

Merit System Protection Board Annual Report FY 1994

Members:

**Angelo M. Caputo, Chairman
Beatrice G. Chester, Vice Chairperson
Anthony W. Hudson, Associate Member**

Executive Secretary:

**Merit System Protection Board
Waddell Longus**

Prepared by:

**Susan W. Goldsmith
Principal Administrative Aide**

**Montgomery County Government
Merit System Protection Board
100 Maryland Avenue, Room 113
Rockville, Maryland 20850
217-3470 / FAX: 217-3472**

June 30, 1994

TABLE OF CONTENTS

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD	1
DUTIES AND RESPONSIBILITIES OF THE BOARD	1
APPEALS PROCESS	5

SUMMARY OF DECISION ON APPEALS

GRIEVABILITY.....	5
MEDICAL RATING.....	8
PROMOTION.....	9
RECLASSIFICATION.....	13
RETIREMENT DISABILITY.....	17
REDUCTION-IN-FORCE.....	42

1994
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 1994 were:

Angelo M. Caputo	-	Chairman (Reappointed 1/94)
Beatrice G. Chester	-	Vice Chairperson (Appointed 1/93)
Anthony W. Hudson	-	Associate Member (Reappointed 1/92)

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, March, 1994.

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, 1994 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 30.4 Appeal Period of the Personnel Regulations. After this information is received, the appeal is processed in one of two ways.

First, if the appeal involves a suspension, demotion or dismissal, a hearing is scheduled. In cases involving suspension or dismissal, at least ten work days advance notice of the prehearing 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.

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 fifteen work days to respond. The Board then provides the Appellant an additional fifteen 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 a hearing is granted, all parties are provided at least thirty days notice.

GRIEVABILITY

Case No. 94-02

BACKGROUND

Appellant has been employed as a County firefighter since April, 1983. In May, 1993, the Department of Fire and Rescue Services issued Vacancy Announcement 93-6 indicating the availability of a position within the Bureau of Enforcement and Investigations, Fire Investigations Division. It indicated that there may be two positions but that lateral transfers only would be considered.

Appellant filed a transfer request in May, 1993 detailing his qualifications and experience for consideration for the lateral transfer. Five qualified applications were received for the vacancy.

Two individuals who had applied received an interview for the position and a third interview was set up, but the individual did not attend the interview. Appellant and another applicant who were qualified did not receive an interview. In July, 1993, Appellant received a memorandum dated July, 1993 from an Assistant Chief advising him that a Sergeant had been selected for the lateral transfer to the Bureau of Enforcement Investigations and that, due to fiscal restrictions, only one applicant would be selected for training. This Sergeant was one of the two individuals who received an interview for the position.

Appellant contends that, by not receiving the opportunity for an interview, his merit system rights have been violated. While the February, 1992 Department of Fire and Rescue Services policies and procedures No. 515 on transfers does not establish any procedures with respect to how the Department will make a determination regarding transfers resulting from vacancy announcements, Appellant believes that interviews should be afforded equally to all qualified candidates. Appellant further contends that the process used denied him equal and fair treatment and, as a result, his rights under the Federal and State Constitutions were violated.

As a remedy, Appellant requested priority consideration for the next vacancy, the establishment of a policy for interviews of all applicants for transfer, and attorney fees.

The Labor/Employee Relations Manager denied Appellant's grievance in August, 1993. The reason for the denial that Section 21-6, Appeal of Transfer, of the Personnel Regulations states that a merit system employee may appeal an "involuntary transfer" in accordance with Section 28 of the regulations. Since Appellant's transfer was not "involuntary", he was advised that his complaint could not be processed further because it was not grievable.

Additionally, Appellant had not claimed any procedural violations of the Department of Fire/Rescue Services Transfer Policy. The County stated that the transfer of employees is considered to be a prerogative of management and not an appealable issue. Appellant's attorney, in his October, 1993 letter, contends that Administrative Procedure 4-4 expressly setting forth exclusions from the grievance procedure, does not exclude the unequal and unfair filling of vacancies by transfers.

ANALYSIS AND DISCUSSION

We agree with the decision of the County that the Personnel Regulations, Section 21-6, limit grievances concerning transfer to involuntary transfers. In this case, Appellant voluntarily applied for a vacancy that was to be filled by a lateral transfer. The Department of Fire and Rescue Services does not have any regulations governing the procedures for selecting applicants to a position by a lateral transfer. As stated by the Personnel Director and Assistant County Attorney, in their Memorandum of September, 1993, managers have a greater degree of discretion in filling decisions by lateral transfer than by promotion.

It is relevant that Section 21-1 of the Regulations defines a "transfer" as the movement of an employee from one position or assignment to another position or assignment at the same grade and salary level while a "promotion" is the movement of an employee from one class to another class with a higher grade level assignment. Thus, there are important differences between promotional decision making and transfer decision making.

For example, Section 22.2 of the Personnel Regulations requires that promotional selections be made from an eligible list certified by the Personnel Office, that they must be made on a competitive basis, and promotional decisions must be made to accomplish certain goals. In addition, Section 22-6 of the Personnel Regulations gives an aggrieved employee the right to appeal any promotional action that was arbitrary, capricious or in violation of established procedure. The Personnel Regulations clearly provide no such procedural rights to employees who seek voluntary transfer opportunities. Specifically, there are no provisions requiring County managers to establish procedures respecting interviews of applicants for transfer.

Nor do County employees who apply for a voluntary transfer have any constitutional right to require the County to develop and implement procedures governing the interviewing or the selection of transfer applicants because such applicants, have no property interests in the desired voluntary transfer. The same is true for the applicant for a County merit system position. Leese v. Baltimore County", 64 Md App. 442, 456-58 (1985); Andre v. Montgomery County Personnel Board 37 Md. App. 48, 63-64 (1977). This case is distinguishable from Montgomery County v. Anastasi, 77 Md. App. 126, 135-36 (1988) where the Merit Board was required to develop a system of procedures in the area of promotional decisions. In this case since the decisions concern the transfer of employees rather than promotions, the Board is not required to develop procedures for the transfer of employees.

Thus, based on the above, it is clear that, while promotional decisions may be grievable, voluntary transfer decisions are not grievable under the Personnel Regulations. The Board denied the appeal and the relief requested.

Case No. 94-06

BACKGROUND

Appellant is a Transit Coordinator, Department of Transportation, Division of Transit Services of Montgomery County. In his grievance he complained that a bus operator tried to hit him with a bus in February, 1992, and that this type of behavior, also directed against other employees was allowed to continue unchecked by management. As relief Appellant requested that Blank be removed from the work force at Silver Spring/Bethesda Ride-On; that Montgomery County employees be provided a safe work environment, and that a special task force and an independent audit committee review serious acts affecting the safety of County employees. After the grievance was filed, Appellant requested reimbursement for annual leave and sick leave used while he was off work, claimed to be due to actions taken against him by Blank.

Appellant was advised of the decision of the Deputy Chief Administrative Officer, by a letter dated December, 1993, from the Personnel Director. In his decision, the Deputy Chief Administrative Officer advised Appellant that Blank had been dismissed from County service in July, 1992, through independent action by the County. No specific relief was granted with respect to Appellant's suggestions concerning violence in the work place since this was the final responsibility of management. Appellant's request for reimbursement of annual and sick leave was denied because it was not part of the original grievance.

ANALYSIS AND DISCUSSION

In his appeal, Appellant states that the County must address the issue of the fair and equitable application of policies and procedures so that it affects all County employees equally. He claims that corrective actions are needed in the Department of Transportation to address root causes which allow some employees to continue their program of violence, vandalism and abuse in the work place. Appellant also seeks reimbursement of sick and annual leave used to recover after nearly being struck by a bus. Initially, he had sought reimbursement of leave through Workman's Compensation but this request was denied.

The primary focus of the grievance was Blank's removal from the work place. This was already accomplished through independent County action in July, 1992.

The Chief of the Division of Transit Services is responsible for the operation of the

Division and, while he may consider any employees suggestion for discipline, he was not under any obligation to agree with or take the recommendations of Appellant, who is a subordinate. The Department Head is responsible for initiating disciplinary action and the Division Chief is accountable to the Department Head to ensure that proper and timely disciplinary actions are taken. Moreover, the grievance procedure is not a forum to develop policy and procedures that effect the day-to-day operations of a Department or Agency.

Because Appellant's request for reimbursement of annual and sick leave was not part of his original grievance, this request was properly denied. In addition, the evidence is not clear that the leave was taken because of improper actions of the County.

CONCLUSION

For the reasons stated above, the Board affirmed the decision of the Deputy Chief Administrative Officer denying the grievance. This appeal was denied.

MEDICAL RATING

Case No. 94-03

The Board reviewed the written record on an Applicant's appeal from the decision of the Personnel Director to remove her name from the eligible list for the position of Health Room Technician I (Substitute) for which she was an applicant.

The record shows that:

1. She was given the same preplacement medical evaluation conducted on all applicants for this position as stated in the Position Announcement, under the section Selection Process.
2. The Employee Medical Examiner qualified her for the position with the following permanent restriction of no lifting of more than fifty pounds. She asked the Director of the Montgomery County Health Department whether an accommodation of this restriction is both reasonable and feasible.
3. After a review of the medical findings, the Director of the Health Department, in an August, 1993 memorandum to the Personnel Director, stated, in an emergency situation, "we do not feel that it would be a safe environment for the individual employee or the student (patient), if the Appellant is in a school assignment.
4. The decision of the Personnel Director in his letter of August, 1993, to her stated that, "It is the opinion of the physician that your condition is permanent, and since it is not possible for the

Health Department to accommodate your condition by altering the work requirements of the Health Room Technician I (Substitute) job, your name will be removed from the eligible list for this position."

The Board affirmed the decision by the Personnel Director and denied the appeal.

PROMOTION

Case No. 91-09

REMAND

Civil No. 71818

This case was remanded to the Board from the Circuit Court for further proceedings consistent with the opinion of the Court of Special Appeals filed October 25, 1993 (No. 49) in James D. Lee, et al. v. Montgomery County Department of Police, et al.

