equity, most increment dates were advanced one week. The appellant's increment date then became June 24, instead of July 1.

3. In approving the pay schedule for Fiscal Year 1988, the County Council established July 5, 1987 as the new effective date. The reason for this date was to make the new pay schedule effective at the beginning of a pay period, rather than in the middle, to simplify administration.

4. Section 4 Service Increments; Service Increment Dates of the Appendix to the Personnel Regulations For Fire and Rescue Service Employees of the Independent Fire and Rescue Corporations of Montgomery County, dated April 1, 1981, contains the following:

"(i) Reassignment of Increment Dates. A corporation may reassign an employee's increment date to prevent or resolve pay inequities and for disciplinary or other reasons. In such cases, the same type of procedures and appeal privileges contained in this section shall apply. Increment dates may also be reassigned by a corporation for reasons deemed to be in the best interest of the service, when such action would not adversely affect an employee. Any increment date reassigned must be reviewed by the Office of Personnel before it becomes effective."

"Service Increment Dates. The effective date of any pay change resulting from approved service increment awards shall be the first day of the pay period in which the employee becomes eligible for such awards."

5. The new pay plan also changed the amount of annual service increments from 2% to 3 1/2%. Because the appellant's increment date was June 24, he received a 2% increment on June 21, the beginning of the pay period in which he became eligible for an increment, and was not eligible for a 3 1/2% increment until June 1988.

It was the judgment of the Board that the decision of the Personnel Director was correct and that the appellant was treated in accordance with established procedures. Accordingly, the appeal was denied.

DEMOTION

CASE NO. 87-42

A Mechanic II appealed his demotion from the position of Mechanic Supervisor to Mechanic II, for alleged failure to perform his duties in a competent or acceptable manner and for alleged violation of established procedures, policies, laws, ordinances or regulations.

Four individuals testified that the appellant used racial epithets, explicit sexual language and constantly degraded, intimidated and harassed them on the job. Testimony showed that he propositioned a female employee on more than one occasion.

The appellant denied all of the allegations concerning on-the-job activity, except one, when he caught two employees smoking reefers. He testified that he had said some of the alleged statements, but that they all occurred during social contacts off the job site.

Management testified that it had no knowledge or indication of any problems between the appellant and his subordinates until notified by the Personnel Office in February 1987. The superiors testified that they were not present during his shift to see or correct any problems that may have existed.

The Board was very disturbed by two factors in this case. First, the pattern of behavior on the part of the appellant continued for a period of years, without concern or abatement, until he became aware of an investigation. Such arrogance and aloofness is unacceptable in the workplace. Secondly, management was totally remiss in carrying out its duties of supervising and monitoring the workplace. The Board was astounded by the fact that this situation evolved over a three year period and management was completely ignorant of, or ignored the problems during that entire time. Further, once made aware of an explosive situation, the Department still declined to get involved and relied on others to do its job of managing the workforce. The Board found such circumstances intolerable and a violation of the public trust.

CASE NO. 87-42 (Continued)

After hearing and observing the witnesses in this case, the Board was convinced that the allegations accurately reflected the work site behavior of the appellant. The Board found such a pattern of behavior to be totally unacceptable for any employee, and particularly outrageous for a supervisor. This case evidenced a total lack of awareness or concern for human dignity by the appellant, and because of the serious nature of the offenses, disciplinary action, up to and including dismissal, would have been warranted and justified. Accordingly, it was the judgment of the Board that the demotion action was fully justified and taken in accordance with established procedures, and it was affirmed.

CASE NO. 87-59

A Merit System employee appealed from an involuntary demotion as the result of a classification action. Counsel for appellant filed a Motion to Dismiss.

The motion was based on the belief that the demotion action had been taken improperly and in violation of the Personnel Regulations. Counsel argued that the August 21, 1987 decision of the Personnel Director to re-title the class of Planning Program Coordinator to Planning Manager, effective August 30, 1987 rendered all subsequent actions related to the class of Planning Program Coordinator moot. Further, Counsel argued that appellant had not received proper notification of the demotion action.

The County argued that the reference to the Planning Program Coordinator class, in the documentation related to the demotion, was simply an administrative oversight and had no adverse impact on the process. The County also contended that the notification requirements of Section 26-4 Involuntary Demotion of the Personnel Regulations did not apply in this case, as that section was applicable only in cases involving unsatisfactory work performance.

CASE NO. 87-59 (Continued)

The record showed that two memoranda were sent out on August 21, 1987. In one to appellant's Department Head, the Chief, Division of Classification, Compensation and Research indicated possible action on three individual positions and requested response prior to final action, as required by Section 7-5 of the Personnel Regulations. The second memorandum was from the Personnel Director to nine Department Heads, in which he set forth his final decision on fourteen classes in the Planning series, to be effective August 30, 1987. On September 29, 1987, the Personnel Director notified appellant that he was demoted from the class of Planning Program Coordinator, Grade 27 to Program Development and Evaluation Officer, Grade 25, effective September 27, 1987.

In the classification process, the action of reclassifying or re-titling of a class resulted in the automatic abolishment of the affected class. Therefore, it was the judgment of the Board that the August 21, 1987 decision of the Personnel Director took precedent over the Chief, Division of Classification, Compensation and Research memorandum, resulting in the abolishment of the class of Planning Program Coordinator on August 30, 1987, when it was retitled Planning Manager. Failure to move all incumbents to the new class was a violation of established procedures and inconsistent with prior Board action (See MSPB Case #83-69). The Board believed it was required to base its decision on the factual record before it and not try to assume what may have been meant or intended. Management, and particularly the Personnel Office, had the responsibility to know and follow the procedures and requirements of the Personnel Regulations and to assure employees adequate due process and fair treatment. In the judgment of the Board, established procedures were violated by not putting appellant in the Planning Manager class on August 30, 1987, thereby negating all administrative action subsequent to that date. Accordingly, the Motion to Dismiss was granted and the County was directed to:

1. Rescind the demotion action and remove all documentation related thereto from appellant's personnel file.
2. Place appellant in the Planning Manager class, effective August 30, 1987.
3. Reimburse appellant for reasonable attorney's fees incurred in pursuing the appeal.

Based on the foregoing, the issue of proper notification was rendered moot and was not addressed.

DISMISSAL

CASE NO. 87-46

A Bus Operator appealed her dismissal, effective May 1, 1987, for alleged violation of established policy or procedure, related to an accident on November 2, 1986.

The record showed that:

1. Appellant had worked for the County as a part-time Bus Operator for approximately eight years, was considered a good driver and had been involved in two minor accidents prior to the incident in question.
2. Appellant had received training in the Smith System Defensive Driving course in 1980 and had been checked out, on the road, upon her return from an extended leave without pay in October 1987.
3. On November 2, 1987, appellant was assigned to drive busses through the service lane so that fare boxes could be removed. The service lane required the bus be driven in a straight line for approximately 130 feet, in a lane 9' 6" wide, with a 6 1/2" steel faced curb on either side and a service pit in the middle that had to be straddled by keeping the bus centered in the lane. The lane was constructed in such a way that the curbs assured the wheels would straddle the service pit.
4. On November 2, 1987, Appellant drove two buses through the service lane without incident. On the third trip, after proceeding about halfway over the service pit area, the bus veered to the right, jumped the curb, crossed a 2' 6" sidewalk, hit a partition and pole and the left rear wheels fell into the service pit. The bus traveled a distance of 24' 6" after jumping the curb.
5. The independent investigative report indicated the accident was caused by excessive speed, improper operating technique and inattention of the operator.
6. Appellant was not wearing a seat belt at the time of the accident, which contributed to the loss of control at the point of impact with the curb.
7. Department of Transportation Administrative Procedure VII-A contained the procedures and guidelines to be used in reviewing accidents, assessing penalty points and for taking disciplinary actions.

CASE NO. 87-46 (Continued)

8. Subsequent to reviewing the accident reports and obtaining appellant's explanation, the Accident Review Committee ruled the accident preventable and assessed her 37 penalty points (15 for operator error and 22 for negligence, carelessness and the severity of the accident).

9. Records on assessment of penalty points and disciplinary actions taken against other drivers revealed other serious accidents and varying penalties based on evaluation of the specific circumstances of each accident.

10. There was insufficient evidence or testimony submitted to adequately support the appellant's allegation of prejudicial treatment or personal vendetta by one member of the Accident Review Committee.

It was the judgment of the Board that the action taken was fair and reasonable and in accordance with established procedures. Appellant was operating the bus in a well defined and safe area without any outside distractions, yet was unable to explain or account for what happened. There was no question that the accident occurred solely because of appellant's operating errors and negligence. The comparison with other accidents was not persuasive as they were not of a similar nature and most happened on-the-road with outside stimulants or distractions. The Board could find no plausible cause or excuse for the accident, particularly when all that was required of an experienced Bus Operator was driving in a straight line. The argument of inadequate training did not mitigate the severity of the events and appellant's failure to wear the seat belt contributed to the severity of the accident and was further evidence of negligence and carelessness on the part of a professional driver. Based on the foregoing, the Board believed returning appellant to the position of a Bus Operator would be inappropriate and could create a serious risk to the County and the citizens it served. Accordingly, it was the decision of the Board that the dismissal be sustained and the appeal and relief requested were denied.

GRIEVABILITY/TIMELINESS

CASE NO. 87-5

An employee appealed her Within-Grade Reduction directly to the Merit System Protection Board.

On July 1, 1986, the County's Personnel Regulations were amended and direct appeal to the Merit System Protection Board on cases of Within-Grade Reductions was deleted. It was now necessary for the appellant to file a grievance, pursuant to Section 28 of the Personnel Regulations Montgomery County, Maryland, 1986, with later appeal to the Board if not satisfied. Accordingly, the appeal was forwarded to the Personnel Office for processing in accordance with established grievance procedures.

CASE NO. 87-6

An employee in the Department of Social Services appealed from the decision of the Personnel Office that her grievance concerning a work performance evaluation would not be accepted as it was not a grievable issue.

Section 8-5 Appeals from Performance Ratings of the Montgomery County Personnel Regulations, 1986, states "Performance ratings are not appealable to the Merit Board. Performance ratings are not grievable except in cases of failure to follow established procedures." In denying the grievance, the Personnel Director stated that the appellant "did not allege or cite a failure to follow established procedures". Except for citing section numbers where alleged procedural violations occurred, the record was devoid of any evidence in support of such allegations. Absent any indication or evidence of the alleged violations, it was the judgment of the Board that the decision of the Personnel Director was correct. Accordingly, the appeal was denied.

