

Merit System Protection Board Annual Report FY 1992

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Robin Gerber, Vice Chairperson
Angelo M. Caputo, Vice Chairperson**

Executive Secretary:

**Merit System Protection Board
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1992
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 1992 were:

Anthony W. Hudson - Chairman (Appointed 1/89)
Robin Gerber - Vice Chairperson (Appointed 1/90)
Angelo M. Caputo - Vice Chairperson (Appointed 1/91)

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 pre-hearing is scheduled. In cases involving suspension or dismissal, at least ten work days advance notice of the pre-hearing is given, with thirty work days notice given in all other cases. Upon completion of the pre-hearing, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision within thirty work days 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 ten 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 meeting for the purpose of receiving oral testimony. If the decision is issued based on the written record, it is prepared and released within thirty work days 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 thirty work days of completing the hearing.

SUMMARIES OF DECISIONS ON APPEALS

COMPENSATION/OVERTIME

Case No. 82-102

Pursuant to a remand order from the Circuit Court dated June 4, 1987, the Board made a final determination with respect to all issues in controversy in this appeal. The decision was based on a review of the record.

The number of overtime hours worked by each Appellant for which they shall be compensated shall be the amount certified by the parties in a letter dated January 22, 1991 from Appellants' counsel to Executive Secretary, MSPE, letter dated April 15, 1991 from Assistant County Attorney to Appellants' counsel, and a letter July 22, 1991 from Appellant's counsel to Executive Secretary, MSPB. These documents with attachments are made a part of this case file.

COMPENSATION/PAY INEQUITIES

Case No. 92-04

The Board reviewed the written record on the appeal filed on behalf of Appellant, et al., from the decision of the Chief Administrative Officer, denying the relief they requested in their grievance.

The Board concurred with the determination of the Chief Administrative Officer that there is no basis for granting the Appellants further pay adjustments since their salaries are equitable and consistent with both the County Code and Personnel Regulations.

Accordingly, the decision of the Chief Administrative Officer was sustained. The appeal was denied.

Case No. 92-06

The Board reviewed the written record on the appeal filed on behalf of Appellants, from the decision of the Chief Administrative Officer, granting partial relief of their grievances.

The Board concurred with the determination of the Chief Administrative Officer that there was no basis for granting the Appellants further pay adjustments since no pay inequities existed and that no County Code, Procedures or Personnel Regulations were violated.

The decision of the Chief Administrative Officer was sustained and the appeal was denied.

Case No. 92-07

The Board reviewed the written record on the appeal filed on behalf of Appellants, from the decision of the Chief Administrative Officer, granting partial relief of their grievances.

The Board concurred with the determination of the Chief Administrative Officer that the salaries of the grievants be increased at the time their next service increment is granted.

The decision of the Chief Administrative Officer was sustained, and the appeal was denied.

COMPENSATION/RETROACTIVE PAY

Case No. 91-46

The Board reviewed the written record on the appeal filed on behalf of a Police Officer, from the decision of the Chief Administrative Officer, concurring in part with a Fact Finder.

The Board disagreed with the determination of the Chief Administrative Officer that the start date for back pay and benefits should be November 19, 1990, the day Appellant was authorized by the County Occupational Medical Examiner to return to work.

It was the decision of the Board that the Fact Finder's conclusion and recommendation were correct. The Board agreed that Appellant's rights were violated since the County admitted that they had not given all of the records requested by the Appellant or his agents to him prior to the Arbitration Hearing. As corrective action, the Board agreed with the Fact Finder's conclusion and directed that the Appellant be given back pay and benefits retroactive to the date of the Arbitration Hearing in June, 1990.

DEMOTION/DISMISSAL

Case No. 91-51 & No. 92-08

This appeal combined #91-51 (Demotion), and #92-08 (Dismissal). Appellant submitted documents for pre-hearing in July, 1991 for #91-51 and August, 1991 for #92-08. The appeals were timely filed. Twenty eight (28) exhibits were filed for the combined appeal.

The County submitted 131 documents and six witnesses for the consolidated hearing. The pre-hearing conference was held on September 26, 1991 and the Appellant was not present. As a result, the Board denied the Appellant any further opportunity to object to the records submitted by the County. The Board did not deny the Appellant a chance to submit further documents and a hearing date was set. The Appellant did not appear at this hearing and offered no explanation for the absence. Thus, the Appellant was given the opportunity to hear charges of the County, to present evidence and witnesses, and to cross examine witnesses of the County.

The Board reviewed the record.

The statement of charges for the involuntary demotion was based on a written warning resulting from unsatisfactory work performance. The action complied with Section 26-4 of the Personnel Regulations. Appellant countered in June, 1991 that there were no reasons for the demotion and that the charges were harassment and retaliation against a merit employee. Few, if any document(s) presented by Appellant addressed the charges of the County in terms of the specifics of the charges and time period - CY 1990 and CY 1991 up to the final notice.

The statement of charges for dismissal was dated in July, 1991 with an effective date in August, 1991. Appellant was provided an opportunity to respond to the charges and the County took these into consideration in its final response. This action complied with Section 27-4 of the Personnel Regulations. The same set of documents were submitted by Appellant in response to the dismissal and to the demotion.

As the Board had noted in Case No. 91-22, which involved the Appellant, it understood that any employee who received an adverse personnel action believed that he or she is being harassed and/or retaliated against. However, the merit system regulations require that such adverse actions be taken for cause(s) identified in rule or regulation, be made known to employees and be specified sufficiently to allow time for response.

This review of the record showed that the actions were taken for reasonable and documented causes. There was little evidence that the actions were capricious or arbitrary. Appropriate regulations had been followed. Appellant's responses had been considered and individually disputed by documentary evidence.

The Board found no basis to countermand these adverse personnel actions. The appeal was denied.

DEMOTION/PERFORMANCE

Case No. 91-50

This was a decision on an appeal of a demotion and suspension for which pre-hearing conferences were held on July 22, 1991 and January 28, 1992. In connection with this appeal, on June 6, 1991, the Chief Administrative Officer concurred with the findings and conclusions of the Fact Finder and denied the grievance and relief requested.

The Appellant chose to file a grievance rather than appeal the discipline directly to the Board. A hearing was held by the County in considering the grievance. Then, the Appellant appealed to reduce/eliminate the disciplinary action which suspended him for 10 days and demoted him for a total of seven months. Initially, this disciplinary action was proposed for a 30 day suspension and nine month demotion. Subsequent supervisory reviews and the Appellant's actual job performance resulted in the reduced discipline shown above.

Inadvertently, one tape of the Fact Finder's recording of the evidentiary hearing in this matter was misplaced, but later recovered, and made available to the Board after the second pre-hearing conference.

On July 30, 1991, the Appellant agreed, in response to the County motion, to waive his right to a second full evidentiary hearing before the Board, provided the Board heard the taped record of the Fact Finder's hearing on his grievance. This was accomplished.

Further, in the exchanges between Appellant and the County in preparation for a hearing (after the tapes were misplaced), the Appellant agreed to almost all stipulations presented by the County. In consideration of the few remaining issues, the Board at the second pre-hearing conference held on January 28, 1992, requested that the parties address in writing the severity of the disciplinary action. This was the basic issue considered.

The Appellant raised another issue during the second pre-hearing conference having to do with an error made by the County in setting the Appellant's salary during his demotion.

The facts in this case were essentially not in dispute. What was in dispute was the severity of the disciplinary action.

Other employees on duty were disciplined but not as severely as the Appellant. The Appellant was the highest ranking employee involved in the matter giving rise to the discipline.

CONCLUSIONS

The Appellant did not put forward any arguments which convinced the Board that the disciplinary action was arbitrary, capricious, or without cause. His performance during the period under the disciplinary action was constantly reviewed and was ameliorated to a lesser penalty at the "11th hour". The disciplinary action was instant and not progressive in nature.

The Board agreed that the penalty for failure to follow procedures required in Departmental policy and procedures did not lend itself to progressive discipline, that is, a reprimand or admonishment, or a short suspension. Management took an action and later shortened its length. The Appellant had a very fine work record up to this incident and this was taken into account.

The Board is not in a position to substitute its judgement for responsible management officials who have a clear obligation to discharge their duties. The management actions were considered reasonable and appropriate and were ameliorated before and after the decision to discipline.

The appeal was denied.

Regarding the issue raised at the second pre-hearing conference, pertaining to the error in the Appellant's salary during his demotion, the Board's decision was that the overpayments made to the Appellant were to be recovered by the County over a three month period.

DISCIPLINARY/REPRIMAND

CONTINUED

Case No. 91-22

This was a decision of the Board in the remanded case, Civil No. 73478, ordered by the Circuit Court for Montgomery County, Maryland, on May 20, 1992.

The Board was ordered to issue a new decision which should be considered along with the Civil No. 68878 so far as the issues are identical.

BACKGROUND FOR BOARD CASE 91-22

This appeal was originally filed with the Board on December 17, 1990, based on the decision of the Chief Administrative Officer which adopted the findings and recommendations of a Fact Finder on the grievance which had been filed on April 4, 1990. The Department was advised to reduce the disciplinary action to a written reprimand based on the Appellant's excessive telephone use and unauthorized use of County facsimile equipment.

As noted in the Board's decision issued on February 26, 1991, the matter considered in Case 91-22 concerned only what had been before the Fact Finder, that is, the disciplinary action grievance. The Appellant attempted to re-introduce on appeal matters concerning her performance appraisal which the Board was considering in its Cases No. 91-19 and 91-39 or had already considered in its Case No. 91-06.

The record reviewed by the Board contained a report of a Fact Finder's hearing, the Personnel Director's in-depth review, and the Appellant's written representations of her disagreement with the record (p. 2.1 - 2.132). Thus, the Board's earlier conclusions were based on an unusually complete and clear record.

The Fact Finder's twenty-seven page report was very thorough and its recommendations were accepted without objections by the County. The Fact Finder dealt with the allegations of discrimination and harassment and found no substance in these allegations by the Appellant. The Fact Finder noted that the County needed to make the reprimand explicit as to what future conduct is or is not acceptable, since the clearer the set of expectations, the better the relationship between the Appellant and her supervisor would be. The Board found the Fact Finder was careful and judicious in considering the Appellant's objections and arguments.

CONCLUSION FOR BOARD CASE 91-22

The Board reviewed the record anew and came to the same conclusion as it did initially.

"In sum, we find that the CAO's decision was based on a carefully documented report from the Fact Finder which weighed all the evidence presented. You have presented little, if any new factual evidence, or information which would cause us to doubt the original evidence presented in your case. You have not disputed the facts surrounding the charges against you. Therefore, we find the CAO's decision reasonable and appropriate in light of the facts leading to the disciplinary action. We do not find a basis to further mitigate or eliminate the penalty."

Upon remand under Civil 73478, we find that the appeal is properly denied.

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DISMISSAL

Case No. 92-22

This was a decision of the Board based on the record and hearing on the appeal of dismissal from the position of Warden of the Montgomery Detention Center.

The Hearing was held on June 16, and June 29, 1992.

BACKGROUND

The County conducted a review of practices at the Detention Center growing out of concerns expressed by employees and the warden about alleged sexual harassment of female employees. As a result of the review, the County proposed dismissal of the warden and, after reviewing his response to the charges, dismissed him for:

1. Failure to perform duties in a competent or acceptable manner;
2. violation of an established policy or procedure;
3. negligence or carelessness in the performance of duties;
4. violation of provisions of County Charter, County laws, ordinances, regulations, state or federal statutes which address standards of conduct and spell out expected behavior to assure equal treatment of employees and a work environment free of unlawful sexual harassment.

It was the position of the County that the Appellant was dismissed because he allegedly sexually harassed female employees working there and fostered an offensive working environment through his actions. The County had broadly defined sexual harassment as abusive treatment of an employee by an employer or agent which would not occur but for the victim's sex. In this case, the County believed that the Appellant created a sexually hostile work environment. In this type of sexual harassment, a manager's sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. In the County's view, it was the reasonable victim's standard which classified conduct as sexually harassing even where the alleged harasser did not realize that his conduct created a hostile working environment. Additionally, the County maintained that all female employees do not have to complain or find some behavior objectionable to determine a hostile working environment.

In putting on its case before the Board, the County produced nine witnesses. They reported instances of objectionable looking at parts of their bodies, unnecessary office visits or calls, greetings with overtones more of friendship than business, invitations to lunch, cocktails, or dinner, discussions of personal and sexual matters, use of abusive language, delays in pursuing charges of sexual harassment, creating a degrading scene at a cocktail gathering (holding filled beer mug to face of female employee), and obscene and degrading statements made at an all-male meeting conducted by Appellant.

The Appellant, on the other hand, alleged that he never asked a female for sexual favors, never cursed in the presence of female workers, never used sexually explicit epithets in the presence of female workers, never touched a female worker in an inappropriate manner and did not recollect statements attributed to him at the all-male meeting. He points to his exemplary work experience, reputation as a fair employer, reputation as a promoter and advancer of women in the work place, and to his treatment of workers socially without regard to sex.

The Appellant did not believe a hostile environment existed because there was no allegation that he asked for sexual favors in exchange for an employment benefit and that the other behaviors taken together -- looking at parts of a worker's body, inviting women to lunch or "out", and speaking of women in abusive language when talking to other males are not sufficiently severe or pervasive enough to create an environment which was abusive. The Appellant argued that there was no proof that he altered the terms or conditions under which women worked nor proof that he undermined the emotional or psychological stability of the employees. The Appellant believed that he was abusive equally in his language

about men and women, but that he was careful not to make any such statements in the presence of women.

In sum, the Appellant found the charges involve incidents which were isolated and trivial, not severe nor pervasive, and believed that there was no alteration of the work environment for women nor an abusive situation which seriously affected the psychological well-being of employees. Even if some behavior was objectionable, the Appellant had done nothing to justify his termination.

Both parties provided the Board with memorandums of law which dealt with the lead cases involving sexual harassment.

The County provided copies of pertinent statutes which it believed were violated by the Appellant.

The Board did not believe on the basis of the testimony that the warden created a hostile work environment, such that a charge of sexual harassment could be found at the detention facility. The Board believed, however, that the testimony of a Correctional Specialist, III, was entirely credible with regard to Appellant's statements at an all-male meeting. These statements were sufficiently severe in their verbiage and intent to warrant commensurately severe discipline.

The Board believed that the warden as a manager acted contrary to the expectations of County policies and standards. The Board believed that his behavior, although not rising to the level of creating a hostile work environment, nonetheless was sufficiently obnoxious and unwelcome as to evidence a disregard on his part of the high standards expected of a key management official of the County.

The Board did not believe that his behavior was so pervasive and obnoxious that he should be dismissed. There was no evidence that he was counseled, admonished, or reprimanded, nor that he was given an opportunity to "clean up his act".

We understand that the Appellant had pending before his dismissal a request for disability retirement. It was the Board's opinion that the Appellant was to be restored to duty with no loss of pay, placed on leave if appropriate, and be given an opportunity to retire on disability, and, in any case, that his dismissal be stricken from his personnel records and replaced by a lesser penalty, such as demotion, suspension, etc.