BACKGROUND

Appellants are six members of the Montgomery County Police Department: three sergeants who sought promotion to the rank of lieutenant and three lieutenants who sought promotion to the rank of captain. By virtue of higher numerical scores, each Appellant was listed on a promotion list for the position sought in the highest classification of "well qualified" but was not promoted.

The Court of Appeals determined that each of the Appellants was entitled to, but was not given, the benefit of the same considerations by his superiors as all the other candidates were given. The Court found that the Chief's memorandum in March, 1989 was not sufficient to cure a defect in the promotional process because (1) this was not the basis of the Board's decision and (2) fourteen of the eighteen promotions were made before the memorandum was published. The Court also found that the Merit Board did not comment directly on the memorandum; it did not base its decision on a finding that the memorandum was sufficient to comply with the Montgomery County Code; and it did not find that the Chief's memorandum complied with the Court's ruling in Montgomery County v. Anastasi 549 A.2d 753 (Md. App. 1988). Further, the Court stated that "if such a finding had been made it would have been subject to challenge as lacking evidentiary support."

The Court determined that, when a violation of the merit system law is found by the Merit Board, the Board has the power to fashion remedies in keeping with the merit system law in the Montgomery County Code, and those remedies may, in the Board's discretion, include a retroactive promotion under Section 33-14 (c) of the Code. The Court agreed with Appellants that the Circuit Court exceeded its authority by limiting the discretion to be exercised by the

Merit Board.

ISSUES ON REMAND

1. Whether Appellants should be given a retroactive promotion, or the benefits of a retroactive promotion, with or without back pay, or some other remedy as provided in the Montgomery County Code.

2. Whether retired Appellants are entitled to attorney fees since their legal fees were advanced by the Union.

3. Whether retired Appellant who was a supervisor is entitled to attorney fees for legal fees not advanced by the Union.

ANALYSIS AND DISCUSSION

Remedy

The sole issues in this case concern the remedy and attorney fees. The Court of Special Appeals determined that each of the Appellants was denied the basic fairness of being given the same consideration for all open positions under the guidelines deemed to be essential if the Chief of Police opts to delegate any of his discretion in the promotion process to subordinates. Because fourteen of the eighteen promotions were made before the March, 1989 Chief's memorandum on guidelines was published, each of the candidates was not given the benefit of the same consideration as all other candidates were given. Moreover, the Court concluded that the Merit Board did not find that the Chief's memorandum complied with the Court's ruling in Montgomery County v. Anastasi, (Anastasi) 77 Md. App. 126 (1988), and further opined, "if such a finding had been made, it would have been subject to challenge as lacking evidentiary support." The Court held that the Circuit Court erred in dismissing the appeal of the sergeants who sought promotion to lieutenant and in limiting the Board's remedial discretion to fashion remedies, including promotion.

Because of the similarity of circumstances, we find that the remedies ordered by the Board on remand in Anastasi and in Re: Appeals of Clarke, W. Fryer, J. Logan and J. Quinn (Clarke), Merit System Protection Board Case No. 86-12, April 8, 1986 should be followed in this case. In Clarke, since the Chief used additional persons in the final selection process, the Board ordered the promotion of Appellants in view of the absence of guidelines or standards to assure fairness and consistency of review and selection.

In Anastasi, the Court noted that the past practice had been to promote from the list in the order of the candidate's examination score. The Anastasi Court accorded considerable deference to the conclusions reached in Clarke due to the Board's thorough and sound reasoning in that case. While the Anastasi Court, like the Court in this case, declined to order a specific

remedy, it specifically directed that "there should be some remedy by the Board" in the nature of back pay, promotion when openings occur or both, or something other than either of these. On remand in Anastasi, the Board ordered retroactive promotions and award of back pay to correct the violations of merit procedures found by the Court.

In this case, the Court found that the trial Court erred in partially affirming the Board on the basis that the Chief's memorandum was sufficient to cure a defect in the promotional process because: (1) that was not the basis for the Board's decision and (2) "fourteen of the eighteen promotions were made before the memorandum was published." Since not all the candidates were considered for promotion under the same guidelines, the Court held that Appellants were denied the basic fairness of proper consideration for all open positions. Hence, the Board must order an appropriate remedy to cure the defect in the promotional process, including promotion, as directed by the Court. Because, in this case, the Court found that all Appellants were not considered for promotion under the same guidelines, it is not necessary for the Board to determine whether the Chief's March 30, 1989 memorandum sufficiently complies with merit principles for application in future cases.

To remedy the defect in the promotion process under the unique circumstances of this case, the Board considers a retroactive promotion for all Appellants, with back pay to be appropriate, with the alteration of promotion dates to promote those officers as and when they would have been promoted if rank order had been used. For those Appellants who have retired, appropriate adjustments in their retirement pay should be made. The Board considers this remedy to be consistent with the decision of the Court of Special Appeals under the specific facts of this case.

Attorney Fees

Section 33-14(c)(9) authorizes the Board to order the County to reimburse or pay all or part of the employee's reasonable attorney's fees. The County objects to payment of attorney fees to Appellants on two grounds: (1) The Board lacks authority to order payment of attorney fees for the time spent by Appellants' attorneys in appealing the case to the Circuit Court and Court of Special Appeals, and (2) attorney fees incurred by Appellants (except for Appellant with respect to legal fees for the appeal to the Court of Appeals and the remand to the Board) were advanced by the Fraternal Order of Police (FOP), which is the representative of the police for corrective bargaining.

We deem this case to be analogous to the Anastasi case because the Court of Appeals in both cases directed the Board to provide a remedy to cure a flaw in the promotion process for County police officers. Accordingly, we are ordering the County to promote Appellants retroactively with back pay. In Calarco v. Montgomery County Merit System Protection Board Civil No. 43531 (1990), the Circuit Court ordered the Board to pay attorney fees for the appeals before the Circuit Court and the Court of Appeals in the Anastasi case. Thus, we see no reason why the Board does not have the authority to order payment of attorney fees for the appeals to

the Circuit Court and Court of Appeals in this case, which is similar to the Anastasi case.

The issue of the FOP advancing the payment of Appellants' legal fees presents a mixed resolution. While we do not regard Appellant's attorney as a "representative of a labor organization" within the meaning of Section 29-1 of the Personnel Regulations, we accepted the County's interpretation of this regulation in MSPB Case No. 93-17 as reasonable. The County interpreted that regulation to also apply to prohibit police management officials from being represented by attorneys paid for by the FOP, which is the case here with some distinguishing characteristics.

In this case, the case is virtually over so that there is no requirement for Appellants to change attorneys at this late stage. Secondly, and more importantly, with the exception of Appellant A, Appellants have retired so that a potential conflict of interest was no longer possible after their retirement. Therefore, any attorney fees incurred after each Appellant retired, respectively, is not inconsistent with the County's interpretation of Section 28-1 of the Personnel Regulations. With respect to Appellant B, the same principle applies except that any fees payable to his attorney, which were not advanced by the FOP, would be reimbursable. Since Appellant A is still employed by the County, attorney fees that are specifically attributable only to his case, but not to that of the other Appellants, are not reimbursable because it would be inconsistent with the Board's decision in Case No. 93-17.

CONCLUSION

In consideration of the above analysis, the Board directs that each Appellant be given a retroactive promotion, with back pay, to the date each would otherwise have been promoted on the basis of rank order. For all Appellants, except A's, who has retired, appropriate adjustments should be made in their retirement pay to conform with their respective dates of promotion and retirement. All Appellants who have retired are entitled to be reimbursed for attorney fees incurred after the retirement of each respectively, irrespective of whether incurred for Court Appeals or for appeals or remand to the Board, except that Appellant B is entitled to reimbursement for attorney fees payable to his attorney, which were not advanced by the FOP; and Appellant A is not entitled to reimbursement for attorney fees incurred only and specifically for his case, aside from attorney fees incurred separately or jointly for the cases of the other retired Appellants.

RECLASSIFICATION

Case No. 90-36

REMAND

Civil No. 65444

This is a final decision of the Board on the order of the Sixth Judicial Circuit on the Appellee's motion for remand, and after hearing, that this Board conduct an evidentiary hearing on the issue of whether the position of Appellant was reclassified. The order of the Court was dated June 8, 1993.

BACKGROUND

A prehearing conference was held in September, 1993. A hearing was scheduled for early November, 1993 and rescheduled for later November, 1993. A continuance was held on December, 1993. Copies of post hearing depositions which were taken on December, 1993 were provided to the parties on January, 1994. Copies of the transcript of the hearing were provided to the parties and the County's and Appellant's closing arguments were made available in February, 1994. Subsequently, the Appellant responded to the County's closing argument in February, 1994. This closes the record in this matter.

ISSUE

Whether under the circumstances of this case, the position of Appellant had "in fact" been reclassified?

Specifically, the Court noted:

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's incumbent position had in fact been reclassified.

References: Montgomery County Personnel Regulations, Section 4 Equal Employment, Section 6, Appointments and Probationary Period, Section 7, Classification, and Section 22, Promotion.

FINDINGS OF FACT

1. Appellant's position was not de facto reclassified.

Appellant's position has never been formally or factually reclassified. No request was made by Appellant or the Department to study Appellant's position; no position study was ever made by Classification and Compensation; none of the procedural steps in Administrative Procedure 4-2 were followed; and no formal (or informal) approval of a reclassification was ever given by the Personnel Director.

Officer positions are always filled competitively, by competitive promotion. Appellant could present no facts to the contrary. The County contends that Appellant, in prosecuting this direct appeal, is trying to avoid the competitive promotion process.

No evidence has been provided to show any personnel action which may be considered as a "de facto reclassification". The term has no meaning in the County's personnel scheme, including the County Charter and Code, the Personnel Regulations, applicable Administrative Procedures, and practices in the Office of Personnel and particularly in DFRS. No position, including that of Appellant, has ever been "de facto" reclassified.

The Appellant contends that he meets the minimum qualifications for promotion. However, the Appellant does not state or accept that the requirement that occupants of positions such as his are filled under promotional requirements which include taking and passing a written examination.