CASE NO. 87-7

A Firefighter appealed to the Board concerning the failure of the Personnel Office to respond to his October 31, 1986 grievance in a timely manner. The record showed that:

1. The grievance was received by the Personnel Office on November 10, 1986.

CASE NO. 87-7 (Continued)

2. Section 5.3 of the Fire and Rescue Commission Administrative Procedure #7-3 Grievance Procedure required the Personnel Office to ". . .provide written disposition to employee, corporation, and Fire and Rescue Commission, within 30 days upon receipt of grievance."

3. The Personnel Office issued its disposition on January 27, 1987, over 75 days after receipt of the grievance, and ruled in the appellant's favor.

The relief sought from the Board was a directed verdict in the appellant's favor. Based on the fact that such award had already been made, albeit not in a timely manner, the issue was moot. Accordingly, the Board considered the matter resolved without necessity of issuing a decision.

CASE NO. 87-22

A Principal Administrative Aide appealed from the decision of the Personnel Office that his grievance concerning a lateral transfer would not be accepted for processing. The record showed that:

1. On January 9, 1987, he was notified of an involuntary lateral transfer within the Department.

2. On January 16, 1987, he filed a grievance with the Personnel Office, which set forth certain allegations related to the involuntary transfer.

3. On February 27, 1987, the Personnel Office sent him a memorandum stating:

". . .The Personnel Office maintains that although you have enumerated eleven points in your complaint, all points relate to your lateral transfer to the position of Principal Administrative Aide in the Ride Sharing Unit. Since you have not alleged that the transfer was either arbitrary or capricious, the appeal of your transfer is not appropriate for processing under this procedure. . ."

4. Section 21-4 Appeal of Transfer of the Montgomery County Personnel Regulations, 1986 states "A merit system employee may appeal an involuntary transfer in accordance with Section 28 of these regulations. The employee must show that the action was arbitrary and capricious or discriminatory."

CASE NO. 87-22 (Continued)

The employee had the burden to show that a transfer was arbitrary, capricious or discriminatory. However, this burden must be met after having been granted due process rights set forth in the established grievance procedures (Administrative Procedure 4-4). The Personnel Regulations are very clear in stating the employee's right of appeal, and such right may not be denied prior to proper receipt of evidence and review of the issues raised. It was the judgment of the Board that denying the appellant an opportunity to present evidence resulted in the Personnel Office decision being arbitrary and improper. Accordingly, that decision was reversed, and the Personnel Office was directed to accept the grievance and to continue processing in accordance with established procedures.

CASE NO. 87-28

A Fire Department retiree appealed from the decision of the Personnel Office (on behalf of the Fire and Rescue Commission) that his grievance would not be accepted for processing because he was not an employee at the time of filing and it had not been filed timely. The record showed that:

1. The appellant had been employed by a Fire Department and had retired on November 1, 1986.
2. The Fire and Rescue Commission's Administrative Procedure #7-3 Grievance Procedures states that it applies to ". . .persons who are employed by the independent Fire and Rescue Corporations of Montgomery County. . ." and that a written grievance must be filed ". . .within 20 calendar days from the date of occurrence. . .or knowledge of the same. . ."
3. The issue grieved concerned alleged overtime pay due for work performed during the period of August 14, 1976 to September 30, 1986. The appellant filed the grievance on January 28, 1987.

It was the judgment of the Board that the appellant did not have any recourse in this forum, as he was no longer an employee of the Fire Department. Therefore, the issue of timeliness was moot and was not addressed. Accordingly, the Board sustained the decision of the Personnel Office and denied the appeal.

CASE NO. 87-30

A Program Assistant appealed from the decision of the Personnel Office that a grievance concerning the classification process would not be accepted for processing.

The issue was resolved administratively prior to Board review, and the appellant withdrew the appeal.

CASE NO. 87-31

A Firefighter appealed from the decision of the Personnel Office that his grievance concerning driving status was not filed in a timely manner. The record showed that:

1. On March 23, 1987, the appellant was notified that he was prohibited from driving County vehicles and would be transferred to a non-driving position.

2. On April 14, 1987, the appellant filed a grievance, requesting review of the March 23, 1987 action.

3. On May 5, 1987, the Personnel Office ruled the grievance had not been filed timely, as required by Administrative Procedure 4-4 Grievance/Open Door Procedure.

4. Section 1-13 Limitations on Actions and Relief of the Montgomery County Personnel Regulations, 1986 states:

"(a) Any action instituted or filed by an employee under these regulations, including grievances, appeals, and reclassification requests, must be filed within 45 days from the date the employee knew or should have known of the occurrence upon which the action is based, subject to the provisions of (b).

(b) If another provision of the Personnel Regulations provides a shorter period of time within which an action must be commenced, the shorter period of time is controlling."

CASE NO. 87-31 (Continued)

5. Section 28-3 Procedure of the Personnel Regulations states:

"The chief administrative officer must establish a procedure for reviewing and processing grievances to assure prompt, objective and impartial resolution at the lowest level of supervision possible. Such procedure must provide for:

(a) Review of the grievance by the immediate supervisor, department head and chief administrative officer or designee:

(b) Specific and reasonable time limits for each level of review or step in the process; . . ."

6. Administrative Procedure 4-4 was implemented on November 1, 1984 and was not part of the Personnel Regulations.

Section 1-13(a) of the Personnel Regulations provided a 45 day period for filing grievances, while A.P. 4-4 provided only 10 days. Section 1-13(b) allowed less than 45 days "if another provision of the Personnel Regulations provides a shorter period of time. . .". In this case the County had relied on time limits contained in an Administrative Procedure, which was subordinate to the Personnel Regulations. Further, Section 28-3 of the Personnel Regulations gave the Chief Administrative Officer authority to establish procedures, including time limits, for processing a grievance, once received. Section 28-3 did not give the Chief Administrative Officer the authority to shorten the time limit for filing grievances, as set forth in Section 1-13(a).

Accordingly, the Board found the action of the Personnel Office to be contrary to, and in violation of Section 1-13(a) of the Personnel Regulations and it was reversed. The County was directed to:

1. Accept the grievance for processing.
2. Process the grievance in accordance with established procedures.
3. Reimburse the appellant for reasonable attorney's fees incurred.

CASE NO. 87-43

A State/County employee in the Department of Social Services filed an appeal with the Board subsequent to filing a grievance with the State of Maryland on the same issue.

On July 1, 1977, the County and the State of Maryland entered into a Memorandum of Agreement concerning the operation of a Personnel System for the State/County positions in the Montgomery County Department of Social Services. Under Section 5 Grievances and Appeals of that Agreement, grievances of this nature were to be processed in accordance with State Law, with decisions binding on the County. Therefore, there was no basis or need for action by the Board.

CASE NO. 87-50

An employee appealed from the decision of the Personnel Director, denying her request to re-open a 1985 grievance concerning retirement credits. The record showed that she received the decision on the 1985 grievance in late October 1985, and that it contained appropriate appeal information. The appellant chose not to appeal at that time.

Failure to exercise appeal rights within the time period allowed in 1985 precluded further action at this time. Therefore, the Board denied the appeal and sustained the decision of the Personnel Director.

CASE NO. 87-51

A Liquor Store Clerk appealed from the decision of the Personnel Office that his grievance, concerning the examination for Liquor Store Assistant Manager, was not filed in a timely manner. The record showed that:

1. The promotional examination for Liquor Store Assistant Manager in question, had been administered on June 16, 1986.
2. On June 24, 1986, the appellant filed an item appeal on nine of the questions, as provided for in the examination process.
3. On September 11, 1986, the appellant was mailed a letter informing him of his score on the examination; that he had received a "Qualified" rating; that four questions had been deleted prior to scoring the written examination; and the eligible list would remain in effect for a period of one year.

CASE NO. 87-51 (Continued)

4. The appellant alleged he learned of new information in August 1987, and on September 17, 1987, after having talked to the Personnel Office staff, he filed the grievance in question.

5. On November 3, 1987, the Personnel Office officially ruled the grievance had not been filed timely.

6. Section 1-13 Limitations on Actions and Relief of the Montgomery County Personnel Regulations, 1986 states:

"(a) Any action instituted or filed by an employee under these regulations, including grievances, appeals, and reclassification requests, must be filed within 45 days from the date the employee knew or should have known of the occurrence upon which the action is based. . ."

It was the judgment of the Board that the appeal be denied for two reasons. First, the Board concurred with the finding and decision of the Personnel Office that the grievance was not filed in a timely manner. Secondly, the eligible list for Liquor Store Assistant Manager was for a one year period, commencing on September 11, 1986, and would have expired on September 11, 1987, prior to filing of the appeal. The expiration of the eligible list, in the Board's judgment, had rendered the appeal moot. Accordingly, the Board denied the appeal.

CASE NO. 87-55

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) that his grievance concerning retroactive pay for Paramedic duties had not been filed timely. The record showed that:

1. The appellant began employment with a Rescue Squad, as a Firefighter, on December 30, 1985. He continued his employment as a Firefighter until his transfer to a Fire Department on May 10, 1987.

2. The appellant claimed he was assigned to perform Paramedic duties for more than 50% of his duty time with the Rescue Squad and should be awarded the 10% pay differential retroactive to his initial hire date.

CASE NO. 87-55 (Continued)

3. At the time of the appellant's employment, and until August 25, 1987, when this Board voided the policy, it was the policy of the Fire Services that an individual had to have one year of service and satisfactorily completed the probationary period before being eligible for the 10% Paramedic pay differential.

4. In a memorandum dated January 19, 1987, the appellant's supervisor recommended he be granted career status as a "firefighter/paramedic". The appellant received a copy of that memorandum.

5. The appellant filed his grievance on October 7, 1987.

6. On November 19, 1987, the Personnel Director ruled the grievance had not been filed timely, i.e., "during the period when he was performing paramedic duties but was not receiving the pay differential."

7. Administrative Procedure 7-3 Grievance Procedures issued by the Fire and Rescue Commission on October 13, 1981 and revised as of February 9, 1984, provided for filing of grievances "within 20 calendar days from the date of occurrence of the grievance or knowledge of the same".