GRIEVANCE

Case No. 92-37

Appellant was a Physician II (part-time) who had filed two grievances. The first grievance alleged wrongful actions by the County involving a written reprimand, a within grade reduction, arbitrary assignments of on-call duty, incorrect departmental medical procedures regarding referral and termination of patients and harassment and retaliation. The second grievance alleged wrongful actions by the County involving arbitrary assignment of duties as reprisal for his filing of a discrimination complaint to the Office of Human Relations Commission (OHRC).

The Board found that the first grievance was not grievable as to the disciplinary action alleged, as this action was not as proposed. The additional allegations in this grievance was not timely raised as they occurred more than 20 days prior to the grievance being filed. In addition, Appellant's allegation of harassment and retaliation for having filed a discrimination complaint with the OHRC was not grievable under SS 4.8 of Administrative Procedures 4-4. This ruling related also to the second grievance which alleged retaliation. Section 4.8 involved harassment or retaliation for having filed a grievance under AP 4-4, not for such allegations relating to the filing of a discrimination. The appeal was, therefore, denied.

GRIEVABILITY/HARASSMENT

CONTINUED

Case No. 91-06

This is a decision of the Board in the remanded case, Civil No. 68867, ordered by the Circuit Court for Montgomery County, Maryland, on May 6, 1992.

The Board was ordered to issue a new decision, in place of the decision of November 21, 1990, which shall set forth specific findings of fact connected with the agency's decision on this case.

The record for this appeal shows that the Board acknowledged receipt of an appeal based on five issues on September 5, 1990 and the County was asked on the same date to respond to the charges. They were shown as follows:

1. Alleged harassment, decided by Personnel, dated 6/14/90;

2. Conduct of Performance evaluation, decided by Personnel, dated 6/15/90;
3. Performance evaluation not signed, decided by Personnel, dated 6/18/90;
4. Alleged retaliation, decided by Personnel, dated 6/25/90;
5. Delay of service increment, decided by Personnel, dated 7/19/90.

1. The harassment allegation was addressed by the Labor/Employee Relations Manager's decision of June 14, 1990 based on a complaint received on June 13, 1990. This allegation focused on a proposed disciplinary action which was withdrawn by management. Thus, the County found no basis to consider the allegation of harassment as grievable since the discipline did not occur in the form proposed and that the counseling which did ensue was within a supervisor's discretion.

The Appellant's response to the County record was a long description of events beginning with the Appellant's assignment to the work unit and perceptions of treatment, what assignments she was given, what work was assigned to others, and how this work environment and supervisory attitude did not contribute to her growth and development. The Board found that the County's action concerning the original grievance was appropriate and the instant removal of a disciplinary action did not provide an opportunity for a grievance.

2. The performance evaluation in question was conducted on October 12, and the County received a complaint on June 12. There is a 20 day limit for filing a grievance from the incident giving rise to the grievance. The grievance was denied.

3. The unsigned performance evaluation form was for the period 2/88 to 1/89 which the Appellant received on January 12, 1990. The basis of the grievance was that the Department Head and Division never signed the evaluation and, therefore, the form was not valid. The County found this allegation as untimely filed and declined to consider the issue further.

When the Appellant filed with the Board on these allegations concerning performance evaluation. the employee interpreted the administrative regulations of the Department to mean that the 20 day requirement should not apply until the evaluation form had gone through all the steps of processing and the results known by the employee.

The Appellant asked the Board to consider the delay in the evaluation as improper. The County found the employee's grievances untimely and noted that the appraisal had in fact been signed by the Division Chief and Department Head. The Appellant did not sign the form as the County states.

Thus the Board found that the County response was acceptable and the response of the employee was an effort to argue a grievance before this Board which was untimely. The reason why the Board brought up the matter of the signed appraisal was an effort to show the Appellant what the Board looked at in view of Appellant's argument. The Appellant in the appeal that the time limit for consideration of the performance evaluation is the date it met the Departmental requirements, i.e., in the Board's view, when it was signed by departmental officials. Yet the Appellant ignored that date and had presented the Board further argument concerning dissatisfaction with that evaluation. Accepting the Appellant's position would mean that when appraisal was presented, the Appellant would have appealed. This was when the form was signed by responsible officials. Even on that date Appellant did not appeal the timeliness, but continued to pursue the same arguments.

The Appellant viewed the totality of actions as harassment by management because Appellant did not get what was believed was due and the failure to receive what Appellant believed was due was a deliberate action of management to harass Appellant. However, each charge must be viewed on its face. The Board looked at the record. The County followed its procedures. The employee was late in raising a grievance. The lateness issue was looked at by the Board, and the County denial of the grievance was appropriate.

4. The allegation of retaliation was addressed by the County in the memorandum of June 25, 1990 which contained the Personnel Director's summary of an investigation of the Appellant's charges of retaliation and harassment in connection with the grievances to the County and charges to the Human Relations Commission. This memorandum was enclosed as an attachment.

The Board reviewed the record and found the County's response reasonable, its review appropriate, and its conclusion acceptable. The Appellant presented no new evidence which caused the Board to direct the County to change its conclusion on the basis of the record on this charge.

5. This charge was based on the County's acceptance of the recommendations of a Fact Finder that the grievance of the Appellant on the delay of the annual increment be denied. The Appellant mentions the Fact Finder's report and provided a copy to the Board. The County did not mention it in its response of September 19, 1990. The Appellant, in reaction to the County's representations on the appeal, gave a complete analysis of disagreement. The Board reviewed the Fact Finder's file in existence at that time.

The thrust of the Appellant's concerns was that the Fact Finder was imprecise, not completely factual, and given to allowing

management the benefit of the doubt. It was clear that the Appellant's contention was on track - that if Appellant did not have written or other indications, that Appellant's work was not up to par as the days passed, how could Appellant have known what to improve, and how to improve, after the fact, particularly when the evaluation was delayed. However, given this consideration, the gist of the Appellant's arguments did not sway this Board that the County's action in accepting the recommendation of the Fact Finder was arbitrary or capricious. Nor did the Board believe that the Fact Finder acted in an arbitrary and capricious manner and was not judicious in considering all the evidence available at the time. The Board did not find a basis to overturn the County's determination to accept the Fact Finder's recommendation.

CONCLUSION

This Board has reviewed anew the file in Case No 91-06 which was available to the Board sitting at the time the initial decision was made. It was the Board's conclusion that the arguments presented by the Appellant did not lead the Board to conclude that there was some material or convincing matter that was overlooked from the information provided by the Appellant, that the County had failed to follow its own regulations in a manner which denied the Appellant due process, or a benefit to which she was entitled, or that the record available for review clearly showed that the Appellant had been mistreated and corrective action was warranted.

For the reasons stated, the appeal was denied.

Case No. 92-42

A Transportation Department employee filed an appeal from the decision of the Labor/Employee Relations Manager, denying the complaint as not a grievable issue. The County later agreed to process the complaint and the appeal was withdrawn.

GRIEVABILITY/PERFORMANCE APPRAISAL

Case No. 92-10

The grievance giving rise to this appeal was filed in March, 1991. It concerned actions directed by the Board in an appeal in 1983 including removing a disputed performance appraisal from the official and departmental files. The form was removed from departmental files which the employee had reviewed at a later time.

The form was not removed from the official files and the document was introduced by the County during the course of another matter in the courts. In the original grievance filed in March 1991, the employee asked for relief to include written confirmation that the records had been purged and reimbursement to the attorney for fees incurred, "...to defend myself against improper evidence which was improperly introduced by the County Attorney during the civil trial."

When the Board ordered corrective action in its decision in 1983, it was not contemplated that it was the employee's obligation to assure that records were expunged. It was the County's burden to purge its files. This was not done. Failure of an employee to review his/her records annually is not an impeachable offense by an employee. An employee can reasonably expect that an order of the Board resulted in full compliance, since the departmental records were purged.

The employee was not requesting legal fees as a result of a matter appealed to the Board. The employee was asking the Board to award legal fees because the employee incurred legal fees in a matter which brought to the fore the existence of a file which had not been purged from the employee's official records. Appellant's lawyer had indicated that the monetary relief requested covered his fee.

The Board was moved by fairness and justice in this appeal. Granted, the grievance and appeal would not be necessary if the employee had reviewed the record. However, to accept such an argument lets the County have little, if any, responsibility to maintain records and files in compliance with decision and procedures. What caused the employee to know of the County's failure to comply was the other litigation in which the employee incurred expenses. Hopefully, compliance will occur without employees bearing an unreasonable share.

The County was directed to pay the fee as requested by the Appellant in resolution of the grievance.

Case No. 92-24

A Planning Manager filed a grievance regarding a performance review/assessment as well as a request that Appellant's supervisor cease hostilities him and treat Appellant respectfully.

The County's response to the grievance granted Appellant relief by setting aside the performance appraisal and also that a new performance appraisal be provided to Appellant in six months. The new performance appraisal was to be prepared using extra care to ensure

that it be both fair and confidential. Regarding the issue of treatment by Appellant's immediate supervisor, the Director stated, "That all Managers treat those that they supervise in a professional manner."

The matter of the performance appraisal has been resolved by the Director. It was also the Board's opinion that the Appellant had failed to ascertain that treatment by immediate supervisors was a matter that fell within Montgomery County Administrative Procedure 4-4, Grievance Procedure. The hostilities referred to was a result of supervisor's review of the performance appraisal with the Appellant. The relationship between a supervisor and an employee could give rise to a grievance if an adverse action or treatment of the employee affected a term or condition of employment. It was the Board's opinion that this had not occurred.

The Board denied this appeal on the record. The Director of the Department responded to Appellant's original charges in an acceptable manner.

GRIEVABILITY/PROCEDURE

Case No. 92-31

The matter appealed was an "Order for Mechanics to assume oversight of, and responsibility, for County owned property (tools)." In the appeal petition, the Appellants noted that this order, violated the scope of the specification for the Mechanic classification and constitutes an illegal delegation of duty addressed within the specification of supervisors. As relief, the Appellants sought cessation of the order.

The County Labor/Employee Relations Manager had informed the Appellants that the initial complaint filed was not a grievable issue and should be pursued under the provisions of Administrative Procedure 4-2, Classification Procedures.

The Personnel Director in his response on this appeal pointed out that the matter grieved originally concerned an issue of working out of class specification rather than assignment of work and that this understanding was reached earlier.

The Appellants, in their final response to the Board, stated that there are two issues for the Board to consider: first, the "... illegal order which forced subordinate employees to assume duties beyond the scope of the Mechanic Class Specification."; and

second, the lack of timeliness in adjudicating this appeal. Concerning the lack of timeliness, the Appellants asked the Board for a ruling without remand and that the Board allow affidavits be obtained from various lead personnel to confirm the existence of the long-standing policy of the Department concerning oversight of County tools. These latter two requests were made as motions.

CONCLUSIONS

The first motion was denied. The Board did not believe it was in the best interests of the Appellants to assume complete jurisdiction at that point in time in view of the issues in this case.

The second motion was denied. Whether there was a long-standing policy concerning the oversight of tools would not drive this appeal at this point. The basic issue was whether this matter raised by the Appellants was, in fact, a grievable matter.

Essentially, the Appellants believed that employees are supposed to work within their assigned specifications and that supervisors are supposed to not assign work out of specifications since the Chief Administrative Officer had so mandated. They reason that the work assignment at issue was thus an issue of working conditions subject to grievance procedures.

The Board did not agree with the Appellants. The classification program had not been suspended. The Administrative Procedure under which the classification program exists was operable. The County had indicated that this was the proper venue for this matter. The Board agreed with the County and denied the Appellants' first motion to decide the facts and not remand. The case was remanded for consideration as a classification matter.

The appeal was denied.

GRIEVANCE / REPRIMAND

Case No. 92-51

Appellant is a physician who was employed part-time and resigned his position.

In January, 1992 Appellant had received a written reprimand for unprofessional and threatening behavior and insubordination. His grievance challenging this action was denied by the Deputy Chief Administrative Officer.

The County alleged that the action taken against Appellant was justified by the nature of Appellant's conduct, and was part of progressive discipline since Appellant had been counseled about behavior toward supervisors and other staff members.

After a thorough review of the record and written arguments by both sides, the Board found that the discipline was justified.

According to the account written by the Fact Finder, Appellant had both acted inappropriately toward supervisors, as well as exhibited a pattern of hostile and uncooperative behavior toward other staff members. These allegations were supported in part by Appellant's own statements.

The Board found that the actions of the County in giving Appellant a written reprimand are supported by the record, and does not find sufficient argument by the Appellant that the disciplinary action was arbitrary, capricious or without reasonable cause. The Board will not overturn the action of the County. The appeal was denied.

GRIEVABILITY/SELECTION PROCESS

Case No. 92-46

Appellant applied unsuccessfully for the position of Code Enforcement Inspector III in the office of the Board of License Commissioners.

The County informed Appellant that the grievance was not timely filed, because he had received verbal notice of his non-selection on February 19, 1992. The County maintained that Appellant demonstrated his knowledge of his nonselection on February 20, 1992 by announcing to a hearing of the Board of License Commissioners that he had not been hired for the position.

Appellant claimed that he was not informed conclusively of his non-selection during the discussion with the Director of the Board of License Commissioners on February 19. Appellant also contends that his statement at the hearing on February 20, only indicated his speculation that he would not be selected for the position.

Appellant was notified in writing of his non-selection on February 21, 1992. Based on this date, his March 12, 1992 grievance would be timely filed.

The Board found that the County could not rely upon informal, verbal discussions with supervisors as notice sufficient to toll the time limit for grievance filing. A formal written

notification, as is the customary practice of the County, is the only fair means to determine the time of notification. The acceptance of less formal communications of such important matter as selection for promotion would result in a plethora of charges of "who said what to whom", simply to resolve matters of timeliness.

The Appellant's appeal was sustained, and the grievance was remanded to the County for processing.

GRIEVABILITY/TIMELINESS

Case No. 89-02

CONTINUED

The Appellant and other Liquor Control employees filed an Open Door Review on June 22, 1988 challenging the leave adjustment benefit credited to them under Sections 13-2 and 14-2 of the 1986 Personnel Regulations. Appellants argued that the employees hired as permanent Merit System Liquor Clerks between the period April and July, 1987, were not credited with the full amount of annual and sick leave due them because of the change in Personnel Regulations, effective July, 1986.

The Board in its initial decision in this case treated Appellant's Open Door Review as a grievance, and ruled in favor of Appellant on July 13, 1989. The County appealed the Board's decision, and on March 19, 1991 the Maryland Court of Special Appeals vacated a lower court decision and remanded the case with instructions to remand to the Merit Board to address the issue of whether the grievance was timely.

Upon review of Appellant's case the majority of the Board has determined that the Open Door Review, which was treated as a grievance, was not timely filed. A grievance "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...", Section 1-13(a) of the Personnel Regulations. In this case, Appellant knew of the allegedly incorrect calculation of benefits on June 5, 1987, when the allowance for annual and sick leave appeared on her paycheck. Therefore, it was the opinion of the majority of the Board that the Appellant did not file the grievance at issue until June 22, 1988, well beyond the allowable time limit.