The Appellant contends that he performed the requirements of the higher level position. This matter is not disputed. It is not relevant, since promotional examinations are required to be taken and passed in order to be promoted.

The Appellant contends that the position at the higher level is/was the same as the position which the Appellant was performing at the lower level. This circumstance can happen. Management has the right to assign and classify work according to its worth under a classification plan. If management had a need to have a broader span of control or a more restricted span of control and created or removed certain positions, the Appellant argues that he cannot lose any status under classification principles.

However, the fact remains that Appellant has not met the requirements under principles and practices of competitive merit practices which are extant in the County and particularly in DFRS. The Appellant testified that he took the written examination and was not placed on the eligible list. If the written examination had been passed by the Appellant, this issue would not arise.

The Board is not persuaded by contentions of the Appellant that the classification study implementation should have resulted in his being associated with, keeping, or owning his duties

and responsibilities regardless of whether he met requirements placed upon an employees.

2. Personnel actions affecting Appellant did not reclassify him.

This sequence of actions affecting the Appellant include those taken in 1990 when a position was abolished and the Department of Fire Rescue Services position was created. After those actions, which did not at that time directly affect Appellant, had been completed, so that the employee complement for Emergency Medical Services in DFRS was formally established, the indicated personnel actions of the Appellant were taken to remove his temporary promotion and transfer him permanently to an another position. These actions do not constitute reclassification, "de facto" or otherwise.

CONCLUSION

The Appellant argues that the instant case is nothing more than a failure by the County and its agencies to follow its own rules and regulations thereby denying Appellant his incumbent rights. Their actions were nothing more than a sham to disguise it eschewal of its own rules. Such action is a violation of the rule of law known as the Accardi doctrine. As articulated by the Court in Hopkins v. Maryland Inmate Grievance Com'n, 40 Md. App. 329, 391 A.2d 1213 (1978):

It is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended or disregarded in a particular case as long as such rules and regulations remain in force...In United States v. Heiner, 420 F.2d 809 (4th Cir. 1979)... [t]hat Court enunciated what appears to be the prevailing rule when it held: "An agency of the government must scrupulously observe rules and regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." Id. at 811. (391 A.2d at 1216-1217).

The County responds that Appellant has been given a hearing, and he has no factual basis for his claim that he was "de facto reclassified" and thereafter "demoted". None of his witnesses support his reclassification theory because they did not show that the personnel actions constituted a reclassification, and that Appellant met the requirements for promotion to lieutenant.

To the Board, the facts of this case show that there was no de facto classification. The Appellant has no claim to a de facto classification merely from a redistribution of assigned duties by management, as in this case, when the history of classified rank positions shows coverage only by promotional examination.

There is no evidence in the record before this Board that the sergeant's position to which the Appellant was permanently assigned was officially or de facto classified upward in a way that the Appellant had/has a fight to be promoted to it without competition. In other words, the circumstance of this case show that the Appellant's previous position was not reclassified de facto by any personnel procedure used by the County under its present rules and procedures.

Appellant grieved the County's failure to upgrade her position from an Administrative Services Coordinator (ASC), grade 28 to a grade 29. The Appellant also requested back pay from June 1991 and attorney's fees and cost.

BACKGROUND

Appellant, an Administrative Services Coordinator, grade 28, in the Personnel Department requested that her position be included in the Classification and Compensation Study being conducted under a January 1993 contract. The County agreed to have the ASC included in the study. The March, 1993 Draft Report of the Classification and Compensation Study recommended that the Appellant's position remain a grade 28. Its review found that, based on a point value determination, the position's grade should be increased to a grade 29. However, the report recommended against establishing a new class, in part, because the majority of duties Appellant performs are already encompassed in the ASC class and that Appellant has not demonstrated that her duties were clearly different from other positions with the same class. In September, 1993, the Appellant requested an administrative review of the Study, under Interim Administrative Procedure 4-2, Classification Procedures dated April, 1991.

The County requested an administrative review of the position, in a letter dated September, 1993. Blank was contracted as a classification consultant (Fact-Finder) to conduct the administrative review. In October, 1993, the review was completed. In the report, the Fact Finder concurred with the Study's findings that the ASC position should remain at grade 28, arguing that the Study's application of quantitative job evaluation system points resulted in a total that was too high for the position.

In November, 1993, the Director of the Department of Human Resources, forwarded the Fact-Finder's report to the Deputy Chief Administrative Officer (DCAO) supporting the move of the ASC position to a higher grade. On December, 1993, the DCAO supported the Fact-Finder that the position remain at grade 28.

The Appellant then filed a timely appeal of the DCAO decision to the Merit System Protection Board. In the appeal the Appellant cited that there was "inappropriate department input".

CONCLUSION

A review of Administrative Procedure 4-2 indicates to the Board that the County acted completely in accordance with the established procedure. Section 7-5, Administrative Review of Classification procedure of the Montgomery County Government Personnel Regulations, likewise was also adhered to by the County. At this point the Board would also like to note that Section 7-5 states:

"At the conclusion of the review the Fact-Finder will file a written report of findings and recommendations with the Chief Administrative Officer (CAO). The decision of the CAO is final."

Section 7-6, Appeal of Decision on Classification states: "That only if there is a violation of procedures contained in Section 7-5 of these regulations may the CAO's decision be appealed to the Board."

It is the opinion of the Board that there was no violation of Section 7-5 and, therefore, the CAO's decision may not be appealed to the Board.

The Board concludes that Appellant has not presented any evidence to show that the County violated Interim Procedure 4-2, Montgomery County Personnel Regulations 7-5 or 7-6. Therefore, the Board sustains the decision of the DCAO denying the Appellant's grievance, and further states that in this case, the DCAO's decision cannot be appealed to the Board since there is no procedural violation.

RETIREMENT DISABILITY

Case No. 89-12

This is a final decision of the Board on the September 24, 1991, Order of the Circuit Court to remand Civil No. 59007 for review of all of the evidence and to make a determination based upon the preponderance of evidence standard and that it might be appropriate for the Board to consider additional evidence.

BACKGROUND

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. She started working for the Government in July, 1979 performing accounting and budget work for the Office of Management & Budget, just as office automation was coming on line. Appellant has 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, 1988 indicates that her mother was diagnosed as having Muscular Sclerosis. Appellant's mother entered a nursing home in 1953 and died in 1961.

In January, 1989, the Hearing Examiner denied Appellant's claim for a Service Connected Disability Retirement Benefit. In May, 1989, the Board affirmed the Hearing Examiner's decision and denied the appeal. In May, 1990, the Board, per Judge B'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.

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

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

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

ISSUES

1. Whether Appellant is 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 meets 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, Dr. A's letter of March, 1990, as well as the meeting and oral presentations made by the two parties on November, 1992, indicates inconsistencies in the findings and medical conclusions.

At the January, 1988 hearing, Dr. A testified about several hypotheses he and his colleagues were working on and indicated that the ability to document them will 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, 1992 proceeding, the Board specifically asked both parties for any medical evidence or test since February, 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 is 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 supports the conclusion that the Appellant is not entitled to a Service Connected Disability Retirement Benefit.

CONCLUSION

The Board finds the record complete enough to reach a decision based upon it. This includes the proceeding in November, 1992. In the opinion of the Board, the testimony and the record do 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 does not indicate by a preponderance of the evidence that the Appellant's condition was aggravated by the performance of her job duties.

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

No legal fees were awarded in this case.

Case No. 91-27

REMAND

Civil No. 79819

This is a final decision of the Board on the January 19, 1993 order of the Sixth Judicial Circuit Court, for a remand to the Board, for a de novo hearing either before the Board itself or before a Board designated hearing examiner. The Board could also remand the case to the Administrator for another hearing.

The order also stated that the records heretofore compiled may be considered in their entirety, together with additional testimony and evidence, and that Montgomery County Maryland may have the Appellant re-examined one additional time so that the medical examination for this case will be coordinated with the medical examination then scheduled in connection with Appellant's Worker's Compensation claims.

The Board referred the matter to the Hearing Examiner of the Office of Zoning and Administrative Hearings on April 13, 1993 for purposes of conducting a de novo hearing, formulating an administrative record, and providing the Board with a report and recommendation based on the evidence of record. The recommendation was that the Appellant, be granted a total service connected disability retirement benefit. In addition, it was recommended that Appellant be awarded reasonable attorney's fees. Both parties submitted written briefs and rebuttal briefs to the Board, regarding this recommendation, and was given one hour for oral presentations before the Board, based solely on the existing record, and time was allowed for rebuttals, regarding this recommendation.

BACKGROUND

In December, 1987, the Appellant was required to leave her desk and walk from her office to another location and passed through a heavy door which was pulled from the other side by someone else causing her to fall in a twisting manner that injured her back. She was in some pain but remained at her job for the remainder of the day. There is no evidence of a pre-existing back injury.

She contacted her family physician, Dr. A, who examined and treated Appellant. He then referred Appellant to Dr. B, an orthopedic surgeon, who evaluated Appellant and he arranged for Appellant's hospitalization to include bed rest and pelvic traction. Appellant was admitted to the Hospital and following this initial hospitalization, Appellant continued to experience pain and discomfort.

When the Appellant was in the hospital, Appellant caught the flu. This later developed into bronchitis.

For about the next six months, Dr. B continued to evaluate Appellant on a regular basis and her condition seemed to deteriorate, although for no apparent physiological reason. Appellant was re-evaluated in May, 1988 and the recovery was found to be progressing slowly. Appellant was considered unable to work for the next five weeks. On June, 1988, Appellant was found not to be doing well, although Appellant was swimming and walking for exercise.

The Appellant testified that during early August, 1988, she attempted to return to work. The plan was to progressively increase her work day over a three week period until she worked an eight-hour day. Appellant tried to extend her workday from four to six-hours, but found that she could not endure the schedule and was only able to complete a week-and-a-half of the three-week planned work program.

In August, 1988, Appellant was found by Dr. B not to be doing well, and an MRI was conducted, but it did not reveal any evidence of disc herniation. In September, 1988, he concluded that no surgery was indicated, although she was unable to work for at least another month. On October, 1988, her recovery was found to be slow and she was unable to work for another month.