The question before the Board was what should constitute the date of knowledge of the grievable issue. The County argued it must be while employed at the Rescue Squad, while the appellant argued it must be the date he learned of the decision on the grievance of another employee on the same issue. It was apparent from the record that the appellant knew or should have known of the one year service requirement for the 10% paramedic pay differential during his period of employment with the Rescue Squad. Considering this, and the fact that the January 19, 1987 memo referred to him as a "firefighter/paramedic", it was the judgment of the Board that the appellant had, or should have had knowledge of the grievable issue in early 1987. Therefore, the decision of the Personnel Director that the October 7, 1987 grievance was not timely filed was correct. That decision was sustained and the relief sought by the appellant was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

MISCELLANEOUS

CASE NO. 86-362

The appeal of a Fire Lieutenant had been remanded to the Board for further action, including a hearing, by the Circuit Court. Upon conclusion of the Rescue Squad's presentation, the appellant made a Motion to Dismiss.

The appellant argued that the Rescue Squad had decided on, and approved a disciplinary action without providing the required due process rights, in violation of the Personnel Regulations. The Rescue Squad argued that it had provided proper due process rights and had proceeded in strict accordance with guidance provided by the County's Personnel Office. The record showed that:

1. On January 13, 1986, the appellant was counseled by the Chief, was informed of specific work performance deficiencies and was told that continued failure to perform in a competent and acceptable manner could result in dismissal.

2. On March 26, 1986, the Chief met with the Board of Directors, in Executive Session, and informed them of alleged continued work performance problems. The Board of Directors approved a motion that stated: ". . . (appellant) be given the opportunity to retire, or have his employment . . . terminated in accordance with the Personnel Regulations for such action. . . ." Subsequent to approval of this motion, the Chief was directed to prepare a Statement of Charges.

3. The appellant received a Statement of Charges, dated April 24, 1986 and submitted a six page rebuttal.

4. The Chief subsequently met with a representative of the Personnel Office, who recommended the action be a 10% Within-Grade Reduction for 60 days instead of termination. On June 10, 1986, in Executive Session with the Board of Directors, the Chief recommended this lesser action. After review and discussion, the recommendation was approved by the Board of Directors.

CASE NO. 86-362 (Continued)

5. On October 13, 1981, the Fire and Rescue Commission had issued Administrative Procedure 7-4 Disciplinary Actions as a means of establishing guidelines for taking such actions. Page 4 of that document contained a draft Statement of Charges, which indicated a specific type of disciplinary action was to be listed therein.

6. Section 21 Disciplinary Actions of the Fire Service Personnel Regulations, subsection 21.1 Policy states: ". . .The severity of the action shall be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record and other relevant factors."

7. Section 21.5 Authority (b) Department Head states: ". . .Prior to taking any disciplinary action, the department head shall provide the employee a reasonable period of time to respond. . ."

In reviewing and discussing the documentation on the Motion, the Board determined that the written record had to stand on its own merit and that it would be inappropriate and improper for the Board to assume or surmise the intent of the Board of Directors in its action of March 26, 1986. The record clearly showed that a specific disciplinary action had been decided on and approved on March 26, 1986, prior to giving the appellant the Statement of Charges and providing an opportunity to submit rebuttal. The Board was convinced that the Rescue Squad had acted in good faith based on the advice it had received. However, it was the judgment of the Board that the process set forth in A.P. 7-4 was flawed as it required a decision as to the type of action before providing an employee any opportunity for rebuttal. This procedure clearly violated the requirements for due process and may not be permitted.

Therefore, it was the judgment of the Board that the Motion to Dismiss be granted and the Rescue Squad was directed to:

1. Rescind the 10% Within-Grade Reduction for 60 work days and remove all documentation related thereto from the appellant's personnel file.
2. Reimburse the appellant for all salary monies lost during the period of the reduction.
3. Reimburse the appellant for reasonable attorney's fees incurred in pursuing the appeal.

CASE NO. 87-1

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning a 30 day restriction on use of annual leave and alleged harassment.

The Personnel Director's Grievance Disposition granted most of the relief sought. The only remaining issues before the Board were the alleged harassment and continued difficulty in use of annual leave. The Personnel Director found that the appellant was no longer restricted in use of annual leave and that there was no evidence of harassment.

A careful review of the record affirmed the findings of the Personnel Director. There was no evidence of any problems or difficulties in using annual leave subsequent to the lifting of the 30 day restriction. Further, while the appellant disagreed with the judgment and the actions of his supervisors, there was no tangible evidence or sufficient indication that those actions were or resulted in the undue and improper harassment of the appellant. Accordingly, the decision of the Personnel Director was affirmed.

CASE NO. 87-3

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning minimum manning standards. The appellant alleged that the written minimum manning policy had been violated; that the policy failed to meet applicable Federal and State laws; and that the allocation of manning by the Fire and Rescue Commission was unfair and inequitable.

The record showed that:

1. On October 15, 1981, the Fire and Rescue Commission implemented a minimum apparatus manning policy that stated:

"The minimum manning for apparatus is as follows:
Three (3) personnel for engines and trucks,
Two (2) personnel for ambulances and medic units."

CASE NO. 87-3 (Continued)

"Apparatus may respond with less than this minimum number of personnel. However, the unit officer must advise Montgomery how many personnel the unit is responding with. Montgomery will then notify the incident commander, who will have the option of requesting additional apparatus"

2. Ryland Research, Inc., in a report prepared for the County Council, recommended a three person minimum at all times for engine and truck functions, and a four person minimum under special circumstances or in specific areas.

3. At least one other Fire Department in the County had established its minimum manning at 4 persons on engines and trucks.

4. Due to limited manpower, the appellant's Fire Department had used the minimum standards promulgated by the Fire and Rescue Commission in an effort to provide basic coverage for its area of responsibility. Requests for additional manpower had been denied.

5. There was no evidence to show that the minimum manning policy was ever violated by the appellant's Fire Department.

A review of the documentation showed that the policy issued by the Fire and Rescue Commission was a "minimum manning" standard. There was nothing to preclude, or prohibit, an individual Fire Department from establishing a higher standard of manning for response of engines and trucks, as done by the one Fire Department, and as recommended by the consulting firm. If an Independent Fire Department believed there was a safety problem related to manning of equipment under its jurisdiction, that Department had the authority and responsibility to set a higher standard than the "minimum" standard issued by the Fire and Rescue Commission. Therefore, it was the judgment of the Board that the minimum manning policy of the Fire and Rescue Commission was not unfair or inequitable and had not been violated, as alleged. Accordingly, those two points were found to be without merit and were dismissed.

CASE NO. 87-3 (Continued)

In light of the independence of the Fire Departments in Montgomery County, and the evidence and argument presented by the parties, the Board was unable to conclude that there had been any violation of Federal or State laws. Therefore, that point was also dismissed.

The issue of manpower assigned to each Fire Department was a management and budgetary matter and did not fall within the Board's purview. Therefore, it was not addressed.

CASE NO. 87-4

A Program Assistant appealed from the decision of the Chief Administrative Officer on her grievance requesting the following relief:

1. Withdraw of OMB's evaluation memorandum including a Memorandum of Withdrawal from OMB and a return of all copies to me;
2. Immediate order for cessation of harassment/retaliation by OMB Director and staff in accordance with MSPB Grievance decision 85-440, 85-448 and 84-70;
3. Attorney's fees."

On December 16, 1986, the Chief Administrative Officer issued a decision on the grievance, stating:

"...the Evaluation Memorandum of December 31, 1985, all copies thereof, and any subsequent memoranda based thereon, are to be withdrawn from all County files and forwarded to you.

The claim of harassment/retaliation by Office of Management and Budget Director and staff is dismissed as being without merit. Moreover, your transfer to the Department of Environmental Protection and consequent removal from any direct contact with the Office of Management and Budget staff renders this issue moot. Attorney's fees are inappropriate as requested relief, as the use of an attorney is optional with the grievant [Ref., A.P. 4-4, Section 9.9(c)] and the concurrent expense must therefore be the responsibility of the employee."

CASE NO. 87-4 (Continued)

It was the judgment of the Board that the first item of relief was granted by the Chief Administrative Officer and the second item had been rendered moot by the transfer. Therefore, the only remaining issue was the award of attorney's fees.

After review of Administrative Procedure 4-4, the Personnel Regulations and Section 33-14(c) of the Montgomery County Code (Merit System Law), it was the judgment of the Board that it lacked the authority to award attorney's fees in this case, as the grievance was properly resolved at the Chief Administrative Officer level. It was the finding of the Board, that it may only award attorney's fees in cases where it overrules management on the issues and the employee prevails in the appeal at the Board level. Accordingly, the request was denied.

CASE NO. 87-19

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning a restriction on the use of annual leave.

The record showed that:

1. On October 13, 1981, the Fire and Rescue Commission established a "Minimum Apparatus Manning" policy for all County Fire/Rescue Departments.
2. Section 9.7 Scheduling of Use of Annual Leave of the Personnel Regulations for Fire and Rescue Service Merit System Employees of the Independent Fire and Rescue Corporations of Montgomery County states:

"Accrued annual leave may be used, if approved by an employee's supervisor . . . Every effort shall be made to give each employee the opportunity to use annual leave earned. . ."
3. On October 22, 1986, the Fire Department issued Temporary General Order 2131 concerning staffing and leave procedures. The order stated that due to lack of funds for overtime or casual labor, leave restrictions were being instituted and would remain in effect until December 31, 1986. Major points of that order were:

CASE NO. 87-19 (Continued)

a. Minimum manning was defined for the period, consistent with the Fire and Rescue Commission Policy.

b. The leave book was closed until December 31, 1986, and leave already approved would be honored. Provisions were included for use of sick leave and for unanticipated emergencies.

c. Kelly days and switching of work days, within normal guidelines, were not affected.

4. On December 2, 1986, the appellant requested annual leave for December 12, 1986 and it was denied because of the Temporary General Order.

Fire Department management had the responsibility for delivery of effective, efficient services within the guidelines and policies established by the Fire and Rescue Commission. It was also incumbent upon management to be aware of the needs of employees and to be fair and reasonable in administration of personnel policies. In this specific case, management was faced with a fiscal problem and decided to alleviate it by reducing expenditures for overtime and casual labor by limiting the use of leave (that had not been scheduled) for a period of approximately 60 days. Exceptions were made for legitimate use of sick leave and emergencies, as well as allowing employees to switch work days, when possible, to alleviate the impact on employees. It was the judgment of the Board that the implementation of the Temporary General Order was within the discretion and prerogative of management, was properly established and was fair and reasonable, under the circumstances. Accordingly, the appeal was denied.

CASE NO. 87-20

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning use of casual/temporary employees by the independent Fire Corporations. The appellant alleged that employment of such individuals violated Section 3.10 of the Personnel Regulations and jeopardized his safety and well being on-the-job.