Case No. 91-41

This appeal involved Appellant's efforts to obtain equal treatment with respect to his employment including an adjustment to his date of promotion. The appeal was based on a determination dated April 2, 1991 which denied the relief which the Appellant requested in his grievance because the grievance was not timely filed.

Appellant believed that the time limit for a grievance was twenty days from the date that he learned that another employee was successful in obtaining relief after filing a timely grievance. The grievance filed by the other employee related to a promotion matter in which Appellant has heretofore been similarly situated. Appellant first became aware of his similar situation when he, the other grievant, and others had their standing changed from "qualified" to "well qualified" on a promotion list. Subsequently, he was permanently promoted to Sergeant retroactively. Later in January, 1991, Appellant learned that the other employee had his retroactive date moved back to January 1, 1989 although he was in a similar situation as himself up to that time.

The County argued that Appellant could not file a grievance because of the relief received by another employee in resolution of that grievance. Further, the County stated that the date when the employee found out another employee's relief in a grievance is not a grievable event. Interestingly, the County referred to the date when employee could have filed a grievance but failed to do so. Later the County stated that the date Appellant could have filed a timely grievance was when his standing on the list improved.

The Board did not agree with the County. Section 28-2 (c) of the Personnel Regulations defines a grievance as an alleged improper, inequitable or unfair act in the administration of the merit system, which may include promotional opportunities, selection for training, duty assignments, work schedules, transfers and reduction-in-force. An employee may file such a claim for relief if he/she believes that he/she is adversely affected.

The County denied the grievance primarily for lack of timeliness, yet reached to the merits of the issue in its representations. The Board disagreed. The claim of the Appellant was a grievance, and was filed at a time in a chain of events and circumstances which was the most appropriate and reasonable time. Grievances can be resolved by management only after careful deliberation and review. Hopefully the reasonable resolution of a grievance ought not to spawn other claims for relief. Within a merit system, fairness, equity, openness, and explainable decision should be the touchstones.

To avoid undue delay and the possibility of further grievances on this matter if case were remanded, it was the decision of the Board to grant the relief requested concerning the retroactive promotion date for the Appellant and award of reasonable attorney fees.

Case No. 91-41

CONTINUED

The County requested reconsideration under Section 29-19 of the Personnel Regulations on the basis of timeliness.

The Board reviewed written representation on this matter.

It appeared to the Board that the County had raised a reasonable question about the Board's decision as it related to the timeliness of the appeal. Thus, the Board agreed to reconsider its decision in the above referenced case.

Case No. 91-41

CONTINUED

The Board vacated its separate orders of October 16, 1991, addressed to the Personnel Director and attorney for Appellant, with respect to the above-referenced appeal.

The Board reaffirmed its decision of September 4, 1991, finding for the Appellant on the issue of timeliness of the grievance.

The Board reconsidered its decision of September 4, 1991 on the merits, and directed the County to process Appellant's grievance.

Case No. 92-19

This was a decision on Appellant's appeal concerning the failure of the Chief Administrative Officer (CAO) to respond to his grievance within the specified time limits as mandated by AP4-4, Section 6.4 dated June 13, 1991.

Appellant apparently moved through the grievance process within the time limits set for his action(s) and, when the County was not responsive, he moved on to the next step even though there had been no consideration on the merit(s) of the grievance. In his appeal petition dated November 21, 1991, he stated that he was pursuing this action "...To preserve his rights of being afforded due process in the grievance procedure."

The matter giving rise to his appeal, concerned two of his performance ratings for the years 1990 and 1991.

The record showed that the County was prepared to meet with Appellant and had scheduled a meeting on the performance issue on December, 1991. This meeting was scheduled too late according to Appellant's memorandum to the CAO in December, 1991.

The Board certainly understood his concern about timeliness in processing actions by the County Government. The Board was also concerned about timeliness and effective administration of the personnel system during austere times. To preclude the possibility of two cases, one on timeliness and one on the issue(s), the Board remanded his grievance to the County to proceed with the resolution meeting which had been scheduled in December, 1991.

The County was made aware of this decision.

Case No. 92-23

This appeal was based upon a claim that the Chief Administrative Officer did not respond to a grievance within the time limits stated in the County's Grievance Procedure. Administrative Procedure 4-4 governs the time limits to be applied in this case. The County had 15 calendar days to meet with the Appellant and attempt to resolve the grievance. The County admitted that it did not meet this time limit. The Labor/Employee Relations Unit, acting on behalf of the CAO, took 25 days to begin attempts to schedule a meeting with the Appellant. The meeting finally took place in January, 1992.

The Board found that the violation of the time limits by the County did not operate to make the Appellant the prevailing party on the underlying grievance. The Appellant must prevail on the substantive merits of the grievance in question. This Board had informed the County in the past to adhere to the guidelines provided in Administrative Procedure 4-4. Proper and fair administration of the Merit System depended on timely processing at all steps. The appeal was denied.

Case No. 92-30

A Health Department employee filed an appeal from the decision of the Labor/Employee Relations Manager concerning the timeliness of a grievance. The appeal was subsequently withdrawn by the Appellant.

Case No. 92-40

The Appellant, filed a grievance in February, 1992, alleging that the decision to promote others to the rank of Sergeant instead of him were politically motivated, rather than based on rating scores. As relief the Appellant requested immediate promotion to the rank of Sergeant. The Labor/Employee Relations Manager in a letter dated March 3, 1992, determined that his complaint was not timely filed and could not be processed further.

The County maintained that Appellant's complaint is untimely because Section 6.0 of Administrative Procedure 4.4 states, "If unable to informally resolve the problem and wish to file a grievance, submit the grievance on the appropriate form to the immediate supervisor. This must be done within 20 calendar days from the date the employee knew, or should have known, that the problem existed." The Appellant referred to a promotion eligibility list which had expired sixteen months prior to his complaint.

The Merit System Protection Board held that Appellant was required to file his complaint within 20 days from the date he learned that he had not received the promotion he sought. A decision of the Board cannot serve as the triggering event for the filing of a complaint, where the employee knew at the time of notification on the promotion matter that he had an issue for complaint.

Therefore, the decision of the Labor/Employee Relations Manager was sustained, and the appeal was denied.

Case No. 92-41

Decision on the record. The instant appeal involved the removal of accrued leave in January, 1992 as a result of the County's action on a decision of the Board on a case which had been remanded by the Maryland Court of Special Appeals for re-consideration of a timeliness issue.

The Board's last decision on timeliness of an earlier Case No. 89-02 reversed its earlier decision and the County removed the relief (leave) which Appellants had attained in this case.

The Appellant was one of several employees who were joined in appeal of Case No. 89-02 which had then advanced again to the courts.

This appeal arose because of denial by the County of another employee's grievance. The County ruled that it did not have the authority to review a Board decision through the grievance process.

Understandably, the Appellant was concerned with the unjust effect of the Board's reversal. However, the proper venue for appeal was with the Courts, not the Administrative Grievance Process. The issue raised could not be handled administratively. Case No. 89-02 which caused this appeal was well beyond, and remained well beyond, the Administrative Grievance and Appeal Processes. The County's action in removing accrued leave was not discretionary. Likewise, the Board was not able to reach the Appellant's concerns.

The Board agreed with the County. This was not an administrative grievance. The appeal was denied.

Case No. 92-44

This appeal involved the removal of accrued leave as a result of the County's action on a decision of this Board on a case which had been remanded by the Maryland Court of Special Appeals for reconsideration of a timeliness issue.

The Board's last decision dated November 20, 1991 on timeliness of Case No. 89-02 reversed its earlier decision, and the County removed the relief (leave) which Appellants had attained.

This appeal arose because of denial by the County of Appellants' grievance. The County ruled that it did not have the authority to review a Board decision through the grievance process. The proper venue for appeal was with the Courts, not the Administrative Grievance Process. The issue raised could not be handled administratively. Case No. 89-02 which caused this appeal now was well beyond, and remained well beyond, the Administrative Grievance and Appeal Processes. The County's action in removing accrued leave was not discretionary. Likewise, the Board had no discretion to hear these concerns.

The Board agreed with the County. The Board noted that this matter was a joint appeal to the Circuit Court for Montgomery County, Maryland in Civil 85167, and decided on July 16, 1992. The appeal was denied.

Case No. 92-45

The instant appeal involved the removal of accrued leave as a result of the County's action on a decision of the Board on a case which had been remanded by the Maryland Court of Special Appeals for reconsideration of a timeliness issue.

The Board's last decision dated November 20, 1991 on timeliness of Case No. 89-02 reversed its earlier decision, and the County

removed the relief (leave) which Appellants had attained.

This appeal arose because of denial by the County of Appellants' grievance. The County ruled that it did not have the authority to review a Board decision through the grievance process.

The proper venue for appeal was with the Courts, not the Administrative Grievance Process. The issue raised could not be handled administratively. Case No. 89-02 which caused this appeal was well beyond, and remained well beyond, the Administrative Grievance and Appeal Processes. The County's action in removing accrued leave was not discretionary. Likewise, the Board had no discretion to hear those concerns.

The Board agreed with the County. The Board noted that this matter was a joint appeal to the Circuit Court for Montgomery County, Maryland in Civil 85167, and decided on July 16, 1992. The appeal was denied.

HARASSMENT/RETALIATION

Case No. No.91-19 and No. 91-39

CONTINUED

This was a decision of the Board in the remanded case, Civil No. 78859, ordered by the Circuit Court for Montgomery County, Maryland, on March 24, 1992.

The Board was ordered to consider further or act upon this case in view of the other Court remands, i.e. Civil No.68878 and Civil 73478.

BACKGROUND FOR BOARD CASE 91-19

An appeal was originally filed with the Board on December 17, 1990 concerning an allegation of harassment and retaliation and a delay of service increment without conducting a performance review based upon the decisions of the Labor/Employee Relations Manager dated November 19 and 21, 1990.

It was filed the same day as another appeal by the same Appellant concerning a disciplinary action. Both matters were considered initially by the Board as one appeal until the Personnel Director in his response to the Board on Case No. 91-22, January 11, 1991,

noted that it was premature to appeal these issues separately to the Board as the propriety of the delay of service increment has yet to be decided by the Chief Administrative Officer. Thus, the Board told the Appellant that case number 91-22 will refer only to the appeal of the grievance on the disciplinary action.

The new case number assigned was 91-19 which covered:

1. Complaint filed October 26, 1990 alleging that Appellant's supervisor's exercise of supervisory authority over her work is harassment. The County found the action not grievable in its final decision on November 18, 1990, noting that "...dialogue between a supervisor and subordinate which results in no adverse or substantive action being taken against an employee is not an issue which is appropriate for review through Administrative Procedure 4-4, Grievance Procedure."

2. Complaint filed October 24, 1990 alleging that she was unaware that her service increment was being delayed for a second time for twelve months. The County found the allegation duplicative of an earlier grievance and would not accept it for processing. Additionally, the County believed that the Appellant was aware that her service increment had been delayed the first time and she knew how long it was to be delayed because a personnel action form had been provided.

STET

The Board reviewed the record anew as required in this remand and stood by its earlier decision to deny the appeal.

No procedural error was found. No evidence was found which caused a change to the earlier decision. The Personnel Director presented a clear report with reasonable conclusions. The Fact Finder reached a reasonable conclusion based on the testimony provided by witnesses. The Appellant was given every opportunity to provide materials for consideration, to examine and cross examine witnesses, and to provide the Board with materials on the issues.

The appeal of Board case number 91-19 was denied on remand under Civil 78859.

BACKGROUND FOR BOARD CASE 91-39

An appeal was originally filed with the Board based on the decision of the Labor/Employee Relations Manager on February 22, 1991, concerning allegations of violations related to the conduct of performance evaluations for the period February 1990 to January 1991. The Personnel Director responded on April 2, 1991 and the Appellant provided final comments on April 12, 1991. The Board decision was dated July 3, 1991.

The employee asked for a hearing, however, the Board decided the appeal on the record so noting in its decision.

The record was complete, the documents were not in dispute, and the Board decision of July 3, 1991 captured the essence of the issue.

Many of the same concerns raised previously by the Appellant in Case No. 91-19 about timeliness, authority, counseling and assignments were presented there.

CONCLUSIONS FOR BOARD CASE 91-39

The Board found no basis to change its earlier decision on Case 91-39.

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MEDICAL RATING

Case No. 92-28

An applicant appealed the "NOT ACCEPTABLE" medical rating received for the position of fire fighter. The applicant was re-examined and he subsequently withdrew the appeal.

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PROMOTION/PROCEDURES

Case No. 90-36

CONTINUED

In response to a case remanded from the Court of Special Appeals for Montgomery County, Maryland.

The Court's decision is as follows:

"On the record before us, we are unable to conclude whether the Appellant's previous position was actually reclassified by another procedure used by the County to circumvent the jurisdiction of the Board. Accordingly, the decision of the Circuit Court is reversed with direction for the Merit Board to determine under the circumstances of this case, wherein the Appellant had met all standards of promotion, whether Appellant's incumbent position had in fact been reclassified."

THE BOARD RENDERS THE FOLLOWING OPINION

Analysis and Findings

Section 7.2(b) of the Personnel Regulations describes classification as "...The allocation of positions to occupational classes and the assignment of each class in the class plan to a pay grade on the general salary schedule."

Under Section 7-2(j), a position is described as "...A grouping of duties and responsibilities assigned by an appointing authority to be performed by an individual. A position may be either full-time, part-time, or temporary and may be occupied vacant, or job-shared."

Section 7-2(m) describes reclassification as "...The reassignment of a position to a different class."

Section 7-3(f) gives the Chief Administrative Officer authority to reallocate a class (Sergeant, Lieutenant, etc) under certain circumstances. "The Chief Administrative Officer may reallocate a class from one pay grade to another when a job evaluation review so indicates, the salary range of the pay grade is no longer competitive in the labor market based on the County's compensation philosophy (as expressed in section 7.1 of these regulations and Section 33-5(b)(3) and 33-11(b) of the County's merit system law), or a change is required to maintain the internal equity of the County's Classification Plan."

Section 7-4(a) states who may request a review of the classification of a position.

"The Chief Administrative Officer must establish written procedures for the review of the classification of a position. An incumbent, or a superior, may request a review of the classification assignment of a particular position."

Section 7-4(b) describes the authority of the Personnel Director to reclassify a position as a result of a review or desk audit.

"The Personnel Director may reclassify a position when a review of the position description or a desk audit indicates a significant change in:

- (1) Type of work performed;
- (2) Difficulty and complexity of duties;
- (3) Level of responsibility; or
- (4) Knowledges, skills, and abilities required."

Section 7-4(c) describes the effect of a reclassification on an incumbent.

"The incumbent of a reclassified position will be placed in the new class unless the incumbent does not meet the minimum qualifications of the new class. Employees reclassified downward are eligible for noncompetitive promotion as provided in Section 6-5 of these regulations."

Section 7-5(c) describes procedures for administrative review which are not further elaborated here.

Section 6-3, Selection procedures describes how a position is to be filled.