In October, 1988, Appellant was re-evaluated by Dr. C who reported lower back pain and he provided an impression of recurrent post-operative back pain, possibly secondary to arachnoiditis.

In December, 1988, Appellant was admitted to the hospital for an epidural block in connection with her back pain.

In 1989, Appellant was evaluated less frequently, although she saw Dr. C on a regular basis and he concluded that until she was able to break her cycle of pain she would not be able to engage in any productive activity. He referred her to The Johns Hopkins Pain Center. In March, 1989, Dr. C concluded that Appellant was totally disabled during 1988. In May, 1989, he concluded that she had reached a plateau of maximum improvement.

In October, 1989, Appellant was examined by Dr. D, an orthopedic surgeon, who concluded that her condition is considered to be permanent.

In 1989, Appellant applied to the Prudential Insurance Company of America, the Administrator of Montgomery County's Disability Retirement Plan, for a service connected disability retirement. After a review of all of the evidence, the Administrator determined that Appellant was not disabled pursuant to SS 33-43 (e) of the Montgomery County Code (1984, as amended).

Appellant appealed the preliminary decision of the Administrator and a hearing was held before the Administrator's Hearing Examiner, on October 4, 1990. At the October hearing, the Appellant testified and both parties submitted documentary evidence. A supplemental hearing was then held before the Hearing Examiner on November, 1990.

In November, 1990, the Hearing Examiner issued his opinion, and Appellant was awarded a non-service connected disability retirement which was appealed to this Board.

In August 13, 1991, the Board sustained the decision of the Hearing Examiner which on August 27, 1991, was appealed to the Circuit Court for Montgomery County.

FINDING OF FACT AND DISCUSSION

1. The record shows that since 1989 when the Appellant first filed for a service connected disability retirement benefit, her condition has not improved significantly with medical care.

In January, 1990, Appellant was again seen by Dr. C, who summarized the office visit in the following manner:

I spoke with Appellant on the phone numerous times in the past, but she has not been seen in the office since May, 1989. She reports that now she is somewhat better but

continues to have intermittent low back pain which radiates down both lower extremities into the knees with severe pain in the calves, making walking extremely difficult. She still appears very depressed as would be expected with her chronic debilitating problem and I once again reiterated the need for a focused, concentrated pain clinic approach to her problem. Although I still feel she may benefit from epidural steroidal injections, her bad experience with her first one attempted at Shady Grove Adventist Hospital makes this an unlikely possibility, at least for the present time.

I have once again stressed that it is my opinion that without inpatient pain clinic evaluation and treatment, it is unlikely she will make any greater significant strides than she has. I also feel that physical therapy on a local level is unlikely to be very successful and that she clearly needs an aggressive multi-disciplinary approach to her chronic pain, as is generally provided through the pain clinic which includes psychiatrist, anesthesiologist, orthopedist, neurologist and physiatrist, as needed.

In March, 1990, Appellant was evaluated by Dr. E, an independent orthopedist. After evaluation and review of medical history, Dr. E concluded that her diagnosis was consistent with the arachnoiditis. His prognosis for return to function was dismal and in his opinion "... Appellant is unlikely to be able to perform work related functions to any significant degree."

In March, 1990, Appellant was evaluated by another orthopedist, Dr. F, who provided the following diagnosis:

Herniated lumbar disk L4-5 status post two laminectomies and disectomies. This is a failed back syndrome.

I evaluated x-rays today. An MRI scan of April, 1988 shows a definite herniated L4-5 disc. A follow-up MRI scan of August, 1988 shows great improvement and the herniated disc is gone.

OPINION: I evaluated Appellant as a neutral party today.

Presently, Appellant is in need of psychiatric help. She needs psychological counseling to deal with her anger and her problems. Although there is definitely some organic pathology present in this case, there is definitely a psychological overlay.

Appellant has not improved significantly with medical care to date. I doubt any help will be gained from traditional medical methods. Because of that, I think psychological counseling is needed.

In July, 1990, Appellant was evaluated again by Dr. C, who repeated previous recommendations about the need for pain clinic evaluation and treatment. He concluded that Appellant's then current condition constituted a 100% disability and she was unable to work.

In October, 1990, Dr. B provided a clarification of his April and May, 1988 statements and concluded that the second operation for repeat lumbar laminectomy...

... was a direct result of the accident of December, 1987. The original herniated disc and weakness in the posterior longitudinal ligament were the direct result of the accident. Had the previous herniated lumbar disc not occurred, with reasonable medical probability, she would not have developed a herniated disc from a coughing and vomiting episode which she had with the flu following her first surgery.

In January, 1991, Dr. C also provided a clarification of his earlier letter of April, 1988:

In that correspondence, I stated that patient apparently suffered from a recurrent lumbar disc herniation because of severe coughing in the setting of bronchitis. Please note that this recurrent lumbar disc herniation is directly and without question, secondary to patient's accident of December, 1987. The fact that her symptomatology was exacerbated by her coughing is in no way related to her underlying problem, and if the cough had not caused her recurrent disc herniation which was in the first place secondary to the accident, then some other maneuver such as bearing down for a bowel movement or bending over would have done the same thing.

In March, 1992, Dr. C provided the following statement:

Patient is an unfortunate 38 year old woman whom I have followed neurologically for more than four years for lumbar disc disease along with devastating post operative arachnoiditis. She is totally disabled from any gainful employment or activity, and based on the last more than four years of follow-up, I believe that this disability is unfortunately indefinite.

Dr. C conducted a neurologic follow-up of Appellant in July, 1992, and concluded that her problems were clearly related to her December, 1987 accidental injury at work and its after effects. He recommended another MRI scan and planned to see her in a follow-up after the test. An MRI was conducted in October, 1992, and Dr. G concluded that there was some scar tissue in the right lateral recess and about the right L5 nerve root, that there was no evidence of residual or recurrent HNP, and that there was no definite evidence of arachnoiditis.

In January, 1993, Dr. H examined Appellant and reviewed her medical history. He concluded that she suffers from a failed back syndrome, but he could not attribute her extreme dysfunction and inability to perform even sedentary work to a physiologic basis. He concluded that she was not totally disabled and would judge her to have a 30% partial permanent impairment. He also concluded that her training would permit sedentary duties within a home or local community environment.

1. In June, 1993, Dr. B provided a statement relating to her surgery of January, 1988, and the early post-operative period when she developed increased pain following a severe coughing

fit as a result of the flu. He concluded that the second operation was related to the original surgery and was at the same level and for the same problem as her original surgery.

2. Dr. B testified at the July 22, 1993 hearing. He confirmed his earlier opinions and indicated that Appellant's second operation was the direct result of her accident of December, 1987, and she would have developed a herniated disc from coughing or a variety of other normal functions. His statements on this issue were not challenged during cross-examination nor was any impeachment evidence introduced.

In July, 1993, Dr. C evaluated Appellant again for purposes of a disability rating. He concluded that she has a permanent impairment and loss of physical function at 20% of her body. He also concluded that she could work in a sedentary situation where she did not have to sit for more than 30 minutes without a break, and would be able to alternate sitting and standing while doing her work.

I find from the evidence that the nature and cause of Appellant's disability was a direct result of her December, 1987 accident while at work, and she suffered a service connected disability. This finding is supported by virtually all the medical evidence.

3. The Hearing Examiner designated by this Board to hear the case determined in his December 9, 1993 report to the Board that:

"While the disability is clearly permanent, there is a dispute about its totality. Several doctors determined Appellant to be only partially disabled in the range of 20 to 30%. However, the preponderance of evidence supports the finding that Appellant is permanently incapacitated for duty and cannot return to the full-time duties of an Office Services Manager for the Fire Department. Appellant testified that she can no longer perform the duties of the occupational classification to which she was assigned. The job calls for the ability to lift ten pounds and she cannot lift that weight. She also lacks the stamina to perform the other physical requirements of the job. She had previously worked more than 40 hours a week in performing her office manager duties and teaching fire safety education to children during the evening. The medical evidence is clear that she is permanently incapacitated and can only perform light duty work. She was not offered a comparable position within the Department that would accommodate her diminished capacity."

The Hearing Examiner further reported that:

"There is evidence that Appellant did not follow through on advice to undergo psychiatric counseling and pain therapy. However, the medical advice on remedial treatment is mixed with some doctors recommending counseling and other pain treatment. One doctor concluded that pain treatment would not be worthwhile in her case. It is not clear that any of these treatments would alleviate Appellant's

incapacity to perform her job. Given this mixed evidence, Appellant's failure to follow through with either psychiatric counseling or pain therapy does not rise to the level of willful negligence relating to her incapacity."

4. The Hearing Examiner also refers to the current interpretation of SS 33-43(e) found in Montgomery County v. Buckman, 96 Md. App. 206, 624 A.2d. 1274 (1993), cert. granted, June 29, 1993, No. 41, Court of Appeals of Maryland, September Term 1992, Daily Record, June 30, 1993. In Buckman, the Court of Special Appeals held SS 33-43(e) to mean that a worker who sustains a work-related injury is totally incapacitated if the incapacity prevents the employee from continuing their job or a position of comparable status within the Department. While this interpretation may not be the last word on the meaning of this provision of County law, it is the last word for purposes of this report and recommendation. Under the Buckman interpretation, which is binding on the Examiner, the findings of fact indicate that Appellant is eligible for a total and permanent service connected disability retirement.

Since the Hearing Examiner's December, 1993 report, the Maryland Court of Appeals reversed the judgement of the Court of Special Appeals, and remanded to that Court with instructions to reverse the decision of the Circuit Court for Montgomery County and to remand the case to that Court with the direction to affirm the order of the Montgomery County Merit System Protection Board.

Therefore, it is the opinion of the Board that BUCKMAN does not apply to this case.

CONCLUSION

Based on a preponderance of the credible evidence, and for the reasons discussed above, the Merit System Protection Board finds that the Appellant is permanently disabled from performing her duties as an Office Services Manager for the Montgomery County Department of Fire Rescue.

