

Merit System Protection Board 1990 Annual Report January – June

Montgomery County Government
Merit System Protection Board
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June 30, 1990

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1990
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 are:

Paul Corcoran - Chairman
(Appointed 1/88)
Anthony W. Hudson - Vice Chairman (Appointed 1/89)
Robin Gerber - Associate Member (Appointed 1/90)

DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in Article 4, Merit System and Conflicts of Interest, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County, Maryland; Article II Merit System, Chapter 33, of the Montgomery County Code; and Section 1-12, 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 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 Chief Administrative Officer 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."

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 generally 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 generally 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 generally released within three weeks of completing the hearing.

SUMMARIES OF DECISION ON APPEALS IN FY 1990
(JANUARY - JUNE, 1990)

CLASSIFICATION

Case No. 90-23

An Office Services Manager filed an appeal from the decision of the Chief Administrative Officer concerning the classification of her position. The issue before the Board concerned a violation of procedural steps/process and the Board concluded that:

Section 7-6 Appeal of Decision on Classification of the Personnel Regulations for Montgomery County, 1986, clearly states that classification decisions are only appealed to the MSPB if there is a violation of procedure. The appeal did not delineate what procedural steps/process were violated and the Board did not find any procedural violations. Therefore, the decision of the Chief Administrative Officer was sustained.

COMPENSATION

Case No. 88-15 (continued from the 1988 Annual Report)

Two Firefighters appealed to the Circuit Court of Maryland the Board's decision on their appeal concerning compensation for the successful completion of EMT-P training classes.

The Court was satisfied that the due process rights of appellants were not violated by the Board's failure to give the appellants a hearing. Appellants were not entitled to be compensated for attending the EMT-P training classes and, therefore, there was no basis for a hearing since they were not deprived of a constitutionally protected property interest.

The Court affirmed the Board's decision.

Case No. 89-20 (Continued from the 1989 Annual Report)

A Mechanic Supervisor appealed to the Circuit Court of Maryland the Board's decision on his appeal concerning shift pay differential.

The Court remanded the case back to the Board to take additional testimony and, consider specific memorandums and Council Appropriation Resolution No. 11-833 in order to conclude whether the shift pay differential policy was in effect for FY 89 and thereafter.

In the meantime, the County Council, at the request of the County Executive adopted resolution No. 11-1823, dated January 23, 1990, which resolved the matter on appeal. All parties were notified and the case was closed.

DISMISSAL

Case No. 88-51

A Liquor Store Manager appealed his dismissal for reasons of unacceptable performance. The case was held in abeyance pending resolution of criminal matters associated with the case. The County and the appellant settled the case. Subsequently the appellant withdrew the appeal, rendering the case moot.

GRIEVABILITY/TIMELINESS

Case No. 89-25 (Continued from the 1989 Annual Report)

The County appealed to the Circuit Court of Maryland the Board's decision, supporting the appeal of Transit Operations Supervisors, from a decision of the Personnel Office denying their grievances concerning a pay inequity matter. The Board ruled that the complaint was grievable and remanded it back to the Personnel Office for further processing.

The Court reversed the decision of the Board, finding that employees are precluded by Montgomery County Code SS 33-12 (b) from pursuing their grievances.

Case No. 89-50

A Fire Department Sergeant appealed the decision of the Personnel Office that his grievance concerning a transfer from the position of acting Fire Lieutenant to the position of Fire Sergeant was not a grievable issue. The record showed that:

1. The Fire Chief, notified the appellant that he was recommended for temporary promotion to the rank of Lieutenant and was reminded that his promotion, when made, would be temporary not to exceed twelve months and without any entitlement to the position on a permanent basis.
2. On January 6, 1988, the appellant signed the Fire Chief's letter indicating that he accepted the position.
3. Effective April 10, 1988, the appellant received a temporary promotion to Lieutenant. The comments section on the Personnel Action Form state: Employee has no vested rights to permanent promotion per M.C. Per. Regs. Sec. 22-4 as amended by EXEC. Reg. 2-88E.
4. Effective October 8, 1989, the appellant's temporary promotion was removed and he was returned to the title of Sergeant and transferred to another station. The record is clear that the appellant knew that permanent promotions to the rank of Fire/Rescue Lieutenant required being successful in all aspects of the 1989 Promotion Examination. Section 7-4(c) of the County Personnel Regulations cannot be applied to the appellant because he did not meet the qualifications; he did not pass the written examination. He also knew that temporary promotions yield no entitlements to the grade levels assigned.