"When a position is to be filled, the appointing authority must be provided an eligible list that has been certified by the personnel office. Subject to affirmative action objectives, the appointing authority is free to choose any individual from the highest rating category. If an individual from a lower rating category is selected, the appointing authority must submit written justification for such action, which must then be approved by the Chief Administrative Officer and made a part of the selection record."

Section 6-5 describes noncompetitive reappointment provisions and we reference subpart (b) only.

"A former County merit system employee, a former employee of a Montgomery County fire and rescue corporation in the firefighter-rescuer occupational series, or an employee demoted as a result of a reduction-in-force, disability, or reclassification may be reappointed or promoted noncompetitively, provided such action is approved by the Chief Administrative Officer and: the individual fully meets the requirements for the subject position."

Administrative Procedure 4-2, Classification Procedures provides further guidance on the issues in this case.

Section 4.1(b) state that, "...An employee who is filling a position on a temporary, short-term (as defined by Section 33-20 of the Montgomery County Code), or acting basis may not request an individual position classification study of that position."

Beginning with Section 6 of this procedure and continuing through Section 13 is outlined the step by step activities which lead to classification decision by the Chief Administrative Officer which is final.

Lastly, Section 22 of the Personnel Regulations state as follows:

22-1 Promotion is the movement of an employee from one merit system class to another with a higher grade level assignment.

22-2 Promotions must be made on a competitive basis. After an evaluation of each individual's qualifications as defined in Section 5.6 of these regulations, the appointing authority will make final selection in accordance with Section 6.3 of these regulations.

22-4 On the recommendation of a department head, the Chief Administrative Officer may approve a temporary promotion on a noncompetitive basis, not to exceed 12 months without approval of the merit board, when it is determined to be in the best interest of the County. This must not give the employee a priority claim or competitive advantage when the position is announced as a promotional opportunity. Upon termination of the temporary promotion, the employee must be returned to the position previously occupied. Employees will not normally be reassigned to a higher classified job unless required by workload as determined by the department head. However, employees who are temporarily reassigned to a higher classified job for a period of more than 45 days shall receive the rate of pay of the higher classified job, except employees covered by a Position And Career Education System (PACE) contract.

FINDINGS

- * The Appellant received a temporary promotion which notified him that the personnel action did not give him any priority claims or competitive advantage.
- * The Appellant's regular position was that of Sergeant.
- * The Department to which the employee was assigned was involved in a reorganization and duties and assignments were in a state of flux and several other employees were temporarily assigned.
- * The fact that the Appellant did not qualify for promotion under the County Promotional Program cannot be dismissed by referring solely to the minimum qualifications in the job specification.
- * An employee cannot be promoted to a position for which clear promotion requirements and procedures exist (i.e. tests, oral exams, scored evaluations, ranked lists, selection in rank order).
- * Positions are reclassified, reallocated, or classified. Employees are promoted or reassigned to classified positions.
- * The County was not able to competitively promote the Appellant to a permanent Lieutenant position because he did not meet the requirements of the County's promotional program.

* Even if the classification request of the Fire Rescue Service to reallocate duties of Sergeants to create new Lieutenant positions had become a final decision of the CAO, promotion could not occur without competition among occupants of Sergeant positions.

CONCLUSION

There is no ipso facto classification. The Appellant has no claim to gain from a redistribution of assigned duties by management as in this case when the history of classified rank positions shows coverage by promotional examination.

If the position permanently occupied by the Appellant were the only position in transition and he was temporarily promoted to another job, he would have no non competitive rights to the reclassified or reallocated position. The matter would be resolved by his reassignment to another permanent position upon termination of the temporary promotion. Granting what the Appellant is requesting would render promotional programs meaningless and allow management to assign grade enhancing duties to any favored employee knowing that "reclassification" of duties would automatically result in "promotion". This is the antithesis of merit principles and system in public agencies in general and County rules and regulations in particular.

There is no evidence in the record before the Board that the Sergeant's position to which the Appellant was permanently assigned was officially classified upward in a way that the Appellant had/has a right to be promoted to it without competition. In other words, the Appellant was appropriately treated by the County under its present rules and procedures.

Case No. 92-02

This appeal involved the non-selection of Appellant for promotion.

First, the process used was an examination. It was made known to applicants. The examination process was routine. It had been followed before on numerous occasions. The position was not at the first or second level of supervision. It was one of the highest non-appointive positions. Thus, it was reasonable that an examination process rely more on interview than written examination and the resultant list consist of persons considered by a panel most able to do the job. Appellant took exception with the process and sought more precision in determining individual scores. This was not how the examination process was designed.

Second, the Board agreed with the County that the decision in Montgomery County v. Anastasi does not apply to the circumstances in this appeal. In this appeal the Chief of Police made a decision directly from the list. He received no input on candidates which after the Lieutenant Colonel list was presented to him was unevaluated and not known to the applicants. The suggestions of the Personnel Specialist were not given to the Chief as selecting official after the list was released to him by the Director of Personnel.

Third, the Board did not find a violation of the merit system rules and regulations. None of the four candidates referred was improperly referred. Each had a summary rating and individual ratings on each of the eight dimensions. A selection was made from among those referred as selectable. There was not a clear understanding on the part of the individual panel members about how consensus was to be achieved. Lack of a clear understanding of a rating scheme by a panel member(s) during a rating process was not a regulatory violation. The presence of a Personnel Specialist who can answer questions solved this concern. The final list produced by the panel indicated that the lack of consensus did not exclude candidates who should have been considered. Rather, the final list included candidates who were not initially included based on the overall consensus ratings.

Fourth, the overall outcome of the examination process followed from the suggestions made by the Personnel Specialist. The suggestions made were not at odds with the nature of the examination process. The panel was not obligated to follow suggestions and the ratings were made by panel members. Again, after considering suggestions, the panel produced a longer list and the Appellant benefitted from one of these reconsiderations. This finding did not indicate full agreement with Appellant's submissions. The Board did not view the actions of the Personnel Specialist as so remarkable that a clear violation of the process or a regulation has taken place. The Personnel Specialist did not change the process as it had been announced; did not introduce a "cut of score" which was not announced; did not require that the panel take suggestions as a mandate. The appeal was denied.

Case No. 92-05

This appeal was from the decision of the Chief Administrative Officer denying Appellant's grievance. The Board's decision was based on a review of the record.

The Board did not find a violation of the County Code or the Merit System Rules and Regulations. None of the four candidates referred were improperly referred. Each had a summary rating and

individual ratings on each of the eight dimensions. There was no "cut-off" score announced nor required by the examination process. The panel was not misled by its Chair nor were individual ratings assigned by panel members changed to meet an unannounced arithmetic "cut-off" for ranking. The Personnel Specialist of the Montgomery County Police Department did not require the panel to take any action. The panel was not obligated to follow her suggestions and the ratings were made by panel members. A selection was made from the list of candidates referred to the Chief of Police. Accordingly, the appeal was denied.

Case No. 92-26

This case was initially a grievance involving an allegation that the Appellant was not allowed to enroll in an Emergency Vehicle Operator Course (EVOC) at a time when some other recruits did. Because of this, the Appellant had a later effective date for promotion which may effect promotional opportunities in the future. The Appellant had asked that the Board set a new effective date for promotion 90 days earlier and provide appropriate retroactive pay and benefits.

In accordance with Administrative Procedure 4-4, Section 6.4, the grievance and relief were denied by the County Labor Relations Manager.

The Appellant was appointed to the position of Firefighter/Rescuer 1 (Recruit) in February, 1988 and with 39 other recruits, completed the Emergency Vehicle Operator Course (EVOC) in September, 1988 and was promoted to the next higher level, grade 16, after the course.

The Appellant alleged that the instructors advised that all recruits would return at a later date to take the EVOC at the Training Academy. The Appellant had been advised by a shift commander that any academy courses need not be taken until the completion of her probation.

The County stated that "There is no requirement that a training class must accommodate all the members of a recruit class at one session."

The Appellant claimed that the practices differ at the Fire and Rescue Districts with regard to allowing recruits to attend training during probation.

What caused this grievance was the promotion of another recruit class member at a date earlier than the Appellant.

Appellant claimed denial of an equal opportunity for promotion.

Since the promotions for some were processed earlier, the Appellant alleged that those promoted earlier have obtained "undue advantage" for immediate and future promotions.

Appellant claimed that the selection of trainees for the EVOC was not based on a notice to all recruits about the openings and that some were chosen and others not chosen is "... arbitrary and capricious and in violation of the Appellant's promotion rights."

CONCLUSIONS

Article II. Merit System, Section 33-5(a) of the Montgomery County Code makes this statement of Legislative Intent, "It is the legislative intent of the County Council that this Article foster excellence in the public service; high individual competence among employees, recognition that respect for the employee as an individual is first required for achieving such excellence and competence; and harmonious and efficient operation within the various components of County government."

Managers must balance "harmonious and efficient" operations with fair treatment of employees without regard to political affiliation or other nonmerit factors in all aspects of personnel administration.

In this case, the Board was asked to declare that the notion of equal opportunity for promotion goes from the principle as stated in #6 of the Code all the way to a practice under which management assures that each and every employee is in lock-step with regard to promotion eligibility.

The Board believed management had acted reasonably and in the public interest in view of the circumstances. Assuming arguendo that management set up a procedure to notify and have employees opt into the ten spaces, how would ten be chosen if more applied? Merit principle #4 states that employees shall be trained to assure high quality performance and that training received should where possible provide increased opportunity to facilitate career development. The Board believed that a merit system should allow management to take necessary actions in the public interest to carry out the essential functions of the County and at the same time follow procedures and protections for employees.

The immediate need for drivers was a valid concern. There were not enough available spaces for all recruits. No matter what method could have been devised, at that time, to place recruits in the EVOC, 29 recruits would not have been able to attend. If the County waited until all could attend, the need for drivers would not have been met. This was a management decision. The employee was not singled out for exclusion from the class. The appeal was denied.

Case No. 92-27.

In May 1990, Appellants competed, but were not selected, for Equipment Operator III. The selectee was rated "well qualified" and was promoted to EO3. In September, 1990, the examination was deemed invalid and the eligibility list was abolished as a result of a grievance which was sustained by the CAO. Although one of the Appellants grieved that the selectee was not as well qualified as others, the County sustained the grievance agreeing with the contention that the process was tainted because the supervisor of the job was a rater in the process of competition.

A retest was scheduled in September, 1990. Employees were not aware before the test what type of equipment would be used. The Department designed and conducted the examination. No Personnel Office staff participated in the initial scoring.

The Fact Finder found improprieties in the set of minimum qualifications of the applicants. As remedy, the Fact Finder recommended that the lower-scored Appellant be retested and that none of the people involved in the first test participate in the retest, that more than one piece of equipment be used, and that the Personnel Office review the applications thoroughly to determine qualifications of the applicants. The County overruled the Fact Finder and the grievance was denied.

In an effort to better review the rating process, the Board asked for certain papers and documents on the examination. Its review of the selectee's application did not indicate definitively that he was minimally qualified for competition for the EO3 position. The County had set the requirement for a one year minimum. All candidates had to meet that requirement. There was insufficient or no documentary evidence that the selectee, or any candidate was minimally qualified to compete.

It was preferable to the Board that some examinations such as the one in contention be designed to measure performance and ability to operate the equipment which characterizes a class. A better way to conduct this examination would have been to consider "time-ingrade" as a basic requirement and then to measure candidates performance and ability on the equipment which is characteristic of the class. The Board meant that any employee who has had one year performing the next lower level satisfactorily was basically eligible to compete. Ratings then would be results of the performance test.

DECISION

Clearly the selectee had gained advantage by doing the work since his selection nearly two years ago. The process was flawed and

the Board agreed with the Appellants. The process needed to be improved and the Appellants given relief.

The County was directed to develop a more rational process for measuring minimum qualifications and performance/ability to do higher level "blue collar" jobs. The Appellants were to be afforded priority consideration for next available positions at EO3 and be reimbursed for legal fees.

Case No. 92-29

Appellants were Code Enforcement Inspectors II who applied for the position of Code Enforcement Supervisor in August, 1991. Appellants were found "not qualified" for the position because they did not possess the minimum qualifications necessary for the position.

The minimum qualifications for the position of Code Enforcement Supervisor contained in Announcement No. 2223101E dated July 24, 1991 were as follows:

Completion of High School and six (6) years of code enforcement/law enforcement experience of which at least three years must have been in field inspection and code enforcement directly related to solid waste/land use compliance. (An equivalent combination of education and experience may be substituted). Possession of a valid motor vehicle operator's license.

Both Appellants lacked the requisite time in field work required by the statement of minimum qualifications. Both Appellants asserted that the equivalency language in the Announcement should allow them to apply their educational backgrounds to meet the minimum qualifications standards. Appellants claimed that the requirement of "relevant education" was subjective in this case. They argued that the connection between their Criminal Justice education and the code enforcement aspects of the job they sought should have served as sufficiently equivalent to meet the minimum qualifications.

The Board found that "relevant education" was not such an elusive concept as the Appellants claim. The minimum qualifications clearly called for three years experience in field inspection and code enforcement directly related to solid waste/land use compliance. Appellants criminal justice educational background was tangentially related to the position in question, and could not credibly have been construed as relevant education for purposes of the equivalency exception to the minimum qualifications regarding the required position-specific field work. The Appeal was denied.

Case No.92-33

Appellant was a Police Officer III with the Montgomery County Police Department. In October, 1991 Appellant applied for the position of Master Police Officer (MPO) and was informed by the Personnel Section that he was ineligible to apply because he did not hold the rank of MPO, and the position was advertised as a transfer not a promotion.

Appellant filed a grievance alleging that his non-selection was violative of the merit system, and requesting relief in the form of promotion to MPO in the Forensic Science Division.

The County denied Appellant's grievance as not grievable under the Collective Bargaining Agreement (CBA) per Article 44 and Article 8.

The Board found that the Appellant's first claim of entitlement to promotion to the MPO Evidence Technician was governed by the County's rights to determine whether a position is to be filled by transfer or promotion. Appellant gave no basis for challenging this right reserved to management, and the Board held that the position was properly advertised. Appellant's non-selection was based on the fact that he did not meet the requirement of having already attained the rank of MPO. Appellant did not challenge the County's right to require the MPO rank as precedential for the promotion in question, and the Board found that the County's action in this regard was in conformity with the merit system, and Article 42 of the CBA.

Appellant also alleged that his non-selection from the promotional eligibility list for the position of MPO was grievable. The CBA provides the exclusive forum for grievances as to the terms and conditions of the CBA. Article 44, Promotions sets forth the negotiated terms and conditions for promotions in the department. Management explicitly reserved its right to make promotions "from a properly constituted list of employees in the highest category, or any category used for such purposes" without being subject to grievance or arbitration.

Appellant's grievance alleged nothing more than a failure to be selected for MPO from the well-qualified eligible list. This would appear to be the precise situation contemplated by the parties when drafting Article 44 of the CBA. Appellant referred to cases where this Board had decided cases within the Police Department related to promotions. These cases involved issues of impropriety in the application of merit system rules i.e. the system for selection off of the eligible list. Appellant had not alleged that merit system rules were improperly applied, but rather that from a group of well-qualified applicants, he was not chosen. Management's right

to choose absent allegations of unfair treatment cannot be abridged by the Board, and in this case was governed exclusively by the CBA. The appeal was, therefore, denied.