CASE NO. 87-20 (Continued)

The initial grievance was filed in June 1986. In August and September 1986, the Chief Administrative Officer and the Fire and Rescue Commission took actions to revise employment methods for such employees and to limit their use to assure compliance with the Personnel Regulations. After review of the record, it was the judgment of the Board that the procedure was permitted and does comply with the requirements of the Personnel Regulations. Further, there was no evidence to show the safety and well-being of any person had been jeopardized by the use of such employees.

Therefore, it was the judgment of the Board that the appeal be denied.

CASE NO. 87-36

A Correctional Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning Educational Salary Differential. The only issue before the Board was the effective date for beginning such pay.

After discussion and consideration of the arguments presented, it was the judgment of the Board that Section 1-13(c) of the Montgomery County Personnel Regulations, 1986 was applicable and controlling in this case. That provision was effective on July 1, 1986 and the appellant did not file his grievance until December 12, 1986. Therefore, while the Board was sympathetic to the request and understood his frustration, the Personnel Regulations required the affirmation of the decision of the Chief Administrative Officer. Accordingly, that decision was affirmed and the appeal was denied in its entirety.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 87-45

A Police Sergeant appealed from the decision of the Personnel Director concerning representation at the Fact-Finder level of review. The County subsequently withdrew its objection concerning the representation, rendering the appeal moot.

RECRUITMENT/SELECTION/PROMOTIONS

CASE NO. 87-8

An applicant appealed from the "Not Acceptable" medical rating received for the position of Firefighter. Subsequent to the appeal, the Personnel Director notified the Board that an additional medical evaluation had been done; the appellant had been found medically qualified for the position of Firefighter; and that she would be allowed to continue through the employment process. Based on this, the appeal was considered moot.

CASE NO. 87-10

An applicant appealed from the "Not Acceptable" medical rating received for the position of Correctional Officer. The appellant allegedly did not meet the requirements of Section 6.0, F.3, (c) and (d) of the County's Medical Standards.

The record showed that the appellant had a recurrent dislocation problem with his right shoulder in 1978-79, and in 1979, underwent surgery to correct the problem. The surgery included insertion of a screw to hold the neck of the scapula in place. Examinations by two orthopaedic specialists (in late 1986) showed no problems with the shoulder, no limitation in use and no more susceptibility to injury than a normal shoulder.

Section 6.0 Specific Medical Standards for Medical Group
I, F Extremities, F. aneous states:

"The causes for rejection for appointment shall be:
. . . (c) Dislocation, old unreduced; substantiated history of recurrent dislocations of major joints; instability of a major joint, symptomatic and more than mild; or if, subsequent to surgery, there is evidence of more than mild instability in comparison with the normal joint, weakness or atrophy in comparison with the normal side, or if the individual requires medical treatment of sufficient frequency to interfere with the performance of duty.

CASE NO. 87-10 (Continued)

(d) Fractures

.3) Any old or recent fracture in which a plate, pin, or screws were used for fixation and left in place and which may be subject to easy trauma, i.e., as a plated tibia, etc."

It was the judgment of the Board that subsection (c) must be interpreted to cover three different types of cases. First, a continuing history of dislocations without any corrective action; second, mobility and history subsequent to surgery, and third, ongoing treatment that interferes with duty. The appellant had surgery to correct the problem and there was no evidence of instability or weakness that would interfere with employment. Section (d) refers to fractures, and since there had never been a fracture, it was not applicable. Even if found to be applicable, there was no evidence that the screw would be, or was, subject to easy trauma.

Based on the foregoing, it was the judgment of the Board that the "Not Acceptable" medical rating for the stated causes was incorrect, and it was rescinded. The County was directed to continue processing the appellant for employment in accordance with established procedures.

CASE NO. 87-11

An applicant appealed from the "Not Acceptable" medical rating received for the position of Police Officer Candidate. The record showed that the rating was based on his recent history of sarcoidosis.

The County had established extensive written medical standards for employment, which were contained in Administrative Procedure 4-13 Medical Standards. Section K.3 Nontuberculous Lesions and Section R.1 Systemic Diseases both contain "sarcoidosis" as a cause for rejection for appointment. As the result of the Medical Standards and the medical history, it was the judgment of the Board that the not acceptable rating was correct and in accordance with the established standards. Accordingly, the rating was sustained.

CASE NO. 87-12

An applicant appealed the selection process used for several positions of Public Administration Intern in the County Government. The record showed that:

1. After review of the appellant's application, her name was placed on the eligible list for Public Administration Intern on May 19, 1986.
2. Of the four positions questioned, two were targeted for, and filled by minorities under the County's voluntary Affirmative Action Plan. Another was filled by a white male with job experience in that specific area and the last was filled by promotion of a white female.
3. All persons appointed or promoted were properly qualified and normal selection procedures were followed.
4. There was some confusion in the release and receipt of the supplemental application for the vacancy, but it did not adversely affect the appellant's selection for applicants to be interviewed.
5. The Department was responsible for scheduling interviews and did not document efforts to contact the appellant by telephone. Further, even though her correct address was on file and on the certified eligible list, the Department sent the letter on scheduling of an interview to the wrong address. Due to these oversights, the appellant was never contacted and/or interviewed.

There was no question that communications and monitoring of the selection process for the vacancy were inadequate and very poorly handled by both the Personnel Office and the Department of Transportation. However, despite the administrative failures and lapses, there was no evidence to show the selection result would have been altered had everything been done right. Further, the Board did not find any technical violation of established procedures that would justify the need to order corrective or remedial action in this case. Accordingly, the appeal was denied.

CASE NO. 87-16

An Office Assistant III appealed from the decision of the Chief Administrative Officer on his grievances concerning the validity of the promotional process for filling an Administrative Assistant I vacancy. The record showed that:

1. The announcement for the vacancy contained the required information, including the statement that ". . .The emphasis for the responsibility will be to improve skills, information transfer, efficient flow of work processing and assurance that maximum use and effectiveness is gained from available OIS and PC systems. . ." The examination process included review of the applicants' training and experience to determine if minimum qualifications were met, and then a written examination.

2. Nine persons applied and were found eligible to take the written examination. Six reported for the exam and only two of the six completed the examination, with one receiving a rating of "well-qualified". The other's score was below the cut-off for a rating of "qualified".

3. The examination consisted of ten questions related to knowledge of the County's Wang and OIS systems, one question on supervisory experience and two questions requiring written analysis skills.

4. Section 5-6 Examinations of the Personnel Regulations for Montgomery County, 1986 states:

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

(a) be based on a written plan for the examination;

(b) Result from a job analysis documenting required skills and knowledges;

(c) Be administered in good faith and without discrimination; and,

CASE NO. 87-16 (Continued)

(d) Be properly and accurately evaluated."

5. Both the Personnel Director and the Fact-Finder prepared lengthy reports, after review of the appeal, containing factual information and conclusions that were reviewed and considered.

The appellant alleged that the promotional process for the Administrative Assistant I vacancy was arbitrary, capricious and discriminatory, as well as a misinterpretation and misapplication of employment procedures. After careful review of the documentation, the Board found insufficient evidence to support those allegations. It was the judgment of the Board that the promotional process utilized was the County's normal procedure and that it complied with all of the established requirements. Therefore, the decision of the Chief Administrative Officer was sustained and the appeal was denied.

CASE NO. 87-17

Seventeen Police Officers appealed the method of selection for promotion to Master Police Officer, Police Sergeant and Police Lieutenant.

The record showed that:

1. Personnel Bulletin #283 contained information concerning the 1984 Police Promotional Examination for the Rank of Sergeant. That bulletin stated in part:

". . .The Sergeant's promotional process is designed so that it will provide optimum advancement opportunity to officers who possess the highest level of knowledge, skills, and abilities required of first line supervisors. . ."

"Promotional Examination

The promotional examination for the rank of Sergeant will consist of two parts; a written examination and an assessment component. "

"Component Weighting:

The two examination components will be weighted as follows:

Written Examination-----50%
Assessment Component-----50%

CASE NO. 87-17 (Continued)

. . .Eligible List Creation - An eligible list will be established and each candidate will be placed in the adjectival category of either "Well-Qualified" or "Qualified". The final standing for each candidate will be determined as follows:

a. Candidate's scoring 79.5 and above will be rated as "Well-Qualified".

b. Candidate's scoring 79.4 and below will be rated "Qualified". . ."

2. The Sergeant's eligible list was certified on March 6, 1985 and 32 individuals, including eight of the appellants, were listed alphabetically in the "Well-Qualified" category.

3. At least 12 individuals had been promoted from the Sergeant eligible list. The numerical scores of those promoted were:

1 - 100%	3 - 89%
1 - 95%	2 - 88%
2 - 92%	1 - 84%
2 - 90%	

4. The appellants' (on the Sergeant list) numerical scores were as follows:

Four had 87%, One had 86% and Three had 85%.

5. In March 1985, each Sergeant promotional candidate was sent a letter containing the numerical scores attained and the rating category assigned. The letter also said ". . .Your name will be listed on the eligible list for the position under the appropriate adjectival rating category in alphabetical order. . ."

6. Personnel Bulletin #285, issued in May 1985, contained information related to the 1985 Police Promotional Examination for the Rank of Lieutenant. It stated that the examination would consist of an assessment center only, and set forth the scoring procedures. It also stated that ". . .An eligible list will be established and each promotional candidate will be placed in alphabetical order in the adjectival category of either "Well-Qualified" or "Qualified"."

CASE NO. 87-17 (Continued)

7. The assessment center for Lieutenant consisted of three exercises: 1) In-basket, 2) an analytical exercise featuring written and oral components, and 3) an oral exercise. It was designed to measure each candidate's ability in Problem Analysis/Decision Making, Planning and Organization, Sensitivity, Oral Communication, Written Communication and Leadership. These were considered the most important and critical knowledges, skills and abilities required of a Lieutenant, as determined in a 1982 comprehensive job analysis, and verified in 1985.

8. The Lieutenant eligible list was certified on September 23, 1985, and ten individuals, including one appellant, were listed alphabetically in the "Well-Qualified" category.

9. Four individuals have been promoted from the Lieutenant eligible list, with numerical scores of 100%, 89%, 82% and 82%.

10. The appellant (on the Lieutenant list) had a numerical score of 95%. His personnel file was reviewed by the Director, Dept. of Police, prior to making a selection decision, and it contained outdated documentation in violation of Section 2.3(d) of the Personnel Regulations. There is no direct evidence to show that this information was considered or affected the selection decision.