It was the decision of the Board that the appellant had been treated fairly under the existing Personnel Practices and Regulations. Accordingly, the decision of the Personnel Office was sustained and the appeal was denied.

Case No. 89-54

A Mechanic Supervisor filed an appeal from the decision of the Personnel Office not to accept his grievance concerning involuntary transfer. The record showed that:

1. On September 22, 1989, the appellant was made aware or became aware of a Personnel Action transferring him to a different work shift, which caused him to be dissatisfied.
2. He filed a grievance concerning this matter on October 24, 1989.
3. Section 28-3 (b) of the 1986 Montgomery County Personnel Regulations (as amended) establishes a time limit of 20 calendar days for filing a grievance.

4. On November 2, 1989, the Personnel Office decided that his grievance had not been filed timely and would not be accepted for processing.

The time limit starts on the date after the adverse impact of the Personnel Action which affected him (Section 1-14 (a) of the 1986 Montgomery County Personnel Regulations), as amended, therefore, his grievance should have been filed on or before October 12, 1989.

The Board could find no basis for overturning the Personnel Office's decision. Therefore, it was the decision of the Board to deny his appeal.

Case No. 89-56

A Mechanic II appealed from the decision of the Personnel Office not to accept his grievance concerning attendance policy. The record showed that:

1. The appellant is a member of the Service, Labor and Trades (SLT) bargaining unit.
2. The Montgomery County Government has entered into an agreement that gives the Union exclusive representation rights for employees in the unit on all matters negotiated by the parties and covered by the contract.
3. Section 401 of the Charter of Montgomery County states that: "...Officers and employees who are members of a unit for which a collective bargaining contract exists may be excluded from provisions of the Merit System..."
4. The County's Collective Bargaining Law excludes the use of the provisions of the Personnel Regulations by unit employees if such matters are covered by the negotiated contract.

After reviewing the existing (SLT) contract and applicable law, it was the judgment of the Board that the appellant's grievance was properly covered by the Collective Bargaining Agreement. Since the appellant was a member of the (SLT) unit, he was required to use the negotiated grievance process contained in Section 10 of the agreement, and could not file a grievance under the Merit System. Accordingly, the decision of the Personnel Office was sustained and the appeal denied.

Case No. 90-24

Several Firefighters appealed the decision of the Chief Administrative Officer denying them compensation for hours which they worked beyond (40) hours per week without additional compensation.

The Board rendered its decision based on the written record and concluded that:

The Montgomery County Code, Section 33-8, authorizes the CAO to establish positions, pay grades and salary rates.

Section 12-2 of the Personnel Regulations for Montgomery County, 1986, as amended authorizes the CAO to establish the workday and work week for operational firefighters. The MSPB agrees that the appellants are operational firefighters pursuant to Section 3-12, Operational Firefighter of the Personnel Regulations, and the decision of the CAO based on these regulations concerning their hours of work was therefore, controlling.

It was the decision of the Board that the Fact Finder properly and correctly evaluated the situation.

The Board agreed with the Fact Finder's recommendation that the appellants failed to demonstrate a violation of the Merit System pursuant to the Montgomery County Code and applicable Personnel Regulations. The Board also endorsed the Fact Finder's decision that, "... There was no apparent violation of the Fair Labor Standards Act (FLSA)..." and also agreed with the appellants' attorney's request to, "...reserve any and all claims which they (sic, the grievants) have with respect to that act (sic, the FLSA) for review in a Federal Forum..." Accordingly, the grievants' appeal was denied.