Case No. 92-43

Appellant alleged that the Lieutenant's promotional process, administered in February, 1992 was not "fair and equitable" with regard to test construction, examination review, validation, administration and the composition of the assessor panels. Appellant claims that the process was not conducted in good faith and without discrimination, as is required by County regulations. The Appellant believed that minority and women candidates were neglected in the process. Appellant believed that his claims with regard to the promotional process directly resulted in his score being lower than deserved.

The Board found that Appellant, as stated in his own words, had filed a grievance based on racial and/or sexual discrimination. Section 4.6 of Administrative Procedure 4-4 (A and B) states:

An employee who believes that he/she has been the subject of discrimination based on race, color, sex, religion, age, handicapping condition, sexual orientation, marital status, ancestry, or national origin may file a complaint with the Montgomery County Office of the Human Relations Commission (OHRC) in accordance with Section 4-2 of the Personnel Regulations. Such complaints must be filed directly with the HRC and are not considered grievable under the County Grievance Procedure.

According to this Administrative Procedure, Appellant must file his claim with the Montgomery County Office of the Human Relations Commission. The appeal was, therefore, denied.

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PROMOTION/SELECTION PROCESS

Case No. 92-09

Appellants were nine Deputy Sheriffs in the Sheriff's Department of Montgomery County. They appealed the adverse disposition of their grievance alleging that they were unfairly denied promotion to the rank of Deputy Sheriff II (Corporal). The grievance stated:

Promotions from the November 4, 1988 Eligible List for the rank of Deputy Sheriff II (Corporal) had been made in violation of the requirements of Section 22 of the Personnel Regulations; Section 33-9(a) and (c) ("non-merit factors"); and the rights guaranteed in Section 33-7(a) of the County Code. As members of the highest qualified category in the above mentioned Eligible List, we have been aggrieved and adversely affected by the aforementioned promotions. The choice of individuals from the list for promotion constitutes a continuing improper application of established rules, regulations, procedures, and policies; and inequitable and unfair acts in the admission of promotional opportunities.

All of the Appellants were part of the well-qualified list of twenty candidates. A promotional panel made up of the Deputy Chief and two Captains were established by the Sheriff. In meetings with the Sheriff, the panel made recommendations based on discussions of the candidates and review of their personnel files.

The panel met four times. At the first meeting on November 18, 1988 the six candidates who had attained the highest test scores (from 90-100) were awarded promotions. Appellants' scores which ranged from 85-89, were below those of this first group.

On April 9, 1989, two promotions were awarded to candidates with scores of 84 and 80. On March 12, 1990 a candidate with a score of 85 was promoted. Finally, on April 22, 1990, a candidate with a score of 80 was selected for promotion.

Appellants based their appeal on the decision of the Fact Finder, as adopted by the Chief Administrative Officer, which upheld the promotions because "grievants had not shown that the Sheriff's selection decisions were arbitrary and capricious or that the promotion process did not assure fairness and consistency of review and selection." Decision of Fact Finder July 11, 1991.

The Board found the CAO's decision to be in error. There was ample evidence that the Sheriff's Department acted without due regard for merit system principles, with impermissible motivation based on political favoritism and absent rational and informed decision making as called for by the County Charter and Code.

Relying upon Montgomery County v. Anastasi, 549 A2d 753 (Md. App. 1988), the Board found that the Sheriff's Department failed to demonstrate that a "system which ensures: fairness, rational, informed decision-making, and compliance with the other mandates of both the Charter and the Code", was used for the promotions in question.

Testimony by the promotional panel members indicated that there were no written evaluations of the candidates upon which selection could have been based. Panel members relied upon comments about the work of the candidates received over a period of a year, but without the benefit of a written record based on such comments or personal observations.

Testimony by the panel was contradictory as to the criteria used for selection, and the validity of the information conveyed. A witness testified that the first six promotions were strictly by test score, yet a Deputy Chief and the Sheriff testified that test scores were not a factor in the decisions.

The Sheriff testified that the Panel gave him first-hand knowledge of the candidates. A review of the Panel members' testimony, however, revealed that they often gained information from subordinates about the candidates.

The Deputy Chief appeared to have relied heavily upon a factor not contained in the Personnel Regulations, nor mentioned by the Sheriff among the criteria he relied upon. The Deputy Chief repeatedly referred to "initiative", a singularly subjective attribute to assess, in describing the criteria he applied to the candidates.

The Board found that the Promotional Panel, including the Sheriff, failed to review the candidates in a systematic and fair manner. In addition, the Board found that the highly charged politically partisan atmosphere prior to the time of these promotions created a greater duty on the part of the Sheriff's Department to insure fairness in selection. Instead, insufficient explanation found in the testimony on behalf of the County to demonstrate the superior qualifications of those promoted over the politically aligned Appellants. Section 33-5(b)(6) of the Montgomery County Code states, "All applicants to and employees of the County merit system shall be assured fair treatment without regard to political affiliation..." (Emphasis added). We held that where the appearance of political retaliation could be found, the County must place the highest priority upon implementing promotions through a demonstrable system of adherence to the principles of assessment based on relative abilities, knowledge, and skills.

Appellants had credibly raised the specter of political favoritism as a factor in the promotions in question. The Sheriff's Department procedures were both inadequate to safeguard against political retribution, and to provide a system which conformed to the mandates of the County Code.

Accordingly, the Appellants' appeal was sustained. The County was directed to award the Appellants, in rank order of their scores on the existing list, the next appropriate vacancies to Deputy Sheriff II (Corporal). The Appellants were to be reimbursed for reasonable attorney's fees incurred.

Case No. 92-15

By a decision issued December 30, 1987 (Anastasi v. Montgomery County Merit System Protection Board, Civil No. 23619). The Circuit Court for the County reversed the Board's decision; however, the County did not accept the Circuit Court's decision, but appealed the case to the Court of Special Appeals. That Court decided the case by an Opinion issued November 4, 1988 [Montgomery County v. Anastasi, 549 A.2d 753 (1988)] ruling that the County had, indeed, violated the applicable law and regulations in the manner in which it had promoted officers out of rank order and that the Board had been arbitrary and capricious in upholding the County's action. Both the Circuit Court and the Court of Special Appeals were critical of the failure of the County and the Board to follow the Board's earlier decision in Clark. The Courts remanded the case to the Board.

On remand of Anastasi, the Board ordered remedial action to correct the Department's violations of merit procedures in which the courts found it had engaged. As had been ordered in Clark, the Board's remedy included ordering retroactive promotions, alteration of promotion dates, and award of back pay based thereon for 11 of the 17 named grievants. The clear thrust of the Board's determinations on remand in Anastasi was to promote officers as and when they would have been promoted if rank order, rather than the County's tainted procedure, had been used.

The County apparently argued before the Board that "relief should be granted to all adversely affected employees, regardless of whether they were Appellants and that it be applied similarly to subsequent eligible lists." Notwithstanding the County's arguments, the Board declined to order such relief, concluding that "it would be inappropriate and could trammel appeal rights of other employees."

FINDINGS

The grievance giving rise to this appeal was filed in September 1990 because the grievants, although certified as "well qualified" were not promoted to the rank of Sergeant in vacancies occurring from July 1, 1988 through June 30, 1990 while others not on the list as well as three lower ranked officers on the list were promoted during the same period.

The grievants state that positions filled as a result of resolution of earlier grievances/appeals are not competitive actions and that the County should make all vacancies occurring during the period of time that the list was in use available for competitive actions only.

A Fact Finding hearing was held in July, 1991, on the following issue: "Was the County's failure to promote the Grievants in accordance with law, prior agreements, previous decisions of the courts and the Merit System Protection Board, fair and equitable?"

The essential facts were not in dispute. It was uncontested that 11 officers were promoted to the rank of Sergeant from the 1988-1990 Sergeant Eligible List during the period the list was in effect.

The Chief Administrative Officer (CAO) did not concur in the examiner's report because it was believed that all employees entitled to relief had received appropriate relief and that the resolution of this grievance would trigger additional complaints. The CAO believed that the County's authority to settle a grievance by using existing vacancies was being challenged by the union. In his view, granting the requested relief would entail creating extra positions over the budgeted complement for Police Sergeants, thus creating unnecessary and duplicative positions.

Additionally, the CAO believed that corrective actions requested could not be made since the remedial principles were applied to differing circumstances. In essence, the County believed that the corrective actions requested cannot be made now that the list has expired and no further promotions were made out of rank order.

Appellants believed they were entitled to a remedy consistent with that previously afforded all other similarly situated grievants. Appellants asked that the grievance be sustained and that they be afforded the relief requested, or in the alternative, that they be promoted, in rank order, to the next available vacancies with back pay and status retroactive to June, 1990.

CONCLUSIONS

The Board reached a decision on the record.

If only 14 positions were available, the Appellants would have gotten what they sought in this appeal. Since the County decided to settle previous grievances by awarding all persons who could have been damaged by the issues raised and decisions of previous decisions, the Board was presented with this matter to fix. There was no way the County could manage to obviate grievances. Management in today's work environment can be sure that each decision it makes will yield unexpected consequences.

Some things are certain however. When management agreed to apply certain principles in resolution of grievances, employees and employees' representatives have reason to expect consistency. The County did not argue that the Appellants have misunderstood what it agreed to do; rather, it argued that the approach it had taken was logical and reasonable. It also argued that the cycle of redress must stop at some point. Nevertheless, it had carried over to new lists the corrective action from previous lists. The Board was asked to not apply this practice to this case.

When corrective action was applied with the intent that no one would be harmed or demoted as a result, it was difficult for the ripple effect not to pluck ripe vacant positions from the

potential grasp of highly qualified promotion candidates. Certainly the County could set aside certain positions for resolution of previous grievances. It could also make no promotions from a list until all issues are resolved and promote on a temporary basis as needed. It could establish positions which are overstrength in anticipation of attrition. Decisions to make employees whole should not prevent the County from establishing positions as it sees fit and selecting persons who are highly qualified.

In conclusion, the Board sustained the appeal and concurred with the reasons set forth in the Hearing Examiner's report.

Promotion to available positions in rank order retroactive to June 30, 1990 was relief to be granted to the Appellants.

Case No. 92-17

Appellant was among fourteen applicants rated "well-qualified" for promotion to the rank of Lieutenant pursuant to a promotional examination in the Spring of 1987. In 1988 nine promotions to Lieutenant were made, two more promotions were made in 1989. Despite recommendations by his superiors, and a ranking of sixth out of fourteen in his assessment score, Appellant was not chosen for promotion to Lieutenant.

Appellant alleged that he did not receive promotion because the Chief of Police impermissably relied upon a written reprimand contained in Appellant's personnel file. This reprimand was removed prior to the promotions of 1989. The Board found that the 1989 promotions were made properly and not in reliance upon the reprimand in question.

It is uncontested that the Chief of Police did rely upon the reprimand in Appellant's file to deny him promotion in 1988. The reprimand was based on Appellant uttering a racial slur in the context of a police training session. Appellant had indicated acceptance of the punitive action in the memorandum of reprimand found in his file. Relying upon the memorandum of reprimand, and without making further inquiry in the incident giving rise to the reprimand, the Chief of Police denied Appellant's promotion to Lieutenant.

The Board found that it was perfectly appropriate to assess relative abilities, knowledge and skills as compelled by the merit principles set out in the County Code, by relying upon information in an employee's personnel file. The Chief of Police had credibly heightened sensitivity to the particular infraction committed by Appellant, and reasonably sought to avoid potential difficulties for the Department by promoting an applicant other than Appellant. The appeal was denied.

Case No. 92-39

Appellant alleged that the candidate who was selected for a position did not possess education or experience as required by the job announcement. Appellant contended that he was adversely affected by the selection of the other candidate, because he had also unsuccessfully competed for the position. Appellant, along with three other candidates, was found to meet the minimum qualifications for the position. All four of these candidates were allowed to participate in the second phase of the rating process, during which additional education and experience was determined by the raters. All four were then placed on the eligible list as "qualified". The hiring authority then made its decision.

The following sections of the announcement pertained to Appellant's claim:

MINIMUM QUALIFICATION: A bachelor's degree from an accredited college or university and five (5) years experience in a supervisory or administrative capacity to include program evaluation and management analysis, two (2) years of which must have been in a public jurisdiction fire and rescue service. (An equivalent combination of education and experience may be substituted.)

SELECTION PROCESS: The selection process for this position will initially consist of a review of the County application form and any attachments of those persons meeting the minimum qualifications to assess the extent and relevancy of education and experience in the following areas:

- * working in a mixed (career/volunteer) fire and rescue service;
- * supervising staff;
- * preparing and monitoring budgets;
- * developing and implementing regulations and policies; and,
- * using computers for developing, maintaining and analyzing program data.

The Board found that the "Minimum Qualifications" as stated in the Job Announcement were the only mandatory criteria for the position to which Appellant aspired. The reference to "using computers", which Appellant alleged was a qualification not possessed by the successful applicant, was contained in the section entitled "Selection Process" within the Announcement. The section simply stated that certain criteria would be assessed during the selection, and not that those criteria were mandatory for selection. The fact that the raters may have used the

referenced criteria to select among a potentially large group, did not alter the nature of the listed skills as optional rating measures. The appeal was denied.

PROMOTION/TEMPORARY

Case No. 92-16

The notice of intent to appeal was filed on October 24, 1991 and the appeal hand delivered on October 31, 1991. The appeal was filed as a result of a decision of the Chief Administrative Officer (signed on Oct. 8, 1991 and attached to a letter signed by the County Personnel Director to Appellant's attorney on Oct. 15, 1991) denying Appellant's grievance filed on March 5, 1991.

The Appellant, a Master Firefighter grieved the termination of his temporary promotion to Sergeant which he maintained had become permanent either by reclassification or through the County's failure to follow its own rules and regulations.

The record shows that the Appellant signed a memorandum in August, 1988 acknowledging for the record that he had been temporarily promoted to the rank of Sergeant and that he had no vested rights to the position. He further acknowledged that if he became eligible for a future permanent promotion, he would have to compete in accord with DFRS and County Personnel Regulations.

The Personnel Action Form for the initial promotion action has an effective date in April, 1988 and a comment which states as follows, "TEMPORARY PROMOTION TO SERGEANT. EMPLOYEE HAS NO VESTED RIGHTS TO THE PERMANENT PROMOTION PER M.C. PER. REGS. SEC. 22-4 AS AMENDED BY EXEC. REG. 2-88E."

The temporary promotion was removed effective May 7, 1989 and restored effective May 8, 1989. The same comment noted above appears on the promotion which was effective on May 8, 1989. The position number was changed in February, 1990.

The temporary promotion was removed in February, 1991 and Appellant was transferred. His salary had been set in 1988 with a five (5%) percent increase in pay. This personnel action processed in February, 1991 caused the instant grievance.

The Appellant contended that he had become a permanent Sergeant as a result of a combination of the County's failure to obtain approval from this Board for his continuing temporary promotion and the position change actions. The Appellant asked the Board to grant a hearing because the removal of the temporary promotion was, in his view, a demotion from the permanent rank of Sergeant.