The Board also finds, based on the record, the Appellant has met the burden of proof under Section 2A-10(b) of the Montgomery County Code.

Based on the record, the Board disagrees with the recommendation of the Hearing Examiner that the Appellant, is entitled to partial permanent disability in the amount of 30%.

Therefore, based on the record, the Board is granting the Appellant a total service connected disability retirement benefit under Section 33-43 (e) of the Montgomery County Code. The Appellant is also awarded reasonable attorneys fees.

BACKGROUND & FINDINGS

In February, 1991, the Appellant filed an appeal of the Administrator's decision to the Board, which considered the appeal on the pleadings and sustained the Administrator's decision by order dated April, 1991. The Board's decision was appealed to the Circuit Court for Montgomery County which remanded the matter to the Board on November 26, 1991 for a de novo hearing. The Board referred the matter to the Office of Zoning and Administrative Hearings on March 17, 1992 for purposes of conducting a de novo hearing, formulating an administrative record, and providing the Board with a Report and Recommendation based on the evidence of record. Following prehearing conferences and other preliminary activities, the hearing was convened on July 29, 1993, and the record closed at the conclusion of the hearing.

Appellant served as a paramedic and then a firefighter with Montgomery County for about 15 years. He was engaged in the performance of his regularly assigned duties and he was assisting in carrying a 250 pound heart attack patient from a residence on a stretcher when his foot slipped on a snow-covered concrete porch, he twisted his back while trying to keep his balance and avoiding dropping the stretcher. After this injury he was examined that same morning and he had no previous back injuries. The injury caused him to miss work for about a six-month period.

During this six-month period, he was examined by a number of medical doctors who concluded that he was not fit for duty as a firefighter and needed to be assigned to an occupation without strenuous lifting, climbing or strenuous activities.

In May, 1990, a health status evaluation by the County's Occupational Medical Section concluded that Appellant had a permanent medical impairment that required special limitations and restricted work assignments until June, 1990. He testified at the October, 1990 hearing that he returned to light duty work for about two weeks and was subsequently assigned light duty work until the October hearing.

On November 30th, the County's Employee Medical Examiner, advised the Director of the Department of Fire and Rescue Services, that Appellant had a permanent medical condition that required significant accommodation by the Department and his return to work would be restricted to activities without repetitive bending, stooping, straining or lifting of weights greater than 20 pounds. The Director testified that the Department did not have permanent light duty positions and he was unaware that Appellant was offered any permanent light duty assignment within the Department. He also testified that it is Department policy that firefighters seek disability retirement if they do not recuperate from an injury and cannot assume their full-time duties.

Appellant testified that the Department did not have any permanent light duty positions available for him and he could not perform the full duties of a firefighter.

In 1991, Appellant was seen by Dr. A on six occasions who observed a deteriorating condition and concluded that the back condition resulted in a permanent and total disability from the performance of any duties as a firefighter. His last examination was in December, 1991.

CONCLUSIONS

The evidence of totality is mixed. Several doctors found Appellant only partially disabled. However, only Dr. B believed he could return to his full-time work. The preponderance of evidence supports a finding that he could not fully perform his duties as a firefighter and was, therefore, unable to return to this job. He was only able to perform light duty work. This ability to perform light duty work may have made him available for a portion of his firefighter duties, but permanent light duty assignments were not an alternative under established Departmental policy.

The evidence, however, is in conflict about the permanence and totality of this disability. Most of the medical evaluations concluded that the disability was permanent. Dr. B provided a contrary opinion, but this evidence does not overcome the preponderance of evidence. We find that his disability was permanent.

There is an absence of any evidence of preexisting back injury. We find that the nature and cause of Appellant's disability was a direct result of his December 9th accident while at work and he suffered a service-connected disability. This finding is supported by virtually all the medical evidence including the reports by the County Medical Examiner and Dr. B.

There is evidence that Appellant did not exercise regularly and neglected to lose weight despite medical advice to do so. However, he did attempt some exercise but the record is ambiguous on this issue. There is no medical evidence that he was a malingerer or deliberately failed to lose weight or regularly exercise. Appellant followed medical advice about some exercise and, given his level of pain and discomfort, he appeared not to have exercised more often or lost weight because of the continuing discomfort in his back between his injury and his death. These facts do not support a finding of negligence.

The findings of fact indicate that Appellant was permanently disabled and unable to return to his full duties as a firefighter and there was no comparable permanent position available to him within the Department to which he could be reasonably accommodated. These findings of fact provide a basis to conclude that Appellant was totally and permanently incapacitated within the meaning of Section 33-43(e).

The current interpretation Section 33-43(e) is found in Montgomery County v. Buckman, 96 Md. App. 206, 624 A.2d. 1274 (1993), cert. granted, June 29, 1993, No. 41, Ct. of App. of Md., Sept. Term 1992, Daily Record, June 30, 1993, Ex. 30(T). In Buckman, the Court of Special Appeals held Sec. 33-43(e) to mean that a worker who sustains a work-related injury is totally incapacitated if the incapacity prevents the employee from continuing his job or a position of comparable status within the Department. While this interpretation may not be the last word on the meaning of this provision of County law, it is the last word for purposes of this decision. Appellant was eligible for a total and permanent service-connected disability retirement.

Appellant would be disqualified from a service-connected disability retirement if his disability was due to willful negligence. The County argues that his failure to follow through with medical advice to regularly exercise and lose weight constituted willful negligence under the terms of the provision of SS 33-43(e). The term "willful negligence" indicates circumstances that are more aggrieved than mere negligence. In this case, the evidence is ambiguous about Appellant's exercise pattern and the degree to which it would have helped him to recuperate. The findings of fact indicate that his exercise and weight reduction were linked to his threshold of pain and discomfort and not to any negligence. It is entirely speculative to conclude that if he had exercised more often or lost weight, his condition would have improved. Appellant's behavior did not in any way amount to willful negligence.

DECISION

Based on a review of all the evidence of record, we conclude that Appellant satisfied the evidentiary standards set forth in SS 33-43(e), and his estate is eligible for an amount equal to a total service-connected disability retirement. The evidence indicates that the Appellant received cash under his temporary partial disability retirement and would have been entitled to \$\$\$ had he prevailed for the total service-connected disability retirement. The difference amount to \$\$\$.

Appellant was to be granted an award of reasonable attorney fees.

Case No. 92-11

REMAND

Civil Case No. 98223

This is in response to a remand order dated May 21, 1993, in which the Board was asked to determine whether the experience of March, 1989, while the Appellant was in the performance of his duties as a fire fighter, aggravated his cardiac neurosis so as to qualify him for a Service Connected Disability Retirement Benefit pursuant to Section 33-43 (e) of the Montgomery County Code 1984, as amended.

BACKGROUND

The Appellant, was a fire fighter for Montgomery County Maryland from 1972 until he stopped working in 1989. The Appellant, in 1979 and 1980, had physical examinations. The medical reports in both cases supported his return to work as a fire fighter. Both the 1979 EKG and post-exercise test showed normal. Dr. A, a cardiologist, who performed the test, reported that the only coronary risk the Appellant faced was from smoking and he advised that smoking be discontinued.

The Appellant testified that his fear of a cardiac event was a significant event of his daily life.

In 1988 the Appellant, weakened by chest pains in the middle of the night, checked himself into the hospital. The hospital report ruled out a heart attack. A cardiac catheterization was performed which indicated a non-obstructive coronary ailment including a transient left bundle branch block.

After being released from the hospital in 1988 the Appellant was referred to Dr. B, a cardiologist. In his report, Dr. B noted that the Appellant smoked, drank coffee and consumed colas as well as beer. He also stated that Appellants's only cardiovascular risk factor was smoking and that he had a brother who had a myocardial infraction. The doctor indicated that the Appellant does have the beginning of arthrosclerosis and at this point in his life he should avoid smoking and caffeine as well as begin a low-fat diet.

In March, 1989, while fighting a fire the Appellant again felt chest pains. He was again hospitalized briefly to determine the cause of his chest pains. Once again a heart attack was ruled out. The Appellant never returned to work again.

In March 1990 the County filed an application for an administrative disability retirement for the Appellant under Section 33-43 (j) of the Montgomery County Code, 1984 as amended. In February 1991 the plan administrator for the Prudential Insurance Company of America notified the County that the Appellant was only entitled to a Non-Service Connected Disability Retirement Benefit under Section 33-43 (d) of the Montgomery County Code.

The Appellant filed a timely appeal and a hearing was held before the administrator's representative. In August 1991 the Examiner granted the Appellant a Temporary Non-Service Connected Disability Retirement Benefit. The Appellant appealed to the Board. The Board decided to hold a hearing. The record indicated an undisclosed potential conflict of interest on the part of the Hearing Examiner. The Board referred this matter to the Hearing Examiner, Office of Zoning and Administrative Hearings for Montgomery County, Maryland. He recommended to the Board that the Appellant be granted a Total Service Connected Disability Retirement Benefit.

The Board agreed that the Appellant is totally disabled from performing his assigned duties and is permanently disabled. In October, 1992 the Board rejected the Hearing Examiner's recommendation and determined that the Appellant was entitled only to a Non-Service Connected Disability Retirement Benefit.

FINDINGS AND DISCUSSION

With regard to the March, 1989 event and its aftermath, the following facts support our conclusion:

1. Although the Appellant believes that he has had at least one heart attack, the Board finds no medical evidence presented by the Appellant to support this belief.
2. In early 1990, a psychologist, issued a report indicating that the Appellant is severely distressed and is no longer able to work at a regular job.
3. In December 1990, the Appellant was seen by Dr. C where his report indicates that Appellant is suffering from a depression probably related to his fear of a cardiac attack, which prevents him from engaging in fire fighting activities.
4. In both reports, the Appellant indicated that the pains in his neck and knee resulting from two earlier accidents are tolerable and are not factors in his retirement from working for Montgomery County.
5. A third set of psychiatric evaluations were performed in 1990. Their joint evaluation came to basically the same conclusions. Their evaluation recommended to the Appellant that appropriate treatment could improve his sleep disturbance, concentration anxiety and depression as well as result in significant improvement in his cardiac neurosis.
6. The Board concludes that the Appellant refuses help despite repeated recommendations to seek psychological help.