11. Personnel Bulletin #288 was issued in July 1985 and contained information related to the 1985 Police Promotional Examination for the Position of Master Police Officer I. That bulletin stated in part:

". . . PROMOTIONAL EXAMINATION

The promotional examination for the position of Master Police Officer I will be a two phase process: Phase I - essay examination; Phase II - multiple-choice examination. There will be no make-up for either phase."

CASE NO. 87-17 (Continued)

"COMPONENT WEIGHTING

The two examination phases will be weighted as follows:

Phase I - Essay Examination.....40%
Phase II - Multiple-choice Examination.....60%"

". . .ELIGIBLE LIST CREATION

An eligible list will be established and each promotional candidate will be placed in alphabetical order in the adjectival category of either "Well-Qualified" or "Qualified". The final standing for each promotional candidate will be determined as follows:

- a) Candidates scoring 79.5 or above will be rated as "Well-Qualified".
- b) Candidates scoring 79.4 or below will be rated as "Qualified".

". . .EXAMINATION PROCESS:

". . .The examination process was developed to test knowledges, skills and abilities (KSA's) that were identified through a comprehensive job analysis as being critical to the Master Police Officer I position. . ."

". . .EXAMINATION GRADING

The essay examinations in Phase I will be graded by a panel of Sergeants or higher ranking officers from within the department. Panel members will not know whose paper they are grading and each paper will be graded individually by two panel members. The scores from the two panel members will be added and averaged, and rounded to two decimal places to obtain a candidate's raw score for the essay phase. Final Phase I scores will be determined according to the Scoring Procedures described elsewhere in this Bulletin. The multiple-choice examinations in Phase II will be scored automatically by machine. A candidate's raw score for the multiple-choice examination will be the total number of correct items. Items which are reviewed and subsequently deleted will not be counted towards the candidate's score. . ."

CASE NO. 87-17 (Continued)

12. The Master Police Officer eligible list was certified on June 2, 1986 and 28 individuals, including eight of the appellants, were listed alphabetically in the "Well-Qualified" category.

13. Twelve individuals have been promoted from the Master Police Officer eligible list. The numerical scores of those promoted were:

1 - 93%	1 - 87%
1 - 92%	2 - 86%
1 - 91%	1 - 84%
4 - 90%	1 - 82%

14. The appellants (on the Master Police Officer list) numerical scores were as follows:

1 - 92%	2 - 87%
1 - 91%	3 - 84%
1 - 90%	

15. In January 1986, each promotional candidate for MPO was sent a letter containing the numerical scores attained and the rating category assigned. The letter also stated ". . .Subject to Affirmative Action objectives, the appointing authority shall be free to choose any individual from the highest rating category based on that person's overall rating, character, knowledge, skill, ability and physical fitness for the job as well as possible future advancement. . ."

16. Except for promotion to Lieutenant, the Director, Dept. of Police did not review candidates' personnel files or performance ratings before making selections for promotion. On this point, the Fact-Finder's Report of January 2, 1987 stated ". . .To the extent the Police Chief discussed promotional selections with his ranking subordinates (three majors and Lt. Col. Brooks) the process was casual, unmethodical and unrecorded. These subordinates submitted recommendations only for candidates whom they personally observed. Information on each and every promotional candidate was neither sought nor considered."

CASE NO. 87-17 (Continued)

17. Most of the appellants had minimal contact with the four officers that made the recommendations, with at least two MPO appellants having no contact whatsoever.

18. The immediate supervisors of the appellants were not contacted or consulted about promotional capabilities.

19. In a prior case (#83-02) the Board ruled that the Chief of Police could select anyone from the highest rating category. It was noted however, that the case involved promotion to Police Captain and involved only two candidates, both known by the Chief of Police.

20. In another prior case (#86-12), which was on appeal before the Circuit Court, this Board stated:

"...The selection of any candidates from the highest rating category is the prerogative of an appointing authority, pursuant to Section 6.3 of the Personnel Regulations, and this Board recognizes and respects that authority. In this specific case, the Board noted that the final ratings of the applicants were based on the results of a written examination and an assessment center evaluation. Use of an assessment center provides a standard of measuring applicant's knowledges, skills, abilities and overall fitness for a task under simulated job conditions. With inclusion of this method of evaluation in the scoring process, the appellant's argument that rank order selection more closely meets the requirements of the Personnel Regulations for selecting the best qualified person, has validity. . .

The use of additional persons in the final selection process is an acceptable practice, provided guidelines or standards are provided to them to assure fairness and consistency of review and selection. There is no evidence of this in this case, which resulted in uncertainty as to how each person decided who to recommend for promotion. . ."

Based on the total set of facts, with particular emphasis on the maintenance and review of irrelevant documents, the Board ordered the promotion of the appellants.

CASE NO. 87-17 (Continued)

21. In a February 3, 1982 report to the County Executive and the County Council concerning employment practices, the Board recommended " the Chief Administrative Officer should prepare and publish administrative procedures necessary to implement the comprehensive recruiting and examination program". The Board went on to say, ". . .These Administrative Procedures should clearly define the role (duties and responsibilities) of all persons involved and should contain detailed procedures and guidelines. . . It appears obvious to the Board that new Administrative Procedures have not been promulgated. . .Unless and until formal Administrative Procedures and guidelines are established, the Merit System will continue to be vulnerable to potential abuses. . ."

22. A review of the County's Administrative Procedures Manual revealed that AP 4-3 Recruitment, Examination and Placement was issued on May 16, 1973 and AP 4-9 Certification of Occupational Class Eligible Lists was issued on February 10, 1975. Even though the Personnel Regulations had undergone at least two major revisions (1980 & 1986), and the County was told in 1982 it needed new Administrative Procedures to be in compliance with those Regulations, the County had not issued any revised or new AP's related to recruitment and promotion.

23. The Department of Police had utilized the numerical rank order for promotions below Police Sergeant since at least 1968. This was the first deviation from that practice at this level and this change was never officially communicated to the rank and file employees.

The issues to be resolved are:

1. May the Director, Department of Police select any candidate from the "Well-Qualified" category without the need to justify the selection instead of using the long established practice of promoting from the eligible list in numerical rank order?

2. Should the County's failure to purge outdated material from personnel files prior to review by the appointing authority be sufficient justification for overturning the selection process?

CASE NO. 87-17 (Continued)

Careful review of the record showed that each candidate was notified, either by information on the Bulletin or by personal letter, that his or her name would be placed on the eligible list in alphabetical order. Prior to the initial promotions, there was no official statement or indication as to how the selections would be made, and Section 6.3 of the Personnel Regulations allows the appointing authority to "choose any individual from the highest rating category". All promotions from the eligible lists in question were made from the highest rating category and there was no question that the candidates were qualified for promotion. The appellants' argument was that they were better qualified than those selected for promotion because of their higher numerical scores in the testing process.

The Board was well aware of the absence of updated Administrative Procedures setting forth necessary guidelines and procedures. However, the documentation showed carefully developed testing procedures and the validity of the examinations was not questioned. Therefore, the majority of the Board did not find this to be a critical or fatal flaw in the process.

The appellants also argued that the procedure was flawed because the Director, Department of Police did not review available records on all persons in the "Well-Qualified" category and did not attempt to obtain recommendations from immediate supervisors. They contended that this denied certain individuals fair and equitable consideration and gave an unfair advantage to those on the Headquarters staff. The record was devoid of any evidence to show such a bias and there was no legal requirement that the records of every candidate must be reviewed prior to making a selection.

In the case of one appellant, outdated records were in his personal file at the time it was reviewed by the Director, Department of Police. However, there was no indication that it had any adverse impact on the selection decision, as the Director said he did not review it and did not consider it in making his decision. Therefore, the Board found no basis for this allegation and it was dismissed.

The Board recognized the prerogative of the Director, Department of Police, under Section 6.3, to select any candidate from the highest rating category based on his judgment of the best qualified. While the appellants disagreed with the decisions made, it was the majority decision of the Board that it was a disagreement in judgment and not one of a legal or technical violation of law. Accordingly, the promotional decisions were sustained and the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANTS

CASE NO. 87-18

An applicant appealed from the "Not Acceptable" medical rating received for the position of Police Officer Candidate because he was diagnosed as having spondylolysis with spondylolisthesis. The record showed that:

1. Section 6, Q-1 Spine and Sacroiliac Joints of the County's Administrative Procedure 4-13, Medical Standards states in part:

"The causes for rejection for appointment shall be:

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

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

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

2. On September 30, 1986, an Orthopaedic Surgeon reported that:

"This patient has a normal physical examination; however, he has a spondylolysis and a mild scoliosis, and statistically this patient will develop back pain with time. I do not feel that he would be able to perform the duties of a police officer during his expected employment."

3. On November 4, 1986, another Orthopaedic Surgeon, examined the appellant and reported his findings as:

"DX BILATERAL SPONDYLOLYSIS WITH SPONDYLOLISTHESIS

DISC The patient does have the defects in the back as noted on x-ray of significance, however is the fact that he has gone through the past 24 years very actively without any physical symptoms whatsoever. Although he is in a slightly higher risk group than the average for low back problems, I do not feel based on his history and physical findings today that working as a police officer should be precluded for him."

CASE NO. 87-18 (Continued)

4. As the result of an examination on January 21, 1987, the second specialist submitted an additional report stating:

"The patient is in for follow up at this time and he is totally asymptomatic with no symptoms referable to his back. On examination he has no spasm and tenderness. His neurologic exam is entirely within normal limits as is the vascular exam.

X-rays were taken which show a bilateral spondylolysis and Grade I spondylolisthesis at the 5.1 level.

It is again my opinion based on statistically what we know that one cannot say with any assurance whether or not this particular individual will or will not develop symptoms in the future. The only way to answer the question of how many patients with spondylolysis develop symptoms would be to screen a totally asymptomatic population and then follow them in a prognostic way. This study to my knowledge has not been done with adequate statistics.

Therefore I see no reason why this patient should simply on the basis of any x-ray finding be excluded from a career in police work."

5. According to the doctors, spondylolysis and spondylolisthesis have the same prognosis and the AMA Guides to Evaluation of Permanent Impairment do not distinguish from either condition.

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

After careful review and consideration of the evidence, the Board found that the appellant was rated unacceptable solely on the basis of speculative future risks involved. There was no evidence that showed that his present condition was likely to interfere with performance of duty or would require assignment limitations. Therefore, it was the judgment of the Board that the "Not Acceptable" medical rating received was inconsistent with the established medical standards and case law. Accordingly, that rating was overturned and the County was directed to proceed with processing him for employment in accordance with established procedures.