Case No. 90-28

An administrative employee of the Personnel Division noted an intent to appeal the decision of the Chief Administrative Officer concerning the final disposition of his grievance. The appeal notice was subsequently withdrawn by the appellant.

MEDICAL

Case No. 89-52

An applicant appealed the "Not Acceptable" medical rating received for the position of Equipment Operator I. The County requested the applicant to submit documentation of alcohol abstinence for 30 days from his private physician, AA, or a counselor. The applicant provided the information and was recommended "medically acceptable" by the County Medical Examiner for placement, rendering the appeal moot.

Case No. 89-53

An applicant appealed the "Not Acceptable" medical rating received for the position of Correctional Officer I. The applicant felt that the medical evaluation by a doctor at the St. Agnes Medical Clinic was inaccurate.

The applicant was requested to provide the Board with a letter from her private physician regarding diagnosis, treatment and prognosis of asthma. After being notified twice by registered mail, the applicant did not respond to the Merit System Protection Board. Subsequently, the Board voted to close the appeal.

Case No. 90-32

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

1. The applicant was given a vision test as part of the entrance medical examination and it was determined that the applicant did not meet the uncorrected vision standard for the position of Correctional Officer.
2. Section 6.0, G.2 (b) of the County's Administrative Procedure 4-13 Medical Standards states in part:

...(b) standard visual acuity...Law and Correctional Officers: Standard visual acuity without correction, less than 20/100 in either eye; and with correction, less than 20/20 in either eye, unless the applicant documents successful long-term use of soft contact lens. Successful long-term use is defined as daily wear of soft lens (not hard or semi-rigid permeable) for at least six months without irritations, infections or allergy. Visual acuity with correction must be 20/30 binocular.

The County's Employee Medical Examiner report stated that if the applicant was able to document successful use of soft contact lens for six months and the soft contact lens corrected their vision to 20/20 binocular, the applicant would not be required to meet the uncorrected vision standard. Because the County's Employee Medical Examiner requirement followed Section 6.0, G.2 (b) of the County's Administrative Procedure 4-13, Medical Standards, and because the accuracy of the Medical Examiner's visual acuity testing was not in question, it was the judgment of the Board the "Not Acceptable" medical rating was correct and it was sustained.

PROMOTION

Case No. 89-22 (Continued from the 1989 Annual Report)

A Police Officer appealed to the Circuit Court of Maryland the Board's decision on his appeal concerning eligibility for the Police Sergeant's examination. The Circuit Court ordered that the decision of the Merit System Protection Board be affirmed.

Case No. 89-38 (Continued from the 1989 Annual Report)

Five Firefighters appealed to the Circuit Court of Maryland the Board's decision on their appeal concerning the promotional process for Master Firefighter/Rescuer and Fire/Rescue Sergeant.

After hearing oral arguments, considering the record, and memoranda of the parties, the Court found that the decision of the Board was not arbitrary, capricious or unconstitutional. The Court ordered that the decision of the Board be affirmed.

RETIREMENT CREDITS

Case No. 89-12 (Continued from the 1989 Annual Report)

An Accounting Assistant appealed to the Circuit Court of Maryland the Board's decision on her appeal concerning a service connected disability retirement, because of multiple sclerosis.

The Court found that the Board applied the incorrect standard as to appellant's burden of proof, and on November 8, 1989, ordered

that his matter be, remanded back to the Board for a decision not inconsistent with the correct standard of proof.

Pursuant to the order, the Board requested briefs from the County and the appellant's attorney on the following questions:

1. What is the correct standard of proof to apply in this case?
2. What is the correct standard of proof to be applied to the scientific testimony in this case?

The Board reviewed the briefs and re-examined the entire case file and continued to find that the decision of the Administrator as to the service connected disability was supported by substantial evidence in the record and must be sustained.