The Board found no basis in the record before it to conclude that the Appellant had become a permanent Sergeant. He was aware

of his temporary status. He received a timely action from the County which removed and restored his temporary status in 1989. There was no indication that he was promoted permanently through competition or that the County Personnel Office conducted a classification evaluation which could have resulted in a review of the actual work he was performing.

The Chief Administrative Officer noted in his decision that the County failed to follow its own rules. Clearly for the period from May, 1990 to February, 1991, Appellant served without appropriate authority. Nonetheless, he was compensated at the rate for a Sergeant during this period.

It was regrettable that the County did not seek approval for an extension. The Board's concern was that the Appellant not be injured because of the action which the County failed to take - for example, had the County terminated the higher salary retroactively. However, he had received what he was due for the period beyond the one year allowed under the regulations. The appeal was denied.

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RECRUITMENT/SELECTION PROCESS

Case No. 92-13

This appeal involved non-selection for employment with the County for the position of Senior Engineer. On September 11, 1991 applicant received a letter from a Personnel Specialist informing him that he was not among the applicants chosen for additional consideration for the position in question. The Personnel Specialist responded to his inquiry regarding his non-selection on September 19, 1991, again explaining the reasons for his non-selection. It was noted, that the position of Senior Engineer was not filled due to County hiring restrictions.

The Montgomery County Code Section 33-5(b)(2),(5) provides appeal rights to applicants for employment who can demonstrate that their non-selection for employment was based on impermissible non-merit factors. Applicant had made no such demonstration, and based his appeal on his assessment of his qualifications for employment. The County rejected his application for employment based on a reasonable assessment of relative qualifications as discussed in the County's letters to him. The appeal was denied.

RETIREMENT CREDITS

Case No. 92-25

Appellant was first hired by the County as a part-time parking lot attendant on June, 1973. He was appointed officially as a non-career, part-time employee to work less than 20 hours per week. In July, 1981, Appellant was promoted to a permanent full-time position as a Public Administration Intern. Appellant sought to receive retirement service credit for the period of his

service in the non-career, part-time position from 1973 to 1981.

Appellant believed that his official appointment was not reflective of the actual circumstances of his position as a part-time parking lot attendant. He claimed, that he worked more than twenty hours per week for the eight continuous years that he was employed as a parking lot attendant. The Appellant believed that although he had been appointed to a non-career position, he was, de facto, a career employee according to the 1972 Personnel Regulations. Chapter 33 of these regulations govern.

The Board found that Appellant's appointment was to a non-career, part-time less than 20 hours per week position. That he had worked more than 20 hours per week during the course of his employment did not alter the basic two components of the employment terms which the County set in his initial appointment, non-career and part-time. The fact that he worked as many hours per week as others or that he worked for as many years as other career part-time or career full-time workers did not make him a career employee.

The employment contract is the Personnel Action Form. The terms of the Appellant's work were set by the County when he was appointed and these conditions were consistent with the 1972 Personnel Regulations.

The County in a separate response to this Board had indicated what the Appellant must do to purchase retirement credits for the service in the County while under the aforementioned non-career, part-time appointment. Therefore, the appeal was denied.

RETIREMENT/DISABILITY

Case No. 89-12

CONTINUED

Pursuant to the order of the Circuit Court for Montgomery County Maryland, Civil No. 59007, dated September 24, 1991. The above case was remanded to the Merit System Protection Board for review of all of the evidence and to make a determination based upon the preponderance of evidence standard. A review of the January 2, 1991 states: "...That it might be appropriate for the Board to consider additional evidence. In this particular case, there was offered a March 2, 1990 letter from a physician. That letter was submitted after the November 8, 1989 remand by the Court, but before the Board's renewed decision."

BACKGROUND

The Appellant was an Accounting/Budget Assistant in the Financial Management section of the Department of Facilities & Services. Appellant prepared and audited monthly budgets, operating reports, modified computer applications on a word processor and performed other accounting and budget activities which require the use of

computers. Appellant started working for the Montgomery County Government in July, 1979 performing accounting and budget work for the Office of Management & Budget, just as office automation was coming on line. Appellant had been off the rolls since late 1987.

Before the Appellant started working for the County, she was diagnosed as suffering from a disease known as Muscular Sclerosis. In 1974 she sustained a jaw dislocation in a motor vehicle accident. Three months later, she had her first episode of right optic neurites. This remitted with steroid therapy. Two years later in 1976, she was diagnosed as having Muscular Sclerosis. Appellant's testimony in January 28, 1988 indicates that her mother was diagnosed as having Muscular Sclerosis.

On January 31, 1989, the Hearing Examiner, denied Appellant's claim for a Service Connected Disability Retirement Benefit.

On May 16, 1989, the Board affirmed the Hearing Examiner's decision and denied the appeal.

On May 2, 1990, the Board, per the Court's remand, re-examined the entire case file and reaffirmed the Administrator's decision to deny Appellant's claim for a Service Connected Retirement Disability Benefit.

On November 23, 1992, the Board, per the Court's remand, held a proceeding where oral presentations were made by both parties. The issues addressed were:

1. County's response to the admission by the Board of a physician's letter of March 2, 1990.
2. Any medical evidence since February 1, 1989 to demonstrate and document a causal connection between life activities in general, and Spinal Multiple Sclerosis.

The Board agreed to accept into evidence the physician's letter of March 2, 1990. At the end of the oral presentations, the Board closed the record.

ISSUES

1. Whether the Appellant was entitled to a Service Connected Disability Retirement Benefit under Section 33-43 (e) of the Montgomery County Code.
2. Whether Appellant's testimony and the evidence presented on her behalf met the burden of proof under Section 2A-10 (b) of the Montgomery County Code.
3. Whether Appellant met the burden of proof under Section 33-43 (e) of the Montgomery County Code.

FINDINGS OF FACT

A review of the entire written record, including the two Circuit

Court remands, the physician's letter of March 2, 1990, as well as the meeting and oral presentations made by the two parties on November 23, 1992, indicated inconsistencies in the findings and medical conclusions.

At the January 28, 1988 hearing, the physician testified about several hypotheses he and his colleagues were working on and indicated that the ability to document them would be markedly increased in the next few years. He stated that he was unable to quantify the type of visual movement necessary to produce the plaque in the upper part of the spine or in the optic nerve area. He noted the timing of the episodes coincided with a return to work, or change in work hours, but could not make a direct medical connection. At the November 23, 1992 proceeding, the Board specifically asked both parties for any medical evidence or test since February 1, 1989, designed to demonstrate and document a causal connection between life activities in general, and Spinal Multiple Sclerosis.

Neither party submitted any new evidence; instead, both parties restated their respective cases.

Multiple Sclerosis is a disease that has a natural progression. The Appellant's disease was in a relatively unstable state. The natural history of her disease, including the high doses of Prednisone Steroids, Corticosteroids and Methyl-Prednisolone made it impossible for her to return to County work.

A preponderance of the evidence contained in the record supported the conclusion that the Appellant was not entitled to a Service Connected Disability Retirement Benefit.

CONCLUSION

The Board found the record complete enough to reach a decision based upon it. This included the proceeding on November 23, 1992.

In the opinion of the Board, the testimony and the record did not indicate by a preponderance of the evidence that the Appellant's condition either was caused or aggravated by the performance of her duties.

Section 33-43 (e) of the Montgomery County Code plainly requires that eligibility for a Service Connected Disability Retirement Benefit must be based upon a condition which is aggravated by the performance of one's job duties. In the opinion of the Board, the testimony did not indicate by a preponderance of the evidence that the Appellant's condition was aggravated by the performance of her job duties.

Accordingly, the decision of the Hearing Examiner was affirmed and the Appellant's appeal was denied.

No legal fees were appropriate in this case.

Case No. 90-30

CONTINUED

Counsel for the Appellant informed the Merit System Protection Board by letter in October, 1992, that this case was successfully resolved and withdrew the appeal. The case was closed.

Case No. 91-26

The Merit System Protection Board reviewed the written record on the appeal filed on behalf of Appellant from the decision of the Hearing Examiner, denying his application of a Permanent Total Service Connected Disability Retirement Benefit.

The issue before the Board was whether the Appellant should receive a Permanent Total Service Connected Disability Retirement Benefit under Section 33-43 (e) of the Montgomery County Code.

The Board decided that the preponderance of the evidence of record indicated Appellant did not qualify for a Service Connected Disability Retirement Benefit nor did he meet the applicable statutory tests for a Non-Service Connected Disability Retirement Benefit. Accordingly, the decision of the Hearing Examiner, was sustained and the appeal was denied.

Case No. 92-01

The Board reviewed the written record on the appeal filed on behalf of the Appellant from the decision of the Hearing Examiner denying her application for both a Permanent Total Service Connected Disability Retirement Benefit and a Non-Service Connected Disability Retirement Benefit.

The issue before the Board was whether Appellant should receive Disability Retirement Benefits under Section 33-43 (d) & (e) of the Montgomery County Code.

The Board decided that the preponderance of the evidence of record indicated that the Appellant did not have a Service Connected Disability nor met the applicable statutory tests for a Non-Service Connected Disability Retirement Benefit. Accordingly, the decision of the Hearing Examiner, was sustained.

Case No. 92-03

This appeal is from the decision of the Hearing Examiner, denying Appellant's application for a Permanent Total Service-Connected Disability Retirement Benefit and awarding a Non Service-Connected Total Disability Retirement Benefit.

The issue before the Board was whether Appellant should receive a Service Connected Disability Retirement Benefit. Section 33-43 (d)&(e) of the Montgomery County Code governs.

The Board was of the opinion that the preponderance of the evidence of record indicated that the Appellant did not have a Service Connected Disability. Accordingly, the decision of the Hearing Examiner was sustained.

Case No. 92-11

BACKGROUND

In November, 1990, the Administrator informed the County that it found the Appellant totally disabled pursuant to Montgomery County Code, Section 33-43(d), Non-Service Connected Disability Retirement. Subsequently, an additional medical report was considered and the Administrator in 1991, reiterated the earlier decision that the Appellant was totally disabled pursuant to Section 33-43(d) Non-Service Connected Disability Retirement Benefit. The Appellant, exercising an appeal right under Section 33-43(k)(1), filed an appeal of the Administrator's decision in March, 1991. A Hearing Examiner conducted a hearing on the appeal on June 6, 1991. The Hearing Examiner's opinion, issued August 1, 1991, determined that the Appellant was qualified for a Temporary Non-Service Connected Disability Retirement to be reevaluated after one year.

In September, 1991, the Appellant filed an appeal of the Administrator's final decision with the Merit System Protection Board pursuant to Section 33-43(k)(2) and requested direct relief or a new, impartial hearing. Under the provisions of the Personnel Regulations, Section 29-10(i), the Board referred the matter to the Office of Zoning and Administrative Hearings to conduct a hearing and to provide the Board with a report and recommendation based on the evidence received.

The Hearing Examiner's Findings of Facts recommended that the Appellant be granted a Total Service Connected Disability Retirement effective to February 21, 1991, the date on which he was granted a Total Non-Service Connected Disability Retirement.

CONCLUSION

The Board believed that the Appellant was disabled and suffered from a cardiac neurosis which had affected his ability to work. The Board did not believe that his work was the sole cause of his disability nor the sole cause of the aggravation, if any, of his disablement.

In the Board's opinion the fear of having a heart attack was very real to the Appellant, but this fear alone did not move it to conclude that there was a service connection. As a firefighter, his work was stressful, but this was his selected occupation. The fear seems to have arisen from the circumstances of his entire work and life history. He had not had a heart attack. His pain from physical problems was integrated into his daily existence. It was not moved to accept that the Appellant had a disablement - cardiac neurosis - which had been caused or completely aggravated by his work. The circumstances of his case fit the definition of Non-Service Connected Disability. No legal fees were appropriate.

Case No. 92-12

The Appellant was a 44 year old Sergeant with the Montgomery County Maryland Department of Police. He applied for a Service Connected Disability Retirement Benefit on April 2, 1991.

On June 18, 1991 the County notified Appellant that the County Disability Retirement Administrator, the Prudential Insurance Company of America, pursuant to Section 33-43(e) of the Employee Retirement System, concluded that he was "not totally disabled", therefore, disability benefits were denied.

In April, 1991, the County, per its reduction-in-force administrative procedures, notified all Sergeants (including Appellant) that nine Sergeant job positions were to be abolished. The Appellant, in June, 1991, met with the Department of Police Officials and requested a Discontinued Service Retirement. The Department of Police, subject to verification by the Personnel Department, determined that the Appellant was the most senior employee in the affected job class. Attached to his verification application to the Personnel Department were copies of the application for retirement benefits signed by the Appellant with the following addendum. "I recognize that this application for Discontinued Service Retirement supersedes my previous application for Disability Retirement." The Appellant was retired and had been receiving monthly pension checks since July 1, 1991.

The Board found that:

1. Appellant had retired and was receiving Discontinued Retirement Benefits under Section 33-45(d) of the Montgomery County Code. Appellant thus had waived his ability to continue to pursue a claim for a Service Connected Disability Retirement Benefit.

2. Appellant had no standing for a Merit System Protection Board hearing because under Section 29-1 of the Montgomery County Personnel Regulations an Appellant must be either an applicant or an employee, and Appellant was neither.

3. Appellant called for the June, 1991 meeting with the Department of Police and chose to accept a Discontinued Retirement Benefit and further chose not to pursue a Service Connected Disability Retirement appeal.

Accordingly, the Appellant's appeal was denied and the decision of the County to withdraw the Appellant's Disability Retirement application was sustained.

Case No. 92-32

The Appellant raised the issue of a "conflict of interest" on the part of the Hearing Officer and also that the Hearing Officer committed errors in failing to recuse himself. The Circuit Court for Montgomery County Maryland has ruled in Civil Case No. 75332 that the Hearing Examiner should disclose prior to the hearing that

his wife is an employee of the Montgomery County Personnel Department. The Court also stated that there was not a conflict of interest, but in order to avoid any aura of impropriety, full disclosure must be made at the beginning of the hearing. This was accomplished by the Hearing Officer at the beginning of the hearing.

BACKGROUND

The Appellant was a Correction Officer, hired in November, 1988, who while on duty, slipped and fell on his rear and right hip. The Appellant continued to work his shift. The next day he went to the hospital for an examination.

In August, 1991, the hearing officer concluded that the Appellant was not disabled and his application of a Service-Connected Disability Retirement Benefit was denied. In addition, the Hearing Officer denied a Non-Service Connected Disability Retirement Benefit.

The Board found the record complete enough to reach a decision based upon it.

Section 33-43 (e) of the Montgomery County Code plainly requires that eligibility for a Service-Connected Disability Retirement Benefit must be based upon a condition which is aggravated by the performance of one's job duties and that the condition must incapacitate the employee. In the opinion of the Board, the testimony did not indicate by a preponderance of the evidence that the Appellant was currently unable to perform his duties. In addition, Section 33-43 (e) (1) of the Montgomery County Code also provides, in extenuating circumstances, the Administrator may waive the requirement that a member's incapacity is likely to be permanent and may approve a Temporary Disability Retirement for one or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to be permanent.