CASE NO. 87-21

An applicant appealed the "Not Acceptable" medical rating received for the position of Firefighter for failure to meet the established vision standard. The record showed that:

1. The County used the nationally accepted NFPA 1001 Medical Standards for entry level firefighter positions. The vision standard set forth therein was 20/40 in one eye and 20/100 in the other, uncorrected.
2. The appellant's vision was 20/80 in one eye and 20/100 in the other, uncorrected.
3. The appellant had been an active volunteer paramedic in Montgomery County for nine years, and was still allowed to function as a volunteer, even though deemed "Not Acceptable" for a career position.
4. The vision standard applied to entry level positions only, and once employed, an individual was not required to continually meet that standard.
5. Volunteer members were not required to meet as stringent medical standards as paid career employees of the Fire Departments.

The Board found two issues pending in this case. First, was the vision standard reasonable? Second, was the standard invalid because it was not applied to volunteers performing the same duties and it did not have to be maintained subsequent to employment?

The Board was concerned about the absence of equitable standards for both career and volunteer members, and remanded the case to the Fire and Rescue Commission for further review and consideration.

CASE NO. 87-24

An applicant appealed from the decision of the Chief Administrative Officer on his grievance concerning Veteran's Credit in the selection process for Deputy Sheriff. The appellant alleged that he did not receive proper Veteran's Credit for the position and the County contended that the issue was moot because he was unavailable for appointment at the time of the four vacancies in question.

CASE NO. 87-24 (Continued)

The record showed that the eligible list was certified on April 28, 1986 and the appellant was in the highest rating category. Appointments were made from that list on July 7, September 2, September 8 and September 10, 1986. The Board concluded from the record, as did the County, that the appellant had indicated he was not available for appointment until October 24, 1986. There was no evidence to show that he took any steps to reveal or indicate that he could arrange to be available sooner.

Based on the fact that the appellant was already in the highest rating category, additional Veteran's Credit would have had no beneficial impact on the selection process. Therefore, it was the judgment of the Board that the decision of the Chief Administrative Officer was reasonable and appropriate and it was sustained.

CASE NO. 87-37

An applicant appealed from the decision of the Fire and Rescue Commission (FRC) denying the request of a Fire Department to appoint him to a firefighter position, within-grade.

It was the judgment of the Board that the Fire Department had provided valid and reasonable justification for the within-grade appointment. The denial of the FRC was based mainly on nebulous, non-job related factors and failed to address the present critical shortage of individuals who were certified paramedics. Based on this, the Board found the decision of the FRC was arbitrary and unreasonable. Accordingly, that decision was overturned, and the Fire Department was notified that it could proceed with the appointment.

APPEALED TO CIRCUIT COURT BY THE COUNTY

CASE NO. 87-38

An applicant appealed from the "Not Acceptable" medical rating received for the position of Firefighter for failure to meet the established vision standard. The Board noted that a similar case was referred back to the Fire and Rescue Commission on June 16, 1987 for further consideration and determination on the application and validity of the established visual standard (Case #87-21).

CASE NO. 87-38 (Continued)

The Board determined that this case should also be remanded for further consideration, and remanded it to the Fire and Rescue Commission for further consideration when considering the issues involved in the vision standard.

CASE NO. 87-41

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

1. The County's Employee Medical Examiner rejected the appellant for employment as a Police Officer Candidate because he did not meet the established medical standards.

2. Section 6.0, Q.1 Spine and Sacroiliac Joints of Administrative Procedure 4-13 Medical Standards states in part:

"The causes for rejection for appointment shall be:

. . . (g) Ruptured Nucleus Pulposus (herniation of intervertebral disk) or history of operation for this condition. . ."

3. The applicant's personal physician reported that he had performed a lumbar laminectomy/disc excision (L5-S1) on the appellant on April 25, 1986. He also stated that, in his opinion, the appellant could perform all the duties of a Police Officer Candidate.

4. A specialist for the County reported that: ". . . While he has made a good recovery and physical examination at this time is normal, it is my opinion that an individual with a rather long history of back symptoms necessitating disc surgery is not a good risk for the heavy duties and physical contact that he may encounter as a full duty policeman. . ."

The question before the Board was whether the appellant satisfactorily met the established medical standards. The County's position was that the appellant must be disqualified because of the 1986 surgery as there was no provision for exceptions, such as provided in other sections. The appellant argued that he had made a complete recovery and was physically capable of performing the duties of the position.

CASE NO. 87-41 (Continued)

The establishment of medical standards is an essential and necessary part of the employment process to assure the well-being of the applicant and citizens of the County. While the appellant had made a remarkable recovery from the surgery, the fact remained that the surgery was a disqualifying factor due to increased future risk. Accordingly, the Board found that the appellant did not meet the requirements of Section 6.0, Q.1(g) of the established medical standards. Therefore, it was the judgment of the Board that the appeal be denied.

CASE NO. 87-44

A Fire Lieutenant appealed from the decision of the Chief Administrative Officer on his grievance concerning the selection of a person for the position of Fire Captain at the Training Academy.

After examination of the evidence, and discussion of the issues raised, it was the judgment of the Board that the decision of the Chief Administrative Officer, (based on the findings, conclusions and recommendation of the Fact-Finder), was correct and in accordance with the law and established procedures. Accordingly, the appeal was denied.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 87-47

Four employees of the Personnel Office appealed from the decision of the Chief Administrative Officer on a grievance concerning procedures for filling a vacancy in the Personnel Office.

The Personnel Office had indicated the vacancy would be filled by promotion from within and had advertised it so. There was no question, in the Board opinion, that the Personnel Office made a commitment to its staff that was morally correct and an exercise of good management judgment and practice. However, after doing so, the Personnel Office then decided to exercise its legal prerogatives under the Personnel Regulations and filled the vacancy with a lateral transfer from another department. While this action was legally correct, in the opinion of the Board, it was inappropriate and clearly an act of "bad faith" on the part of management.

Despite the Board's concerns and misgivings about such action by management, the fact remained that the action was legally correct and within the prerogatives of management, as provided for in the Personnel Regulations. Therefore, it was the judgment of the Board that the appeal be denied.

CASE NO. 87-48

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

1. The County's Class Specification for Electrician I required an applicant to "be free from colorblindness".
2. On September 29, 1987, based on the results of an Ishihara Test and Ishihara Book, used by the County to check for colorblindness, the appellant was rated medically not acceptable for the position.
3. On September 30, 1987, an ophthalmologist reported that the appellant had a "mild red-green defect".
4. On January 13, 1988, another ophthalmologist reported:

". . .On testing (the appellant's) vision with the Pseudo-Isochromatic plates, he could identify 5 out of 14 correctly, which demonstrates a mild red-green color deficiency. I assume to be able to perform his job adequately, (the appellant) has to be able to identify the colored wires, and with no hesitation and no difficulty, he identified correctly the colors of all 21 pieces of wire, which had certainly been arranged in a random fashion. I myself would have described the wires in exactly the same words as he used, and I personally would feel that he should have no difficulty performing his job using those particular color wires. . ."

The medical evidence in the record showed that the appellant was able to properly identify all of the colors related to the job of Electrician I. After due consideration, it was the judgment of the Board that the requirements of the Class Specification, with respect to colorblindness, were not properly job related. The County was directed to revise the Class Specification for Electrician I to reflect the ability to identify colors used in that occupation; to rescind the "Not Acceptable" medical rating assigned; and to continue processing the appellant for employment in accordance with established procedures.

CASE NO. 87-52

A Liquor Store Clerk I appealed from the decision of the Chief Administrative Officer on his grievance concerning the selection process for Liquor Store Clerk II.

The Board shared the Fact-Finder's concerns about the inappropriate behavior and actions of the Acting Director in this case. However, there was insufficient cause or evidence to show any violation of the Personnel Regulations and Section 6.3 gives an appointing authority wide discretionary authority in the final selection of employees. Accordingly, it was the judgment of the Board that the decision of the Chief Administrative Officer must be sustained and the appeal was denied.

CASE NO. 87-56

A Police Officer appealed a promotional decision. The Merit System Protection Board determined it involved issues similar to those addressed in Case #87-17, that the County had appealed to the Court of Special Appeals.

Based on the fact that the issues were presently in litigation, it was the judgment of the Board that this case should be held in abeyance pending resolution of the legal challenge.

RETIREMENT

CASE NO. 87-2

An employee of the Housing Opportunities Commission appealed from the decision of the Disability Retirement Hearing Board on the administrative application for a service connected disability retirement. There was no dispute as to the facts concerning the nature and type of disability, and the only issue before the Board was the amount of disability payment due.

The appellant had been awarded a permanent partial service connected disability retirement of 10%. Section 33-43(f) Amount of Pension of the Employees' Retirement System of Montgomery County (ERSMC) states:

"The yearly amount of pension payable upon retirement for service connected disability will equal:

(1) Two percent of final earnings multiplied by years of credited service, up to a maximum of thirty-six years, plus sick leave credits, but not less than sixty percent of final earnings if the member is totally and permanently incapacitated; or

(2) Six percent of final earnings for each ten percent of permanent disability, but not less than 25 percent of final earnings, if the member is partially and permanently incapacitated. . ."

In 1981, the Court of Special Appeals of Maryland, in the case of Montgomery County, Maryland vs Charles R. Whittaker, Jr., issued a ruling applicable to Section 33-43(f). In affirming the Circuit Court decision, which had awarded Whittaker full service connected disability benefits even though only partially disabled, the Court of Special Appeals stated:

". . . We agree with the trial judge that the rules of logic and statutory construction, when applied to the Disability Retirement Act, require that an employee who is totally incapacitated for duty, though not totally disabled from any gainful employment, is entitled to full disability benefits. . ."

CASE NO. 87-2 (Continued)

There was no question that the appellant was disabled from his position with the Housing Opportunities Commission and there was no other position available for his continued employment. Therefore, it was the judgment of the Board that the Whittaker decision must be used as a guide and applied to this case. Accordingly, the Board found that the appellant was eligible to receive benefits under Section 33-43(f)(1) of the ERSMC and the County was directed to:

1. Correct the appellant's retirement records to reflect eligibility for benefits under Section 33-43(f)(1).
2. Reimburse the appellant for all additional benefits due as the result of this change, retroactive to the date of the disability retirement.
3. Reimburse the appellant for reasonable attorney's fees incurred.