Case No. 89-51

A Deputy Sheriff appealed the decision of the Personnel Office that his grievance, concerning the purchase of military retirement service credits, was not filed timely. The record showed that:

1. The appellant began County employment, and entered the County's Retirement System on February 20, 1973.
2. The retirement law in effect from 1972 to 1978, gave an employee the right to purchase Retirement Service Credits for prior Military Service, provided such option was exercised within 30 days of the fifth anniversary of that employee's continuous County service.
3. Under the law, the appellant's eligibility period would have been from January 20, 1978 through March 20, 1978. He did not exercise the options during this period.
4. As a result of County Council legislation, the Employee's Retirement System was amended effective July 1, 1978. The major changes were the establishment of a new integrated plan; an open application period for the purchase of prior service credits, including military for all employees with five or more years of service; and a requirement for the County to formally notify all subsequent members of eligibility to purchase prior service credits on their fifth anniversary date.
5. The 1978 changes were communicated to County employees via local media stories, the June 1978 Employee Newsletter, "Overtimes" and a Personnel Bulletin dated July 13, 1978.

6. The appellant alleges he was never informed of his rights until the date of his grievance, October 19, 1989.

7. A check of the appellant's personnel records showed that he elected to join the Integrated Retirement Plan on September 5, 1979.

Appellant argues that the County's decision in 1978 to require actual notice to employees of their rights to purchase military service credits is "compelling evidence that there is no basis for a finding that appellant 'should have known' that a problem may have existed in the absence of actual notice."

A review of the legislative history of the Retirement Law Amendments - Legislative Bill No. 13-78, lends some support to Appellant's argument. In the course of discussing the modification of the purchase of military service credit procedure, the Chief Administrative Officer stated "that the Executive Branch has the responsibility to notify employees of their option to transfer military credits as it does to notify them of important options in other areas of the fringe benefit package included in the Personnel Regulations." Minutes of County Council work session, April 29, 1978, p.5., the CAO goes on to state that a computer program will be written to accomplish this notification objective.

As appellant argues, therefore, there is some support for the contention that the County recognized a deficiency in the notice procedure. There is, however, no evidence in the legislative history or other documents submitted in this case to indicate that the County Council intended to remedy this deficiency by making this legislative change retrospective. As a general principle, legislation is prospective unless otherwise indicated. In this case, making the notice requirement retrospective would have imposed a substantial burden on the Executive Branch. If this had been the Council's intent we believe they would have made it explicit.

In addition to the Board's failure to find support for appellant's argument that the County had a duty to apply the notice requirement retrospectively, we find that appellant's exercise of his option to join the Integrated Plan on September 5, 1979, weakens his contention that he had no knowledge of his right to purchase military service credits. Appellant does not explain the apparent inconsistency of arguing that he had no knowledge of his right to purchase military service credits, but did know of his right to join the Integrated Plan, when the information on both procedures was contained in the same materials and disseminated in the same manner.

For the foregoing reasons, the decision of the Personnel Office is sustained.

Case No. 89-55

An Automotive Supply Supervisor filed an appeal from the decision of the Administrator denying him a service connected disability retirement. The issues before the Board were:

1. Whether the Administrator erred as a matter of law in finding that Montgomery County, Maryland's appeal of the preliminary decision of the Administrator was filed within the required period.
2. Whether the Administrator erred in failing to find that the appellant is totally incapacitated for duty as the natural and proximate result of an accident occurring, or an occupational disease incurred of a condition aggravated while in the actual performance of his duty.

It was the decision of the Board that the timeliness of the matter brought no harm to the appellant and the decision of the Administrator was sustained. The Administrator's decision as to the service connected disability was supported by substantial evidence in the record. Accordingly, the decision of the Administrator was affirmed.

Case No. 89-57

A Bus Operator filed an appeal from the decision of a Hearing Officer, denying him a service connected disability retirement because of severe pain associated with paresthesia in the lower right extremity.

It was the judgment of the Board that after a thorough review, the decision to deny the service connected disability retirement was supported by substantial evidence in the record. Accordingly, the decision of the Prudential Insurance Company was affirmed.

SUSPENSION

Case No. 89-48 and 89-49

A Transit Operations Supervisor appealed from the decision of the Director, Department of Transportation concerning a one day and a three day suspension.

The case was settled prior to the scheduled hearing and Board action was not required.