CONCLUSION

Based on the preponderance of credible evidence, we are not persuaded that there is a basis to conclude that the March, 1989 event and its aftermath meet the criteria for a service connected disability.

The Board has reviewed this case and determined that the experience of March, 1989, while Appellant was performing his duties as a fire fighter, did not aggravate his cardiac neurosis any more than any other event or other life activities, so as to qualify him for a Service Connected Disability Retirement Benefit pursuant to Section 33-43(e) of the Montgomery County Code 1984, as amended.

The Board holds to its original decision of October, 1992, which granted the Appellant a Non-Service Connected Disability Retirement Benefit.

Case No. 93-31

This is a decision of the Board in the above referenced appeal from the March, 1993 decision of the Hearing Examiner for the Prudential Insurance Company, to deny the Appellant, a Service Connected Disability Retirement Benefit. The Hearing Examiner also concluded that, because Appellant had passed her normal retirement age, a Non-Service Connected Disability Retirement Benefit was also denied.

A hearing was held before the Hearing Examiner on January, 1993. From both the testimony and exhibits, the Examiner concluded that the Appellant is totally and permanently disabled from the performance of her duties but that the disability is not service connected.

The Appellant filed an appeal with the Board in May, 1993 seeking a reversal of the Hearing Examiner's decision denying the Appellant's claim for a Service Connected Disability Retirement Benefit including reasonable attorney's fees and expert witness fees. The Appellant also requested a full hearing before the Board. The Board finds the record and exhibits complete enough to reach a decision upon it without a hearing.

ISSUES

1. Whether the Appellant is entitled to a Service Connected Disability Retirement Benefit under Section 33-43(e) of the Montgomery County Code?
2. Whether the Appellant has met the burden of proof supported by a preponderance of the evidence of record under Section 2A-10(b) of the Montgomery County Code?

BACKGROUND AND FINDINGS

1. The Appellant started working for the County in 1981. She became eligible for normal retirement benefits in 1990.
2. The Appellant's application for a Service Connected Disability Retirement Benefit was originally dated in February, 1992. The Appellant stopped working in June, 1992 because she claimed she was totally and permanently disabled and could no longer perform her duties.
3. After working from 1981 to 1983, the Appellant's Supervisor, transferred her to a less complicated and less stressful place.
4. The Appellant's supervisor testified that the Appellant had problems in the performance of her duties since 1981, "the day she walked in the door."

5. The Appellant testified that she first exhibited symptoms of arthritis in the early 1980's, just about the time she started working for Montgomery County. Her disability manifested itself during the mid and late 1980's. In the early 1980's the Appellant began taking medication and 'gold shots' and her treating physician recognized that the Appellant was having problems with her joints and fingers. Her joints were surgically replaced, her wrist fused, the nodules on her joints were removed (they have again reformed) and, in 1989, the Appellant had surgery for carpal tunnel syndrome.

6. In addition to the arthritic condition, Appellant suffered from angina. The records also indicate that the Appellant was diagnosed with arterial sclerotic, coronary heart disease, peripheral vascular disease and underwent a cardiac catheterization in 1988.

7. The testimony also indicates that Appellant has smoked cigarettes for a number of years and, on the morning of the hearing, had at least three cigarettes with coffee at breakfast.

8. As a result of her illnesses, she could not continue her normal life activities including driving to see her family. For a good number of years the Appellant was also very active with one of her hobbies but in 1990 she could no longer use the fine tools, including drills, saws, hammer and nails as well as screws.

9. Both the Appellant and her supervisor, testified that, although she was eligible for a normal retirement, she was kept on just waiting for the day when she could get "some kind" of benefits.

DISCUSSION AND CONCLUSION

The Appellant is not entitled to a Non-Service Connected Disability Retirement Benefit as she is eligible for normal retirement benefits under Section 33-43(d) (1) of the Montgomery County Code.

The Board agrees that the Appellant is totally disabled from performing her assigned duties and is permanently disabled.

Both the medical evidence and testimony indicates that the Appellant suffers from rheumatoid arthritis with crippling deformities. Dr. A stated that the deforming rheumatoid arthritis "has major activity" and is aggravated by the work. Dr. B, a rheumatologist testified at the hearing that working caused little progression of her disease. However, after Appellant transferred in 1985, he stated that her disease deteriorated considerably. Dr. B also concluded that her peripheral vascular disease coupled with her arthritic cumulatively rendered her disabled and were proximately caused by her employment.

The Appellant's supervisor for over eight years, noticed that the Appellant had problems with the performance of her duties since the day she started working for the County. She also testified that the performance of her duties and her overall condition radically changed over the years. She transferred the Appellant from a position at where there was driving from one building to another and a great deal of walking, to a less demanding position.

The issue is whether Appellant's actual job performance aggravated her physical condition. Her physical condition is such that aggravation is possibly caused by certain life activities (walking, standing, sitting, driving, using ones extremities in any way) as well as some work activities (walking, standing, sitting, driving, and using extremities).

For there to be aggravation, there should be evidence that an existing condition was aggravated to the point where there is an additional disability beyond that which already existed. In the Board's opinion, the proof presented must be sufficient to meet the preponderance of the evidence standard.

Next, the retirement law requires that there be a connection between the aggravated condition or disease and the Appellant's work. A work-related activity must be the proximate cause of the aggravation. Proximate cause means that there are probable facts to show that the condition of the employee could have been caused by the job-related activity and that no other cause has intervened between the disablement and the job-related activity [Yellow Cab Co. vs. Bisasky, 11 Md. App. 491 (1971), 275 A.2d 193 (1971)].

There should be sufficient evidence in the record to support the conclusion that Appellant's performance of her job was in fact the cause of the worsening of Appellant's condition.

When, as in the instant case, there is conflicting testimony as to the cause of the worsening of a preexisting condition or disease, the Board will apply the preponderance of the evidence test to decide whether, based on all the evidence presented, it believes that the job performance contributed to the aggravation.

Here, Appellant argues that there is a causal connection and concludes that any causal connection is sufficient to persuade this Board. We are not persuaded by Appellant's argument.

Based on the preponderance of the credible evidence, the Board sustains the decision of the Hearing Examiner that Appellant is not entitled to a Service Connected Disability Retirement Benefit. We also agree that because Appellant is eligible for normal retirement benefits she is not eligible for a Non-Service Connected Disability Retirement Benefit.

The appeal was denied.

This is a decision on the record in the above appeal. Appellant appealed the May, 1993 decision of the Hearing Examiner after a March, 1993 hearing, denying his claim for Service Connected and Non-Service Connected Disability Retirement Benefits. The Examiner did not believe that Appellant is disabled from performing the duties of his employment.

ISSUES

1. Does the evidence show that Appellant is disabled from performing the duties of his employment?
2. If disabled, does the evidence show that Appellant's disability was caused or aggravated by his employment?
3. Assuming Appellant's disability was aggravated by his employment, does the nondisclosure of Appellant's preexisting condition bar him from receiving service connected disability benefits?

BACKGROUND AND FINDINGS OF FACT

1. Appellant, was hired by the County full-time, career Engineering Technician II in October 1988. When he became employed, Appellant had to take a preemployment physical examination through the occupational Medical Section. During his physical by the Medical Examiner, Appellant indicated that his present health was excellent, that he had never had recurrent back pain and that he had not had a back injury before.

2. The record shows that Appellant had a history of back and shoulder injuries that were neither caused by nor related to his County employment, starting at least as early as October, 1982, when he injured his back on an earlier job. His orthopedist's records show other injuries in later years before Appellant was employed by the County in October 1988. Prior to his County examination, Appellant had been treated by Dr. A at least 31 occasions. Dr. A had diagnosed Appellant as having a herniated disk and had recommended surgery. The Hearing Examiner concluded that Appellant had knowingly and deliberately concealed his history of back pain and treatment and whatever disability was associated with his back problems.

3. Appellant's job included performing plant inspections of concrete, asphalt, brick and pipe, and also inspection of concrete trucks. Prior to his County employment, Appellant had been steadily employed in a similar position as a materials inspector until October 1988 and then with the County until March 1991. Appellant's duties involved climbing ladders, getting into hoppers, inspecting silos, bins, taking samples of various materials, testing materials, and carrying test samples of varying materials with weights from a couple of pounds up to as high

as 75 pounds. His duties also included chopping at compacted soils, dropping a "hammer" weight from shoulder height in a metal tube or sleeve, which would be done multiple times during a test. Appellant was also involved in testing concrete mixes and at times in certain test methods, he would have to lift samples and shake them. Certain concrete test cylinders, weighing 25-30 pounds each, would be carried in the laboratory. Appellant's climbing up and inspecting concrete trucks could run to 20-40 trucks per day, for a total of about 400-500 per year.

4. Appellant testified he performed the functions of his job over the years even though he had a history of back injury and pain and suffered from at least one, possibly three, degenerated discs. Appellant's performance evaluations for October 1988 - October 1989 noted that he had proved to be a very conscientious employee and was a definite asset. His January, 1990 evaluation showed that Appellant performed well in yearly plant inspections and mix design evaluations. There is no indication of any physical difficulty or limitation by Appellant. Although Appellant took 92 hours of sick leave during his first year, the County did not present sick leave records or show a pattern of sick leave or reasons therefor.

5. The record shows that Appellant was involved in a nonwork automobile accident in December, 1990, following which he was out of work for several weeks. He went back to work on January, 1991 on light duty for one week, then resumed his regular duty in the early part of February 1991.

6. In March, 1991, while at work, Appellant slipped and fell on three steps when he was carrying a concrete test cylinder. Appellant testified that during the period between February, 1991, when he returned to full time employment, and March, 1991, when he slipped on the steps, he was not restricted, was not having pain, and his back was excellent. The Hearing Examiner stated that he had reservations about the credibility of Appellant's testimony. He also believed that the March, 1991 fall was not as severe as Appellant made it to be.