CASE NO. 87-9

An employee in the Health Department appealed from the decision of the Disability Retirement Hearing Board (DRHB) on the administrative application for a service connected disability retirement. The DRHB denied the request because it believed the appellant could still be employed as a Community Services Aide.

Section 33-43(c) Service Connected Disability Retirement of the Employees' Retirement System for Montgomery County sets forth the requirements for eligibility of this type of retirement. Two of those requirements are:

". . .(1) The member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring, . . .while in the actual performance of duty. . .

(3) The member is unable to perform the duties of the occupational classification to which assigned at the time disability occurred or a position of comparable status within the same department, if qualified."

CASE NO. 87-9 (Continued)

The majority of the doctors could find no permanent residual damage as the result of a fall on the job. The overwhelming consensus of the doctors was that the appellant could be returned to duty and any problems she may be having were the result of a prior stroke and seizure, not the 1985 fall. Further, the Health Department indicated that it would be willing to work with the appellant to return her to her prior job or to another position, if preferred. Therefore, it was the decision of the Merit System Protection Board that the appellant did not meet the requirements for a service connected disability retirement and the decision of the DRHB was affirmed.

APPEALED TO CIRCUIT COURT BY THE APPELLANT

CASE NO. 87-13

A Firefighter appealed from the decision of the Disability Retirement Hearing Board to grant a non-service connected disability retirement instead of the service connected one requested.

The Board noted that the appellant was granted a non-service connected disability retirement, even though he had been employed in another job subsequent to the injury and the medical evidence indicated he could be employed, but not as a Firefighter. It was the Board's judgment that this award was contrary to, and in violation of the requirements of Section 33-43(b) of the Retirement Law - specifically 33-43(b)(5).

The second concern of the Board was the lack of clarity of the information on the alleged subsequent injury in 1985. The Board noted that while the appellant alleged another injury and submitted a report to support the claim, the actual facts were unclear; the Department's position was not clear; the medical evidence did not reference any injury subsequent to 1981; and the Worker's Compensation ruling of February 7, 1986 was unclear as to whether this was another injury or just another period of lost time due to the 1981 injury.

Because of these concerns, the Board remanded the case to the Disability Retirement Hearing Board for further development of the record in the areas of concern mentioned; reconsideration of the award of a non-service connected disability retirement in light of the facts and the law; and issuance of a new decision based on the evidence then available. The appellant was also awarded reasonable attorney's fees.

CASE NO. 87-14

A Correctional Officer appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement. There was no dispute as to the facts concerning the nature and type of disability, and the only issue before the Board was the amount of disability payment due.

The appellant had been awarded a permanent partial service connected disability retirement of 30% and there was no other position available in which he could be satisfactorily employed. Section 33-43(f) Amount of Pension of the Employees' Retirement System of Montgomery County (ERSMC) states:

"The yearly amount of pension payable upon retirement for service connected disability will equal:

(1) Two percent of final earnings multiplied by years of credited service, up to a maximum of thirty-six years, plus sick leave credits, but not less than sixty percent of final earnings if the member is totally and permanently incapacitated; or

(2) Six percent of final earnings for each ten percent of permanent disability, but not less than 25 percent of final earnings, if the member is partially and permanently incapacitated. . ."

In 1981, the Court of Special Appeals of Maryland, in the case of Montgomery County, Maryland vs Charles R. Whittaker, Jr., issued a ruling applicable to Section 33-43(f). In affirming the Circuit Court decision, which had awarded Whittaker full service connected disability benefits even though only partially disabled, the Court of Special Appeals stated:

". . . We agree with the trial judge that the rules of logic and statutory construction, when applied to the Disability Retirement Act, require that an employee who is totally incapacitated for duty, though not totally disabled from any gainful employment, is entitled to full disability benefits. . ."

There was no question that the appellant was disabled from the position of Correctional Officer and there was no other position available for continued employment. Therefore, it was the judgment of the Board that the Whittaker decision must be used as a guide and applied to this case. Accordingly, the Board found that he was eligible to receive benefits under Section 33-43(f)(1) of the ERSMC and the County was directed to:

CASE NO. 87-14 (Continued)

1. Correct his retirement records to reflect eligibility for benefits under Section 33-43(f)(1).
2. Reimburse him for all additional benefits due as the result of this change, retroactive to the date of the disability retirement.

CASE NO. 87-26

A Mechanic appealed from the decision of the Disability Retirement Hearing Board on his application for a service connected disability retirement. There was no dispute as to the facts concerning the nature and type of disability, and the only issue before the Board was the amount of disability payment due.

The appellant had been awarded a permanent partial service connected disability retirement and there was no other position available in which he could be satisfactorily employed. Section 33-43(f) Amount of Pension of the Employees' Retirement System of Montgomery County (ERSMC) states:

"The yearly amount of pension payable upon retirement for service connected disability will equal:

(1) Two percent of final earnings multiplied by years of credited service, up to a maximum of thirty-six years, plus sick leave credits, but not less than sixty percent of final earnings if the member is totally and permanently incapacitated; or

(2) Six percent of final earnings for each ten percent of permanent disability, but not less than 25 percent of final earnings, if the member is partially and permanently incapacitated. . ."

In 1981, the Court of Special Appeals of Maryland, in the case of Montgomery County, Maryland vs Charles R. Whittaker, Jr., issued a ruling applicable to Section 33-43(f). In affirming the Circuit Court decision, which had awarded Whittaker full service connected disability benefits even though only partially disabled, the Court of Special Appeals stated:

". . .We agree with the trial judge that the rules of logic and statutory construction, when applied to the Disability Retirement Act, require that an employee who is totally incapacitated for duty, though not totally disabled from any gainful employment, is entitled to full disability benefits. . ."

CASE NO. 87-26 (Continued)

The Disability Retirement Hearing Board refused to follow the Whittaker guidelines based on the fact that the appellant was not a "Sworn duty" employee, as was Mr. Whittaker. In the Board's judgment such a position was without foundation and contrary to the law. The County disability retirement law provisions apply to all members of the system, and there was no distinction for "sworn" employees.

Therefore, it was the judgment of the Board that the Whittaker decision must be used as a guide and applied to this case. Accordingly, the Board found that appellant was eligible to receive benefits under Section 33-43(f)(1) of the ERSMC and the County was directed to:

1. Correct the appellant's retirement records to reflect eligibility for benefits under Section 33-43(f)(1).
2. Reimburse the appellant for all additional benefits due as the result of this change, retroactive to the date of the disability retirement.
3. Reimburse the appellant for reasonable attorney's fees incurred.

CASE NO. 87-32

A Library Assistant appealed from the decision of the Disability Retirement Hearing Board on her application for a service connected disability retirement. There was no dispute as to the facts concerning the nature and type of disability, and the only issue before the Board was the amount of disability payment due.

The appellant was awarded a permanent partial service connected disability retirement and there was no other position available in which she could be satisfactorily employed. Section 33-43(f) Amount of Pension of the Employees' Retirement System of Montgomery County (ERSMC) states:

"The yearly amount of pension payable upon retirement for service connected disability will equal:

- (1) Two percent of final earnings multiplied by years of credited service, up to a maximum of thirty-six years, plus sick leave credits, but not less than sixty percent of final earnings if the member is totally and permanently incapacitated; or

CASE NO. 87-32 (Continued)

(2) Six percent of final earnings for each ten percent of permanent disability, but not less than 25 percent of final earnings, if the member is partially and permanently incapacitated. . ."

In 1981, the Court of Special Appeals of Maryland, in the case of Montgomery County, Maryland vs Charles R. Whittaker, Jr., issued a ruling applicable to Section 33-43(f). In affirming the Circuit Court decision, which had awarded Whittaker full service connected disability benefits even though only partially disabled, the Court of Special Appeals stated:

". . . We agree with the trial judge that the rules of logic and statutory construction, when applied to the Disability Retirement Act, require that an employee who is totally incapacitated for duty, though not totally disabled from any gainful employment, is entitled to full disability benefits. . ."

The Disability Retirement Hearing Board did not follow the Whittaker guidelines. In the Board's judgment such a position was without foundation and contrary to the law. Therefore, it was the judgment of the Board that the Whittaker decision must be used as a guide and applied to this case. Accordingly, the Board found that appellant was eligible to receive benefits under Section 33-43(f)(1) of the ERSMC and the County was directed to:

1. Correct the appellant's retirement records to reflect eligibility for benefits under Section 33-43(f)(1).
2. Reimburse the appellant for all additional benefits due as the result of this change, retroactive to the date of the disability retirement.

CASE NO. 87-34

A Firefighter appealed from the decision of the Personnel Director (on behalf of the Fire and Rescue Commission) on his grievance concerning retirement credit for a period of prior employment in a casual labor status. The Board also reviewed and considered the relevant provisions of the Personnel Regulations and the Retirement Law.

CASE NO. 87-34 (Continued)

After discussion and due consideration, it was the judgment of the Board that the decision of the Personnel Director was correct and in full compliance with established procedures. Therefore, the appeal was denied.

CASE NO. 87-40

A Firefighter appealed from the decision of the Disability Retirement Hearing Board subsequent to a prior remand. Counsel for the parties mutually requested a remand of this case to the Administrator for further review and appropriate action in accordance with established procedures, and the request was granted.

CASE NO. 87-58

A Firefighter appealed from the decision of the Hearing Examiner on his application for a Service Connected Disability Retirement. The parties agreed that the appellant was disabled from further employment as a Firefighter and the only issue to be decided was whether the disability was related to a service connected injury. The record showed that:

1. On November 20, 1987, the Hearing Examiner stated in his opinion, ". . . While I concur that (the appellant) is permanently disabled from work as a firefighter, . . . I do not find that his disability is a service connected disability as a result of the incident occurring on or about September 28, 1985. While (the appellant) did injure his knee on September 28, 1985, while performing his duty, I do not find that the injury occurring that day was an aggravation of a condition which caused him to be permanently disabled..." The Hearing Examiner believed the disability was caused by degenerative chondromalacia.
2. The Medical Review Committee found the disability to be work related.
3. The Fire Department did not investigate the alleged injury in September 1985 and was unable to refute the testimony of the appellant and other witnesses to the incident.

CASE NO. 87-58 (Continued)

4, Section 33-43(c) Service Connected Disability Retirement of the Employees' Retirement System for Montgomery County states:

"A member may be retired. . .on a service connected disability retirement if:

(1) The member is totally incapacitated for duty or 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. . .".