Accordingly, the decision of the Hearing Examiner was sustained and the Appellant's application for a Service-Connected Disability Retirement Benefit as well as a Non-Service Disability Retirement Benefit was denied.

Case No. 92-36

This was a decision on the record in the appeal filed on July 2, 1992. The Appellant appealed the decision of a Hearing Examiner denying him either a Service Connected Disability Retirement Benefit or a Non-Service Connected Disability Retirement Benefit.

BACKGROUND

The Appellant was employed as a Heavy Equipment Operator since 1975.

On February, 1990, he filed for a Service Connected Disability Retirement Benefit. On January, 1991, the Appellant was granted a Temporary Non-Service Connected Disability Retirement Benefit by the Disability Retirement Administrator.

The Appellant filed a timely appeal and a hearing was held on September 17, 1991 by a Hearing Examiner. On December 24, 1991, the Hearing Examiner ruled that the Appellant was not disabled from his employment and, therefore, should be granted neither a Service Connected Retirement Disability Benefit nor a Non-Service Connected Disability Retirement Benefit.

In the Fall of 1981, the Appellant suffered a non-work related neck injury while playing football. Again in 1984 he had a work related knee injury, and in August, 1985 he injured his neck again in a work related injury. In January, 1986, the Appellant had surgery related to the 1981 non work related football injury.

The Appellant returned to work in June, 1986, after recovering from the surgery. When he returned to work, it was with the understanding the he not lift more than forty pounds nor operate a jackhammer. The applicant's testimony indicated that he did not operate a jackhammer in his current position.

As a result of the December, 1991 decision by the Hearing Examiner, the Appellant reported to work in early 1992, as requested, and was examined on February 10, 1992 by the Montgomery County Occupational Medical Section for a return-to-work examination.

The examination indicated that he not be permitted to lift objects weighing greater than 15 pounds, nor stand or walk for more than 50% of the working time. The examination also indicated that a temporary impairment existed. The medical report did not set a time frame for the limited work assignment.

In July, 1992, the Appellant appealed the Hearing Examiner's decision to the Merit System Protection Board seeking a Total and Permanent Service Connected Disability Retirement Benefit under Section 33-43(e) of the Montgomery County Code.

A review of the record, including both the Appellant's testimony and the exhibits, indicated that the Appellant was required to perform arduous work, and the operating of equipment and vehicles could be physically taxing. For example, climbing in and out of equipment, bending, lifting and pulling, involved considerable physical effort.

CONCLUSION

In the opinion of the Board, based on the record, the testimony did not indicate by a preponderance of the evidence that the Appellant's condition was caused while in the performance of his duty.

Accordingly, it was the Board's decision that the Appellant be granted a Temporary Non-Service Connected Disability Retirement

Benefit for the period March 1, 1992 to December 31, 1992. The Appellant was to report to his previous Supervisor within seven days of receipt of this decision, for instruction for his return to work after another return-to-work examination.

Case No. 92-47

This was a decision from the record in an appeal filed in August, 1992. Appellant appealed the decision of the Hearing Examiner, denying her both a Service Connected Disability Retirement Benefit and a Non-Service Connected Disability Retirement Benefit.

BACKGROUND

Appellant was a Correction Officer working at the Detention Center and began working for the County in May, 1989.

Approximately ninety days later, in August, 1989, after completing a twelve hour shift at The Center, the Appellant attended a picnic with her fellow employees. She arrived at the picnic at approximately 9:00 p.m.

Appellant helped organize the picnic. The County Detention Center helped fund the picnic which was identified as a voluntary social event for the staff and their families. While at the picnic, Appellant's testimony indicates that she was assaulted by three male co-workers. The Montgomery County District Court later convicted two of the individuals of fourth degree sexual assault and battery (touching/pushing). Her testimony also indicated that the three male co-workers also threatened to harm her boyfriend if she reported the incident to authorities. Appellant's testimony also indicated that she had been engaged to this boyfriend since 1985.

The next day, Appellant returned to work. She continued working at the Center through December, 1989, and for several weeks she was temporarily assigned to duties in another location for which she received excellent performance appraisals. In December, 1989 she was assigned to the Police Academy and only occasionally held assignments at the Detention Center. May, 1990 was the last day she worked for the County.

According to her testimony, after the incident she became depressed, anxious, nervous and had difficulty eating and had not been able to work. In April 1990, Appellant began seeing a psychiatrist. The Appellant stated that she had not been able to work since May, 1990. In July, 1990, she enrolled at Montgomery College where she achieved A and B+ grades in her courses. Appellant then began taking graduate courses in environmental engineering at the University of Maryland.

During several discussions with four doctors, she stated that she was raped at age six (6) by two boys from her neighborhood; was again raped at age 21 while attending Merrimac College by a professor who was also her landlord. Appellant stated that she did

not report the second rape to authorities. She also told her doctors that at age 17 she was hospitalized for six (6) days for depression and was released after the doctors found nothing wrong with her. The medical records indicate that in 1987, two years before she started working for the County, she was again hospitalized for 19 to 20 days at Melrose Wakefield Hospital for observation due to an emotional episode.

When she applied for employment with the County, she did not disclose on her employment application either her previous hospitalizations, medical, mental or emotional problems. Both in 1990 and 1991 Appellant's doctors concluded that the evidence of rape at any early age is weak and that the Appellant was able to return to work.

Since Appellant suffered anxiety at the County Detention Center, the County attempted an alternative placement search and found eight possible areas of employment where three jobs were available.

The County recommended that she apply for the three jobs. Appellant refused all three positions because she wanted to work only in environmental engineering.

ISSUES

Whether Appellant was entitled to either a Service Connected Disability Retirement Benefit under Section 33-43(e) or a Non-Service Connected Disability Retirement Benefit under Section 33-43(d) of the Montgomery County Code.

FINDING OF FACT

A review of the record, including both Appellant's testimony and the exhibits, indicated that there were inconsistencies in the findings and conclusions as well as the Appellant's testimony. The record showed a finding that the Appellant had a medical history which included severe emotional/adjustment episodes requiring hospitalization which preceded her employment with the County.

A preponderance of the credible evidence contained in the record supports the conclusion that Appellant is not incapacitated for duty.

CONCLUSION

In the opinion of the Board, the testimony did not indicate by a preponderance of the evidence that the Appellant's condition was either caused while in the performance of her duty, or that she was mentally or physically incapacitated for the further performance of duty.

Both the definitions and conditions under Sections 33-43 (d), Non-Service Connected Disability Retirement, and/or Section 33-43 (e), Service-Connected Disability Retirement, of the Montgomery County Code had not been met.

Accordingly, the decision of the Hearing Examiner, was sustained and Appellant's application for either a Service Connected Disability Retirement Benefit or a Non-Service Connected Disability Retirement Benefit was denied.

CASE NO. 92-48

This is a decision on the record in the appeal filed in May, 1992. The Appellant appealed the decision of Hearing Examiner denying him a Service Connected Disability Retirement Benefit.

The Appellant raised the issue of a conflict of interest on the part of the Hearing Examiner and also that the Hearing Officer committed errors in failing to recuse himself. The Circuit Court for Montgomery County Maryland has ruled in Civil Case No. 75332 that the Hearing Examiner should disclose prior to the hearing that his wife is an employee of the Montgomery County Personnel Department. The Court also stated that there is not a conflict of interest, but in order to avoid any aura of impropriety, full disclosure must be made at the beginning of the hearing. This was accomplished.

BACKGROUND

The Appellant was a Sergeant in the Montgomery County Police Department who joined the Department in 1957. In October, 1990, he had pains in his arm and chest. The Appellant continued his normal routine for the next six or seven days; the pains came and went. His doctor referred the Appellant to a heart specialist. It was determined that there was coronary artery insufficiency and an angioplasty was performed in January, 1991 to open coronary arteries.

The Appellant applied for a Service Connected Disability Retirement Benefit and it was granted in August, 1991. The County appealed the decision to a hearing examiner. The Hearing Examiner conducted the hearing on January 15, 1992 and denied the application for a Service Connected Disability Retirement Benefit.

The Appellant then accepted a normal retirement and was advised by the County in April, 1992 that his acceptance of a normal retirement would act as a waiver of his claim for a Service Connected Disability Retirement Benefit.

On May 15, 1992 the Appellant appealed the Hearing Examiner's decision to the Merit System Protection Board.

In the opinion of the Board, the testimony did not indicate by a preponderance of the evidence that the Appellant's condition was caused or aggravated while in the performance of his duty.

Accordingly, the decision of the Hearing Examiner was sustained and Appellant's application for a Service Connected Disability Retirement Benefit was denied.

RETIREMENT/DISABILITY/REMAND

Case No. 91-24

Pursuant to the order of the Circuit Court for Montgomery County Maryland, Civil No. 75276, the above case was remanded to the Merit System Protection Board for a review on the record and decision containing specific findings of fact and conclusions of law.

BACKGROUND

The Appellant was a Principal Administrative Aide and started working in 1984. In January, 1990, she applied for a Service-Connected Permanent Disability Retirement Benefit under Section 33-43 (e) of the Montgomery County Code. She stated that she had Carpal Tunnel Syndrome, could no longer do the job adequately and that the job was the cause of her disability.

In May, 1990 she was granted a Temporary Non-Service Connected Disability Retirement Benefit. She appealed this determination and the Hearing Examiner conducted a hearing on November 8, 1990. On November 26, 1990, the Hearing Examiner affirmed the decision that Appellant was entitled to a Temporary Non-Service Connected Disability Retirement Benefit.

The Appellant appealed to the Merit System Protection Board in December, 1990 and the Board sustained the Hearing Examiner's decision on April 16, 1991.

FINDINGS OF FACT

A review of the testimony of the Appellant as well as the exhibits failed to indicate that the cause of the Carpal Tunnel Syndrome was either job related or that the job aggravated the disorder. Both the testimony and the exhibits failed to demonstrate worsening of the disorder. In fact, there was no testimony that she failed to report for work from June, 1984 until May of 1990 (when her retirement was granted) because of her Carpal Tunnel Syndrome; or that she left work early due to her condition; or that she performed less than the full complement of her duties. In addition, she worked full time, full duty until she was granted a Non-Service Connected Disability Retirement Benefit.

A doctor's report dated April 20, 1988 did not make mention of any causal relationship between the Appellant's Carpal Tunnel Syndrome and her duties as a Principal Administrative Aide including her typing. His report also indicated that the tingling in both her hands could be caused by another underlying systemic disease including Diabetes or Hypothyroidism.

Another doctor's report dated March 30, 1990 indicated that the condition was fundamentally an aging process and, in this case, there can be no association between Carpal Tunnel Syndrome and Appellant's occupation.

Reports from two other doctors dated January 30, 1990 and March 30, 1990 recommended surgery in the form of a bilateral release of transverse carpal ligaments. These reports did not support Appellant's claim that she was permanently incapacitated from duty.

The Appellant further testified that she did not plan to have Carpal Tunnel Syndrome surgery performed because she knew, "by reading up on it that surgery is not always successful."

CONCLUSION

The Board found the record complete enough to reach a decision.

Section 2A-10 (b) of the Montgomery County Code requires that all decision be supported by a preponderance of the evidence of record. The Board concluded that the Appellant had not met her burden of proof.

Section 33-43 (e) of the Montgomery County Code plainly requires that eligibility for a Service-Connected Disability Retirement Benefit must be based upon a condition which is aggravated by the performance of one's job duties and that the condition must incapacitate the employee. In the opinion of the Board, the testimony did not indicate by a preponderance of the evidence that the Appellant was unable to perform the full complement of her duties. In addition, Section 33-43 (e) (1) of the Montgomery County Code also provides, "In extenuating circumstances, the Administrator may waive the requirement that a member's incapacity is likely to be permanent and may approve a Temporary Disability Retirement for one or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to be permanent."

Accordingly, the decision of the Hearing Examiner was sustained and the Appellant's application for a Service-Connected Permanent Disability Retirement Benefit was denied and a Non-Service Temporary Disability Retirement Benefit was granted.

RETIREMENT/DISCONTINUED SERVICE

Case No. 92-14

This appeal concerned a grievance filed with regards to a Discontinued Service Benefit.

Appellant was a Police Captain at the time he learned that the Chief of Police was implementing a reduction-in-force for two Captain positions. The positions were to be abolished effective July 1, 1991. He was notified that his position was to be abolished, and he made application for a Discontinued Service Retirement (DSR). Prior to the abolition of his position, he was transferred to another assignment as Police Captain in June, 1991. He maintained the position number he held prior to the transfer

which was transferred with him to his new assignment. On July 1, 1991 the two designated assignments were discontinued, and the two related Captain positions were abolished. Two other employees, with more seniority than him, were granted DSR's as they had requested. The position numbers of these two Captains were abolished.

He argued that the retirement law entitled him to a DSR because he was occupying a position which was abolished. He relied on Section 33-45(d) of the County Code which states, "Any member whose position has been abolished or employment has been terminated by an administrative action may elect a discontinued service pension."

He contended that the County Administrative Procedure 4-19, Section 5.3(c) on Reductions-in-Force, conflicts with Section 33-45(d) because the administrative procedure provides for DSR's to be granted on the basis of seniority.

The Board found that Section 33-45(d) did not confer an entitlement to a DSR upon an employee simply because he/she happened to occupy a position slated in the future for abolition. If that were the case, Section 33-45(d) would interfere with management's ability to transfer employees and conduct reorganizations. Administrative Procedure 4-19 created an equitable basis for granting DSR's by relying upon seniority. This administrative procedure did not conflict with the retirement law, but rather supplemented it. The appeal was denied.

SUSPENSION

Case No. 90-44

CONTINUED

An Environmental Protection Employee filed an appeal from the decision of the Director, for a 10 day suspension. The appeal was subsequently withdrawn by the Appellant.

TERMINATION/AWOL

Case No. 92-34

The Appellant was ordered back to work on October, 1991 with a report date in November, 1991 to another work location. When the Appellant did not report to the location, a meeting was held by officials with the Appellant and his counsel of record at that time in an attempt to discuss and resolve any outstanding matters concerning his 1990 dismissal.

The Appellant did not report to duty as ordered and the Department took progressive disciplinary actions based on his continued absence without authorized leave. He was warned that continued absences would result in termination. The Appellant

alleged that he would not be physically safe at this location and that he was going to be set up to be fired. The Department looked into these allegations and finding no basis for change proceeded with further discipline leading to a notice of dismissal later in November, 1991. The Appellant did not appeal any of the disciplinary notices, including the dismissal, under the negotiated grievance procedure. These notices were effectuated during December, 1991 and the notice of dismissal was issued in January, 1992. This action was not appealed.

The Appellant wrote to the County's representative in January, 1992 and offered a conditional agreement for his return to work. Upon consideration of his stated terms, the County was unable to accept his terms and so advised him in February, 1992.