7. The preponderance of medical evidence shows that, after Appellant's March, 1991 fall, he was not able to resume work at his regular employment. Dr. B's notes of June, 1991 state that Appellant has three disc herniations and radiculopathy, and he concludes that Appellant needs surgery. However, the medical evidence does not show the extent of the disc herniations which, according to the Hearing Examiner, are not automatically disabling.

8. Dr. C's May, 1992 report stated that Appellant had a preexisting extensive degenerative disc disease at three levels, one of which was further torn at the time of Appellant's fall. Dr. C concluded that Appellant cannot engage in any physically demanding occupation, such as an Engineer Technician III, because his back causes him pain and there is always the danger of falling if he had an acute episode of pain while working. However, Dr. C felt that Appellant's condition was probably symptomatically aggravated by the general physical use of his occupation, in the sense of a transient or symptomatic aggravation, but should not be considered to be a cause of the underlying degenerative disease. The Hearing

Examiner interpreted Dr. C's report as meaning that there were temporary symptoms that occurred.

9. Although the record shows that Appellant has three herniated disks in June 1991, it does not tell when they occurred. Dr. A believed that the March 1991 accident directly caused the two additional herniated discs despite the fact that the MRI was read as degenerated discs. While Dr. A recommended physical therapy which Appellant did not pursue, both Drs. C and A felt that Appellant should not be involved in heavy activity.

10. Dr. D's report of July, 1991 showed that Appellant had abnormalities at three lumbar disc levels and he believed that the spinal changes shown on the MRI scan were of long duration. While Dr. D restricted Appellant in weight lifting and limited him to light or medium duty, he was of the opinion that Appellant's problems are primarily due to degenerative changes in his back which predated his accident.

11. In January 1993, the Employee Medical Examiner determined that Appellant was not fit for full-time duty as a Highway Construction Inspector II and that all restrictions recommended by Appellant's surgeon should be considered to be permanent.

12. In June, 1993, the department Director informed Appellant that he had not been able to find another job for which Appellant met the minimum qualifications. He advised that, since Appellant's medical condition is deemed permanent and precludes him from working as a Highway Construction Inspector II, light duty or other work of a temporary nature is deemed inappropriate. Accordingly, Appellant was informed that he was being terminated, effective July, 1993.

13. Based on his observations of Appellant at the hearing, a report and photographs obtained during a surveillance of Appellant showing that Appellant was able to carry on certain physical activities in a normal fashion, and Appellant's work history, the Hearing Examiner determined that Appellant is not disabled from performing the duties of his employment. He also concluded that injury/disability considerations do not warrant a finding of service connected disability, nor of the aggravation of such disability. The Examiner believed that Appellant exaggerated his symptoms in his testimony and to the doctors to try to impress them with the severity of his condition. The Hearing Examiner concluded:

"This case presents a very difficult decision. On the one hand, the applicant describes pain and limitation and presents his doctor's belief that his difficulties stem from the March, 1991 accident with the implication that it caused two additional discs to herniate or, at least, aggravated his spinal condition such that he can no longer perform his duties. On the other hand, there is medical evidence that, while the applicant has significant degenerative disease in his spine, the accident injuries were not all that significant and created some additional transient symptoms but cannot be said to have caused the disc problems. On that same other hand is evidence that the applicant at various times over a period of many months in 1992 was observed going about certain physical activities in an apparently ordinary and normal

fashion, some activities which he had told his doctors he could not do, and a lengthy evaluation report which also suggests that the applicant exaggerates his symptoms."

ANALYSIS AND DISCUSSION

The Board disagrees with the Hearing Examiner's conclusion that Appellant is not disabled from performing his duties. To the contrary, the preponderance of medical evidence demonstrates that Appellant is disabled from performing the duties of his position as Engineer Technician II. This was the determination of Drs. A, C, D and the County Medical Examiner and no contrary medical evidence was presented.

The Hearing Examiner based his conclusion that Appellant is not disabled upon his own observations and the surveillance report and photographs of Appellant in his home area. However, these observations involve quite different circumstances than those under which Appellant worked as an Engineer Technician II. Appellant's employment subjected him to more strenuous bending, climbing and heavy lifting than usual. The doctors who examined Appellant after the March, 1991 accident concluded that he was disabled from performing the duties of an Engineer Technician II, but that he could perform light duty work. Since Appellant was not able to perform the duties of his position, he may be eligible for a service connected disability retirement if otherwise qualified and if the injury is work-related. Montgomery County v. Buckman, 96 Md. App. 206, 624 A.2d 1274 (1993).

The next question is whether Appellant's disability was caused or aggravated by his employment. The doctors who examined Appellant agreed that Appellant had a preexisting back condition consisting of disc herniations or degeneration which was his primary condition. Two of the doctors (A and C), however, believed that Appellant's disability was aggravated by the March, 1991 accident. Dr. A concluded that the March, 1991 accident caused the herniation of two discs. Dr. C believed that one of the degenerative areas further "tore at that moment" (i.e., the March, 1991 accident) and that the underlying condition was symptomatically aggravated and was caused more painful by the general physical use of his occupation. While Drs. D and the Medical Examiner agreed that Appellant was disabled from performing the duties of his position, neither of them addressed the issue of whether the accident aggravated Appellant's preexisting back condition.

Section 33-43(a) of the Montgomery County Code (1984), as amended, provides that a member may be granted a service connected disability retirement if the member is incapacitated for duty "as the natural and proximate result of an accident occurring, or an occupational disease incurred or condition aggravated while in the actual performance of duty." (emphasis supplied)

To show aggravation of an existing condition, there should be evidence that an existing condition was aggravated to a point where there is an additional disability beyond that which already existed. See Bethlehem Steel Co. v. Ruff, 101 A.2d 218 (1953). The work-related activity must be the proximate cause of the aggravation. Proximate cause means

that the condition of the employee could have been caused by the job related accident or injury, and that no other cause intervened between the accident or the injury. Reeves Motor Co. v. Reeves, 204 Md. 576, 105 A.2d 236 (1954); Yellow Cab Co. v. Bisasky 11 Md. App. 491, 275 A.2d 193 (1971). The proof presented must be sufficient to meet the preponderance of the evidence standard.

Based on the preponderance of the evidence, the condition of Appellant could have been aggravated by the March, 1991 on-the-job accident, as concluded by two out of four doctors who examined him. The other two doctors did not address the issue of aggravation. We base this conclusion on the fact that, prior to the accident on March, 1991, Appellant was able to perform his duties satisfactorily without undue absences for back problems for over two years.

Although the Hearing Examiner had doubts as to the severity of Appellant's symptoms, we believe that his doubts are not well founded because they are based on observations of Appellant's ordinary physical movements. However, these ordinary movements are not comparable to the more strenuous physical requirements of Appellant's job involving the lifting of heavy material and objects and continuous climbing and bending movements. Although the doctors agreed that Appellant could perform light duty work, the County was not able to accommodate Appellant's disability by finding a light duty position.

The last issue is whether Appellant is barred from entitlement to a Service Connected Disability Retirement Benefit because he knowingly and willfully made a false statement about his physical condition when he obtained employment with the County. Although the Hearing Examiner did not decide the issue of whether Appellant is barred from entitlement to disability retirement benefits because of a fraudulent employment application, he found that Appellant knowingly and deliberately concealed his history of back pain and treatment and whatever disability was associated with his back problems when he was first employed by the County.

A County witness testified that if the County had known of Appellant's back history, he would have been referred to the Occupational Medical Section where his earlier medical records would have been reviewed, he would have been further examined, and a decision made as to the appropriate placement or restriction. Appellant could have been refused or not for the particular position, or he could have been asked to release or waive future claims for disability as to his back, or whatever accommodation the County and Appellant might have reached. However, the County was prevented from considering Appellant's back history because of his false medical history form and false medical history told to the examining doctor.

According to the County Medical Examiner's April, 1993 letter to the County Attorney, "The preplacement medical examination is provided to ensure that an applicant is physically able to perform the duties and responsibilities of his/her position with the least possible risk to safety, for the perspective employee, his coworkers, and to the liability of his

employer." When the applicant provides full disclosure, based on the medical information, a set of restrictions is then tabulated by the medical examiner and presented to the departments on behalf of the applicant. If these restrictions can be accommodated, the applicant is hired.

The Medical Examiner stated that it would have been easy to provide such a list for medical accommodation in Appellant's case, which probably would have included restrictions on lifting, bending, stooping and straining of the lower back and working in off balanced and awkward positions. He concluded it is probable that aggravation of Appellant's back condition could have been avoided had he disclosed his medical history during preplacement medical evaluation.

While there is no Maryland statute barring disability retirement benefits because of a false preemployment statement as pointed out in the County Attorney's letter of August, 1993 under common law, a wrongdoer is precluded from profiteering from his fraud or willful misrepresentations. Federal Copper & Aluminum Co. v. Dickey, 43 S.W.2d 463 (Tenn. 1973). Thus, employees who willfully misrepresent or fail to disclose information regarding their physical condition when they obtain employment will not be allowed to recover benefits under workers' compensation. Shippers Transit v. Stepp, 578 S.W. 2d 232 (Ark. 1979). This common law principle applies to disability retirement benefits since they are analogous to workmen's compensation benefits.

Before a preemployment false statement will bar recovery the employee must have made these false representations willfully and knowingly; the false representations must have been relied upon by the employer in hiring the employee; and a causal connection must exist between the false representations and the injury. Dickey, supra; Stepp, supra.

The evidence discloses that, during his preemployment physical examination, Appellant affirmatively indicated that he had not had recurrent back pain and he had not had a back or knee injury. However, Appellant's medical records from Dr. A is that, over the six year period between October, 1982 and the October, 1988 preemployment examination, Appellant had no fewer than 31 office visits with Dr. A concerning his back. Dr. A's records show that Appellant had injured his back several times on the job. Dr. A's March, 1986 report indicates that Appellant's condition is deteriorating, that he is increasing the partial disability rating to 15% and that it is quite probable it will go up.