Based on the evidence of record, it was the judgment of the Board that the appellant had sustained a second on-the-job injury to his right knee in September 1985; that said injury aggravated his prior condition; and that he was unable to be employed as a Firefighter. Therefore, the appellant met the requirements for a service connected disability retirement under Section 33-43(c) of the Employees' Retirement System for Montgomery County. Accordingly, it was the judgment of the Merit System Protection Board that the decision of the Hearing Examiner must be overturned and the County was directed to award the appellant a service connected disability retirement retroactive to the date he was retired and reimburse him additional monies due as the result of such change. The County was further ordered to reimburse the appellant for reasonable attorney's fees incurred.

SUSPENSION

CASE NO. 87-15

An employee of the Department of Social Services appealed a one day suspension. There was a question on right of appeal as she was in a State/County position.

In 1977, the County and the State of Maryland jointly prepared and signed a "Memorandum of Agreement Concerning the Operation of a Personnel System for State/County Positions in the Montgomery County Department of Social Services." Item #5 Grievances and Appeals of that agreement states: "Employees shall process appeals concerning disciplinary matters and grievances in accordance with State Law, Rules and Regulations and Department of Personnel Policy #9, "Grievance Procedures".

" Based on this, there was no right of appeal to the County Merit System Protection Board on the suspension, and the appellant was notified that the decision of the State of Maryland on her appeal would also apply to, and be binding on the County.

TERMINATION

CASE NO 87-57

An Engineer III appealed the termination of his employment. The record showed that:

1. The appellant began employment with the County on March 16, 1987 as an Engineer III, and was required to serve a six-month probationary period.
2. On September 16, 1987, the appellant's supervisor notified him that he was going to recommend an extension of the probationary period, and did so on September 17.
3. The formal notice of Extension of Probationary Period from the Department Head was dated November 9, 1987; was signed by the Department Head on November 13, 1987; and was given to the appellant on December 1, 1987.
4. On December 10, 1987, the Department Head notified the appellant that he would be terminated effective December 16, 1987, but would be retained on paid Administrative Leave until January 13, 1988.
5. On December 16, 1987, the Department Head notified the appellant that the effective date of the termination would be January 13, 1988, instead of December 16, 1987. This action was required to assure payment of the Administrative Leave.

A review of relevant Sections of the Personnel Regulations revealed the following:

1. Section 1-2 Applicability states:

"The Personnel Regulations apply to all merit system positions and all County employees. "

2. Section 3 Definitions, Subsection 3-4 Merit System Employees states:

"All persons who are employed by the County in full time. . .positions. . .who have satisfactorily completed the required probationary period."

CASE NO. 87-57 (Continued)

3. Section 6 Appointments and Probationary Period,
Subsection 6-4 Probationary Period states:

"(a) Purpose. Each person appointed. . .to a full-time. . .merit system position must serve a probationary period as a continuation of the examination process to provide an opportunity to demonstrate proper attitude and ability for the position for which employed. . ."

"(b) Length and Effective Date. . . .The probationary period begins immediately upon employment. . .The Personnel Director must notify the Department Head thirty days prior to the employee's probationary period ending."

"(c) Extension. An appointing authority may extend the probationary period, up to a maximum of fifty percent of the original length of time, to provide a marginal employee an opportunity to improve, if deemed reasonable and appropriate."

"(e) Termination During Probation. Inadequate performance after counseling is justification for termination. A probationary employee must be notified in writing at least 15 days before the effective date of such action. . ."

"(g) Merit System Status. A Probationary employee becomes eligible for merit system status after satisfactory completion of the required probationary period and is then entitled to certain rights and benefits as provided for in these regulations. Merit System status is not automatic on expiration of the probationary period but is attained only when granted by the Chief Administrative Officer or designee. If, at the expiration of the probationary period or any extension, an employee has not been terminated, reassigned or granted merit system status, the probationary period is automatically extended and the employee must be placed on administrative leave until an action is taken. Employees subsequently terminated or reassigned must be given 15 days written notice of the action."

4. Section 24 Termination states:

"24-1 Definition. Termination is a non-disciplinary act by management to conclude an employee's service with the County. Reasons for termination include. . .
.(b) a probationary employee's failure to achieve a satisfactory level of performance during the probationary period. . ."

CASE NO. 87-57 (Continued)

"24-2 Management Responsibility. Prior to terminating an employee for the reasons states in (b). . .above, management must inform the employee in writing of the problem; counsel the employee as to what corrective action to take; and allow the employee adequate time to improve or correct performance or attendance."

"24-3 Appeals. A merit system employee who is terminated may appeal pursuant to Section 28 of these regulations."

5. Section 33-12 Appeals of Disciplinary Actions; Grievance Procedures, subsection (a) Appeals of Certain Disciplinary Actions of the Montgomery County Code states:

"Any merit system employee, excluding those in probationary status, who has been notified of impending removal. . . shall be entitled to file an appeal to the Board. . ." (Underlining added for emphasis)

6. Section 30 Disclosure of Illegal or Improper Acts gives the Board jurisdiction in cases involving merit system employees. The Ethics Commission has jurisdiction in all other cases.

Counsel for the appellant had alleged numerous violations of established procedures, while the County argued that the appellant lacked standing to file an appeal and had asked the appeal be dismissed for lack of jurisdiction.

It was the judgment of the Board that the attainment of merit system status is achieved only after a positive act by management and that such status may not be granted or attained by default. The appellant did not attain merit system status, and therefore, did not have right of appeal of a termination action. The appellant remained on the job until December 16, 1987, in full pay status until January 13, 1988 and was not harmed financially by the County's failure to meet the requirements of timeliness. Accordingly, the Board dismissed the appeal.

Counsel requested the Board conduct an investigation under Section 30 of the Personnel Regulations. After review of that Section, it was the judgment of the Board that because of the appellant's lack of merit system status, it did not have such jurisdiction and that request was denied.

TRANSFER

CASE NO. 87-25

A Firefighter appealed the failure to finalize his request for transfer from one department to another and the refusal of the Fire and Rescue Commission to intercede and direct such action.

The issues before the Board were whether the appellant was properly compensated for duties performed and whether the delay in releasing him to another Fire Department was a proper management action or an unreasonable and unfair one.

Testimony indicated that the appellant had been assigned to perform paramedic duties during his first year, but had not received the pay differential because he did not have one year of service. The Board noted that the County had established the one year of service requirement prior to paying the differential, but also noted that accrediting of such individuals was a State function. The Board believed the basis for a pay differential must be based on competence and proficiency, as measured by State certification, and not solely on longevity. Therefore, since the appellant was accredited by the State, and was assigned as a paramedic approximately 74% of the time, it was the judgment of this Board that he was entitled to the pay differential.

The Fire Department cited four reasons for the time required to find a replacement for the appellant: (1) he had not completed the probationary period; (2) the need for Board of Directors approval; (3) the limited paid staff available; and (4) the shortage of trained paramedics.

The Fire Department that offered the transfer had requested the transfer be effective on March 15, 1987, which was after completion of the probationary period. Further, the Fire Chief stated in his Feb. 15 letter that he did not anticipate any problems with satisfactory completion of the probationary period on March 3, 1987. Therefore, the requirements for transfer would have been met prior to the requested effective date.

CASE NO. 87-25 (Continued)

The "Vacancy Procedure", issued by the Fire and Rescue Commission, required the current employer to respond to a request for transfer within 15 days, which the Fire Chief did. As the Dept. Head, his willingness to accommodate the transfer must be considered the departmental response, as the Board of Directors did not act until 30 days after the request. Therefore, the Fire Department agreed to the transfer as required by the Personnel Regulations.

The staffing level at the Fire Department was adequate to man the equipment cited by the Fire Chief, and required one paramedic each day. At the time of the request for transfer, the appellant was a Firefighter, was not receiving a paramedic pay differential and the Fire Department had its fully authorized complement. Therefore, the requirement that he be replaced by a fully qualified paramedic appeared to be inappropriate and unnecessary.

The Fire Chief also testified that the Fire Department had about 20 volunteer paramedics, but that no effort had been made to find out if any of them were available to help on the day shift. It appeared to the Board that the shortage of paramedics cited was more theoretical than actual. While additional paramedics were desired, and the Fire Department had three authorized, the daily need was only one. Therefore, this argument was not sufficiently valid to be considered further.

The Board fully understood that the Fire Department had the responsibility to provide a public service and desired to do an outstanding job. However, in personnel matters it is necessary to maintain a balance between the public interest and fairness to employees. Staffing is a management responsibility and individual employees should not be penalized or suffer because of an inability of management to solve its problems. It was the judgment of the Board that the 30-35 day advance notice was more than adequate notice for the Fire Department. If additional time was needed, it should have sought a mutually agreed upon delay, rather than arbitrarily refusing to release the appellant. Additionally, the Fire Department did not actively pursue replacement in a timely manner and had not exhausted its available resources for replacement or adequate coverage.

CASE NO. 87-25 (Continued)

It was the judgment of the Board that the action of the Fire Department in delaying the appellant's transfer was unreasonable and arbitrary. Accordingly, it was directed that:

1. The Fire Department transfer the appellant within five days.
2. The Fire Department reimburse the appellant for the 10% Special Pay Differential (Paramedic) for the period of March 3, 1986 to March 15, 1987, with such payment being in cash and payment made within 30 days from the date of the decision.
3. The Fire Department reimburse the appellant for reasonable attorney fees incurred in the appeal.

APPEALED TO CIRCUIT COURT BY THE FIRE DEPARTMENT,
BUT SUBSEQUENTLY WITHDRAWN

CASE NO. 87-39

A Police Officer appealed from the decision of the Chief Administrative Officer on his grievance concerning an involuntary duty reassignment for medical reasons.

The case was resolved administratively, negating the need for Board review and action.

CASE NO 87-49

A Firefighter appealed from the refusal of a Fire Department to release him for transfer to another Fire Department. The record showed that the offer of a transfer was made on July 29, 1987 and agreed to on August 12, 1987.

Previously, the Board ruled that a 30-35 day advance notice was sufficient time for a Department to find a replacement and that delays of 4 to 6 months were totally unreasonable and unacceptable. The Board still found that to be true. Accordingly, due to the extended time that had elapsed, the Fire Department was directed to release the appellant to the other Fire Department. It was further ordered that the Fire Department reimburse the appellant for reasonable attorney's fees incurred in the case. Finally, the transfer, which should have occurred in late August or early September 1987, was not allowed to adversely impact on or affect the appellant's right to transfer to County employment, effective January 15, 1988.