The Appellant contended that the instant dismissal causing this appeal was a continuation of preordained, arbitrary and capricious actions taken by department management which were found to be unwarranted by a Fact Finder in his arbitration case. He also believed that the failure by the County to reach agreement on his return to duty was a part of the continuing pattern of retaliatory actions. He contended that the reassignment was without precedent within the department; that he had been assigned to a job for which he was not qualified; that he was not wanted by workers at the facility, and that since he was not familiar with the work, he was being set up to be fired for poor performance. The Appellant believed that he must be restored by the County to the same position he occupied before his 1990 dismissal.

FINDINGS OF FACT

The Appellant had been employed by the County since 1983 and according to his testimony, he had no experience in the new work.

The Appellant believed that he would not be afforded a chance to learn and succeed at the new location with equipment with which he was not familiar and with employees who did not want to work with him.

The Appellant believed that the Fact Finder had found the County responsible for his first firing without adequate cause and that the transfer would be a repeat of what had been found, initially concerning his performance evaluations.

Because it took so long for the County to provide back pay in regard to the restoration to duty, the Appellant did not believe that the County would abide in good faith with any terms set for his return to duty.

The Appellant believed that the County was obligated to return him to the same position since that was what was stated to him in a letter.

The Appellant believed that he, "...Had not at any time refused to return to work," and that he, "... Didn't request special preference from anyone."

The County contended that the Appellant's position required that he work on whatever equipment he was assigned to and in whatever unit he was assigned for duty. While the Appellant believed that his position number would govern, and should remain the same after restoration, thus preventing any change in duties or work location.

The Appellant had never received an order during his employment and did not interpret the order to return to duty as a restoration in keeping with the Fact Finder's award since he had not received all the back pay he believed was due him.

The Appellant did not desire to file a new grievance over the unsettled matter from 1990 after he had returned to duty since the earlier matters had not been resolved in his favor and he had not benefitted in any way whatsoever.

The Appellant was aware that the County had a right to transfer him to another office in the department if he were an employee. He did not consider himself an employee since he had not been paid for the period of time for which he was supposed to have been restored to duty.

DECISION

The Appellant was wrong in not returning to duty. The Appellant had reasonable doubts and fears that caused him to take enforcement into his own hands when a settlement could not be reached according to his terms. The County had properly followed the rules and procedures in handling this matter.

The Appellant was willing and ready to work, but had not been able to do so because of the matters outlined above in this appeal hearing. A majority of the Board was moved by equity to restore Appellant to County employment as specified below.

The Board unanimously found that the County had authority to place the Appellant where it determined there was work to be done and;

- any unsettled matters from the 1990 over-turned dismissal may be subject to redress under appropriate procedures available to Appellant as an employee upon his return to duty.
- no attorney fees were payable under this decision.

A Board majority held that;

- no back pay was authorized by this decision.

One member dissented and found that the County action was sustainable and no relief appropriate.

TERMINATION/MEDICAL

Case No. 92-21

This decision of the Board was based on the record and hearing held on July 16 and 28, 1992 as a result of an appeal of the termination of the Appellant on December 20, 1991.

BACKGROUND

The termination action was taken by the County under Section 24 of the Personnel Regulations which state that:

"Excessive absences caused by ongoing medical or personal problems that are not resolved within 3 calendar months after the date the employee exhausts all paid leave, including any grants of leave received from the sick leave bank." (Sec. 24-1c)

The Regulations further state that prior to terminating an employee for the reason stated 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.

The record shows that the Appellant was in a Leave Without Pay status beginning April 4, 1991 (this personnel action was dated October 3, 1991) and was directed to report to work on a light-duty basis as of October 7, 1991. The Appellant failed to return to work because her physician approved her for part-time work only. The Appellant met with her supervisor on November 27, 1991 in an effort to resolve differences and assure her return to work. She returned to work on December 2, 1991 and insisted on working only part-time. She was considered absent without approved leave for four hours on that day.

The termination notice was dated on the next day, December 3, 1991, referencing her return to duty on December 2, 1991, to work a full-time schedule. The notice informed her that her excessive absences caused by ongoing medical or personal problems had not been resolved within three calendar months after April 4, 1991. The notice also informed the Appellant of her recent written responses to management as well as her recent conversations with the Department's Deputy Director.

The Appellant contended that the County did not require her to return to duty until October in 1991; did not clarify the mix-up on full-time/part-time working until early December of 1991; did not clear up her personnel records to document the reasons until after the fact; did not counsel her until after she returned to duty, and that the meeting with her supervisor was not a counseling session but was a conversation in which she was told she must work full-time, and can not count time lost before returning to duty as the basis for meeting the three month's time requirement, after the employee, in fact, returned to duty.

ISSUE

The issue was whether the County had properly terminated the Appellant under Section 24 of the Personnel Regulations.

FINDINGS

The record shows that the Appellant had been allowed to work part-time prior to her last return to duty in December, 1991.

The Appellant, upon advice of her physician, did not wish to return to work on a full-time light-duty basis, even when asked to do so on October 7, 1991.

The County believed that the one day of duty, December 2, 1991 was just one more day in the required 90 days which would be provided to "...Allow the employee adequate time to improve or correct performance or attendance." (Sec. 24-2)

The Appellant had exhausted all available leave early in 1991 and was placed in a Leave Without Pay status as of April 4, 1991. Three calendar months after this date, the County and the Appellant were involved in another proceeding concerning entitlements and no action was taken by the County under Section 24 of the Regulations.

The failure of the Appellant to report when asked, to work the schedule required, and perform tasks required are matters which, under the circumstances in this case, could have been handled under other provisions of the Regulations.

CONCLUSIONS

The Board found the instant termination did not comply with or meet the intent of the regulations used by the County.

The County did not use disciplinary action which it could have because the Appellant clearly did not follow reasonable directions from management officials.

The County did not terminate the employee for abandonment of position, under Section 24-1a, after three days of unauthorized absence.

Rather, the County used the most restrictive termination provisions which required notifying with reasons, counseling the employee as to corrective action, and allowing the employee adequate time to improve or take corrective action on attendance or performance.

When the County decided to use these provisions over the Thanksgiving Holiday and weekend period, the County believed it had done enough to terminate an employment arrangement. The Board did not agree.

The issue causing the employee absence from working full-time on

December 2, 1991 was her perceived inability to do so. When the employee in fact, demonstrated that she could/would not work full-time, the County, in fact, then knew that there was no resolution of the issue in terms which it desired.

In our view the period of time for notification, counseling and working together began at that point. It did not end at that point.

Termination is not a disciplinary action and is governed by rules of reasonableness and accommodation of an employee's situation by management. If the County wanted to terminate the employee immediately after the holiday weekend conversations, an "either/or" notice allowing three calendar months or a clear statement of what time periods the County was including in meeting the three months was required.

The Appellant prevails in this case.

The County was directed to immediately restore the Appellant to duty on a full-time basis and begin a 30 day period of counseling to settle the unresolved issue (part-time employment on light-duty, vs. full-time employment on light-duty). No back pay was appropriate here because of the circumstances. It was during the hearing that the Appellant made clear her desire to return to work and to be gainfully employed. Legal fees were provided.

TERMINATION/REDUCTION-IN-FORCE

Case No. 92-35

This was a decision on the appeal of the termination of the Appellant as a result of reduction-in-force which was effective March 19, 1992. The notice of termination was dated February 18, 1992 and the appeal filed on February 19, 1992. The Board granted a stay of the termination on March 2, 1992 which was opposed by the County and reaffirmed by the Board on May 20, 1992.

Prehearing motions were handled during April through July as well as discovery and attempts at resolution. A hearing scheduled for July 28, 1992 was cancelled and, when it was certain that no resolution was possible, an open hearing was set for November 19, 1992.

In the appeal petition, the Appellant alleged that the County had violated the procedures of the A.P.4-19, Reduction-In-Force, and that the termination was an act of continuing harassment and retaliation. As relief, the Appellant asked that the notice of termination be withdrawn and that he be assigned to a position in which the Appellant could perform the requirements of his class specification.

BACKGROUND

The Appellant began working with the County in March 1976 and remained with the Department of Transportation (DOT), until he was transferred to the Department of Fire and Rescue Services (DFRS) in July, 1990. It was the intent of DFRS that the Appellant become involved in the implementation of a vehicle maintenance program which initially called for centralized maintenance of fire and rescue equipment in the County. This transfer was involuntary and was made in connection with the resolution of a grievance and appeal which the Appellant had filed. The Board upheld the transfer. In transferring, the Appellant was assigned to work with DFRS vehicles although his primary experience had been with trucks as a maintenance mechanic and supervisor.

County revenue began to fall and all departments were asked to cut back. DFRS abolished a Shop Supervisor position for FY 92. This was the position which the Appellant was to occupy. Thereafter, DFRS and DOT worked together to retain the shop supervisor job within DFRS. A vacant mechanic's position was abolished in DOT to facilitate this action by DFRS and DOT agreed to continue funding for the Appellant's supervisory position through FY 92. Shortly afterward, the implementation of the vehicle maintenance program was delayed rendering the Appellant's position vulnerable. After an effort at a return to DOT of the Appellant. Officials of DOT decided to abolish the shop supervisor position through termination by Reduction-In-Force.

The County contended that the Appellant did not grieve the transfer and any reference to it was untimely at that point; that DFRS was ready and willing to use the Appellant and that its managers could not be considered as agents of harassment or retaliation of the Appellant; that the Appellant turned down an offer made of a position for which he had applied after he had been terminated (during the stay period); and that his termination was a part of a County-wide reduction-in-force activity which affected several employees.

The Appellant chose not to make an opening statement at the hearing and both parties agreed to file written closing comments.

The Appellant argued that his position was abolished in DOT when the budget was finally approved by the County Council and that the budget, not the personnel documents, were controlling in determining the locus of an employee's position. The County countered that the Appellant was "actually" an employee of DFRS and "virtually all of the evidence presented before the Merit Board demonstrates this."

The Appellant countered that the evidence pointed to the budget documents as controlling and that he held a position which "...was only temporarily assigned to the Department of Fire and Rescue Services." It must be noted that this argument was crucial to the allegations of the Appellant since the Reduction-In-Force regulations called for a Department to take certain actions concerning occupants of positions that were going to be abolished.

Under these rules, "...If Appellant's position were in the DOT and became subject to a Reduction-in-Force he would not be the person to lose his job if he chose not to accept a Discontinued Service Retirement."

The Appellant contended that the abolishment of his Shop Supervisor position under the Reduction-In-Force procedures was improper because the County refused to place him in one of six vacant Mechanic positions for which he applied in September of 1991. Further, he contends that the DOT intended to abolish any position remaining available if he were to apply for them. In the Appellant's view, "...There are no provisions ...which authorize the County to refuse to appoint the Appellant to a vacant, funded Shop Supervisor position on the grounds that the position will be abolished in the future. If the Appellant is willing to apply and take his chances under the Reduction-In-Force procedures then the Board should find that the County is violating its own Interim Administrative Procedure by trying to stop Appellant from applying for the vacant Shop Supervisor position."

The Appellant contended that by the time he was moved to the DFRS, there was nothing to do since there was no County maintenance facility in existence for fire and rescue vehicles nor were there any plans to build one in the future. The Appellant was expendable. He was a Shop Supervisor, not an Information Management Specialist. In his view, the actions of the County were obvious and purposeful - to place him where he could not exercise his seniority rights in a Reduction-In-Force.

FINDINGS OF FACT

1. The Appellant was transferred from DOT to DFRS as evidenced by a personnel action form effective July 15, 1990.
2. The personnel action form and documents derived from it determined the work location and status of an employee.
3. The County was involved in a major reduction program as a result of reduced revenues and the DFRS actions were a part of the major reduction.
4. The DFRS Reduction-In-Force was conducted in accordance with provision of Section 25 of the Personnel Regulations and Administrative Procedure 4-19.

CONCLUSIONS

1. The Board concluded that the Appellant was an employee of DFRS.

He was transferred effective July 15, 1990 and he provided the Board a copy of the personnel action form.

The comment on this form stated that he was being transferred with position number to DFRS from DOT. From that date, the Appellant was under the supervision and direction of officials of DFRS.

The Appellant argued that he was "temporarily assigned" to DFRS. If this were the case, there would not have been a personnel action. The County did not have a personnel action allowing movement within the County between Departments called "temporary transfer" or "detail".

2. Once transferred, as the Board understands the personnel practices of the County, the Appellant did not have to deal anymore or contact officials of DOT for permission to be absent, for obtaining equipment and supplies, or for work assignments and performance appraisal. He received his pay from the County and officials bargained over which Department was to be billed. These matters of pay are secondary to the fact that the personnel action of July 15, 1990 determined the Appellant's work site as far as the personnel system is concerned. This means that he was an employee of DFRS from the effective date of that transfer. He could not and can not chose what Department he prefers to be in when a Reduction-In-Force occurred. How he was paid and what machinations were required by the budget and fiscal officials to meet payroll in DFRS did not change the personnel action form. Subsequent personnel action forms were endorsed by officials of DFRS.

Absent the personnel action form, there would be chaos. Employees are not asked to go from Department to Department to pick up the pro-rata share of the cost for their by-weekly pay checks. We understand that the provisions of Section 9 of the Personnel Regulations govern these matters. Sections 9-11 and 9-12 in particular. That the County had plans underway to improve its processes for creating and using employee listings and, in particular, using position numbers does not make the facts in this matter less clear. Personnel actions still originate within Departments and Reductions-In-Force are still handled within Departments.

3. The elimination of the Appellant's position was not an isolated event, but a part of a large scale, county-wide series of actions related to reductions required to meet revenue shortfalls which involved abolishment of 22 positions, 10 demotions, 33 discontinued service retirement, and 3 lay-off, not including Appellant.

4. The Board did not conclude that the County violated its own regulations and practices concerning a Reduction-In-Force within DFRS for the position(s) called "Shop Supervisor". Appellant was the only employee in the "Shop Supervisor" class within the Department. The record showed that proper notice was provided; Discontinued Service Retirement was offered to the Appellant and declined by him; and six Mechanic positions for which he could be considered were vacant by the time he received notice of reduction-in-force. The County would not have been obligated to hire Appellant under its rules.

The Appellant had charged that his termination was a part of a continuing pattern of harassment and retaliation by County officials. The Board did not see evidence of this allegation by officials within DFRS who accepted the Appellant as a colleague and

expected him to perform as a program manager. He had noted that he was a shop supervisor and apparently wanted to do hands-on work while officials of DFRS, given the changed situation, wanted him to manage the maintenance program. He characterized management's desires as expecting him to be an Information Specialist. Such happens in modern public bureaucracy. Many public agency activities are managed from desks, using information and computers, and, based on desires of governing managers; work is performed at lower levels, sometimes by contract, or is managed as a program for conformance with pre-set standards of adequacy. To expect program management of a legitimate County activity from a supervisor is not harassment. In this case, it seemed that the Appellant, quite honestly, believed that he was the wrong person to be expected to perform that way.

In summary, the Reduction-In-Force was legitimate, and, under the circumstances, it was regrettable that it resulted in termination. The Board found no basis to overturn the actions of management. The appeal was denied. We note, however, that the Board had granted a stay in this matter. The employee was to have been terminated effective the end of two pay periods after the date of this decision.