The County Attorney concludes, and we concur, that it is inconceivable that Appellant, with such a sordid history of back problems, did not willfully misrepresent his physical condition when he indicated that he had not had recurrent back pain and that he had not had a back injury. The County relied upon Appellant's false representation when it hired him. By misrepresenting his physical conditions, Appellant prevented Montgomery County from scheduling him for a more in-depth physical examination. If Appellant had disclosed his prior back condition, he would have been sent to Occupational Medical for more in-depth physical examination, which the County was prevented from doing. Thus Appellant should not be allowed to profit from his misrepresentations.

CONCLUSION

Based on a preponderance of the credible evidence, and for the reasons discussed above, the Board finds that Appellant is disabled from performing the duties of his position as an Engineering Technician II in the Department of Transportation.

The Board also finds, by preponderance of the credible evidence, that Appellant's existing back condition was aggravated as a result of the March, 1991 on-the-job accident.

However, in accordance with principles of common law, because Appellant represented at the time of his examination for his current job that he did not have a back condition, Appellant should not be allowed to profit from his wrongdoing. Had Appellant told the County about his back condition, accommodations could have been made to restrict Appellant's physical movements on the job, which could have prevented the March, 1991 accident. Since Appellant knowingly and willfully misrepresented his back condition when he obtained employment from the County, which was relied upon by the County, and there was a direct causal effect between the misrepresentation and the injury, he is barred from entitlement to disability retirement benefits.

Case No. 94-04

This is a final decision of the denial of a Service and Non Service Connected Disability Retirement by the County in October, 1993. In connection with Appellant's application for retirement, a hearing was held in August, 1993.

BACKGROUND

The record shows that she appeared before the examiner without counsel and represented herself.

As an Applicant for disability retirement, she submitted two exhibits. Appellant's Exhibit 1 is a letter from a social worker. Appellant's Exhibit 2 is a letter from Dr. A. The County submitted one exhibit, consisting of several pages of medical records and a copy of the insurance company's denial letter.

According to the record, she reported no other major injuries or illnesses until the complaints involved in her application for retirement. Her most recent work with the County has been in the Department of Finance. She said there were constant interruptions, and she had to have receipts properly accounted before the end of her day. While she did not work overtime, she sometimes worked through lunch.

Her disability claim is that she developed an ulcer because of the stress of her job; that she later developed pancreatitis because of the untreated ulcer; that although the pancreatitis has now been resolved she still has abdominal and back pain and also has arthritis in her hands, knees and feet.

In a response dated February 4, 1994, the County states as follows:

In order to determine eligibility for benefits, an independent medical examination was performed by Dr. A, a board certified internist. The Administrator, after reviewing the medical evidence, including the report of Dr. A made a preliminary determination that Appellant was not disabled pursuant to SS 33-43 of the Montgomery County Code.

Appellant conceded that she was having relationship difficulties within her family but when asked to discuss them stated, "I would rather not. I don't feel comfortable talking about it."

Appellant is also under treatment for numbness in her feet, but her doctor has not told her that it is her job that causes the numbness.

In her final comments on the County's response which are dated February 12, 1994, she stated the following:

1. At no time did I ever concede that the ulcer that I suffer from is not a direct result of the stress related to my job. When I was being treated in the hospital, a doctor from the Digestive Disease Center specifically asked me if I was in a stressful job.

2. I did not state that I haven't worked for the County since 1990. I worked until I was no longer able to perform and was hospitalized in 1992.

In addition, I am still under the care of Dr. B for ulcer disease, diabetes, rheumatoid arthritis and hyperlipidemia. I have had two major flare ups. The most recent was in December.

Any person who works in the office can attest to the stress that I labored under for five years. That stress led to the formation of an ulcer which led to the pancreatitis and other medical problems, as it was explained to me.

I have no doubt that the medical problems that I continue to have are directly related to my employment. I had requested and was to receive a different job until the County experienced a budget crisis before I became ill.

My family has been experiencing financial difficulties because I am unable to return to my former position. I have been working since the age of 14. As God is my witness, there is no way that I would go through all of this if I was able to return to that job.

She had not worked at her position of Principal Administrative Aide since November, 1992.

The County Medical Examiner did not find that she was unable to perform the duties of her position.

She had been or was being treated for ulcer disease, diabetes, rheumatoid arthritis and hyperlipidemia.

The record does not contain any evidence that her physical condition was related to the performance of her duties as a Principal Administrative Aide.

We note that she was terminated effective April, 1994 and provided rights to appeal to this Board with 10 work days or to notify the MCGEO/Local 1994.

CONCLUSION

For an appeal such as this one, the Board seeks to find in the reasons for her appeal a preponderance of evidence in her favor. This means that she must show us evidence that the County is more wrong than right in denying her appeal.

To do this she could have shown medical evidence from doctors of her own choosing whose examinations and diagnosis of her physical condition showed that what ailed her was probably caused by or aggravated by performing her work. She stated that coworkers would know that she was under stress. She had no witnesses. She presented no compelling evidence of the relationship between the stress she felt on the job and her physical condition. We are convinced that the County had reason to deny her application and that she has not shown by a preponderance of evidence that the County should not have denied her application. The appeal was denied.

REDUCTION-IN-FORCE

Case No. 93-38

This is a decision on the record in the appeal of the decision of the Chief Administrative Officer (CAO) on the grievance filed December 21, 1992.

BACKGROUND

The grievant was employed as a Legal Office Manager in the County Attorney's Office. After becoming ill in 1991, she took sick leave which extended to June, 1991. She was transferred to another department before she return to work.

After her illness, the grievant filed a claim for benefits with the Workers' Compensation Commission. The grievant claimed that her illness was the result of job stress. The Commission found that the grievant's illness at work was not connected to County service, and the claim was denied.

While the grievant was on sick leave, directives were issued by the Chief Administrative Officer and the Budget Director regarding budgetary limitations and the need to reduce the County's workforce. The grievant was notified that she would be subject to a County Reduction-In-Force action.

For FY 92 it was decided by the Office of Management and Budget that the reduction-in-force ordered by the CAO should be accomplished in the County Attorney's Office by eliminating single-incumbent classes, work classes in which only a single employee held a position, and OMB selected the Legal Office Manager class as one class to be eliminated. Another single member class, that of the Senior Executive Administrative Aide, was also designated for abolishment beginning in FY 92.

The grievant was transferred from her Legal Office Manager position in the County Attorney's Office to an Office Services Manager position with the Department of Recreation. The grievant was still on an extended sick leave. The Legal Office Manager position was abolished, effective June, 1991. The duties and responsibilities of the position were assumed by other clerical employees in the County Attorney's Office.

At the start of FY 93, the County Attorney was required to reduce the offices clerical employee complement by a total of two positions, and there were no clerical vacancies.

The grievant filed an application for the Legal Secretary I position. The grievant filed with her application a "Request for Priority Consideration," to claim a priority under Reduction-In-Force regulations.

The County's response to this grievance can be briefly stated. It is shown by the facts and is not subject to dispute that the County Attorney, at all relevant times in this matter, has had to operate under severe budgetary constraints. While the grievant was eligible for hire, there was no time when the budget permitted it. Blank's resignation effectively never created a full fledged vacancy. Blank, a Legal Secretary in the County Attorney's Office who was transferred to another County Department in November 1992, and the Blank appointment simply demonstrated to the County Attorney that no clerical vacancies should be filled, for the foreseeable future. That was the status of the clerical employee complement in the

County Attorney's Office in January 1993, and that is the status today.

Appellant responds that she was always "eligible for hire and, if the budget permitted the hiring of Blank, it permitted the hiring of her." If the County Attorney's Office knew when it appointed Blank that the budget did not permit the hiring of the second vacancy, it was misrepresenting the status to Personnel when it stated there were two vacancies and is persisting now in that misrepresentation. Indeed, if the merit system was followed, Blank would not have been appointed unfit after Appellant's "fitness for duty" had been established.

The County argues that grievant cannot demonstrate in this case that the County Attorney ever acted arbitrarily or in violation of her rights. At all times the County Attorney's actions were reasonable, and well within the discretion she has as head of an Executive Branch department. The CAO's decision should be affirmed, and the grievance should be denied.

Appellant, on the other hand, contends that the decision of the CAO must be reversed and Appellant should be granted the next available position in the County Attorney's Office for which she is qualified, back pay of the difference of what she would be earning at a Grade 16 from the time she would have gotten that Grade until she is returned to the County Attorney's Office and all attorney fees and costs of pursuing this appeal.

FINDINGS AND CONCLUSIONS

Section 25.4 of the Personnel Regulations applies. It states as follows:

"Except for those employees as defined in Sections 3-7(a) and 3-9(a) of these regulations, a merit system employee who is terminated as the result of a Reduction-In-Force must be placed on a reemployment list for 2 years and given priority consideration for any position for which qualified subject to the provisions of Section 33-7 (b)(4) of the Montgomery County Code. A new employee may not be hired for any vacant position as long as there is a qualified person for that position on the reemployment list. Voluntarily demoted employees are eligible for noncompetitive reappointment as defined in Section 6.5 of these regulations."

The County is required to take these actions when an employee appears on a re-employment priority list. In this case the Appellant has been notified properly, placed on a list and subsequently rehired from that list. At issue, is whether she properly received priority consideration earlier.

We do not believe she received proper consideration. If, as the County states there were two vacancies at the time of the Blank's appointment, it seems that the Appellant should have been notified and considered first before hiring another candidate. The fact that Blank

was hired and reassigned a short time afterward does not make it a short-term appointment. She was hired to fill a vacancy and she opted to leave.

We could construe the long preemployment medical evaluation as a form of consideration. But the actual hiring of an outside applicant in the same office from which the employee had been RIF'd and the tenuous reasons causing the delays in processing her medical evaluation lead us to agree that the County has not followed, its own procedures. We believe that employees must have confidence that rules set will be followed, particularly when one's livelihood is at stake. Since the Appellant has continued working in another position, corrective action is limited.

The Appeal was sustained. The Appellant shall receive the next available Legal Secretary I in the Legal Office occurring within six months from this decision. Back pay does not seem appropriate. The issue here involves appointment to a position for which consideration and employment was given to an outside applicant. The Appellant has been at the same grade. Legal fees are appropriate.