

Merit System Protection Board Annual Report FY 1996

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Walter T. Vincent, Vice Chairman
Angelo M. Caputo, Associate Member**

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1996
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 1996 were:

Beatrice G. Chester	-	Chairperson (Reappointed 1/96)
Walter T. Vincent	-	Vice Chairperson (Appointed 1/95)
Angelo M. Caputo	-	Associate Member (Reappointed 1/94)

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, 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. A written decision is issued.

MERIT SYSTEM PROTECTION BOARD

INTERPRETATION

OF THE

MONTGOMERY COUNTY CODE

The Merit System Protection Board was requested to interpret the Montgomery County Code as it pertains to a former Master Firefighter who retired from County Employment after over twenty one years of credited service. A timely appeal was filed with the Board, from the decision of the Chief Administrative Officer (CAO) to denying Master Firefighter (retired) the right to convert a regular retirement into a disability retirement.

The Board's review of the Appeal indicated the following:

1. Section 33-56 of the Montgomery County Code designates to the CAO the responsibility for rendering decisions under Article III Employees' Retirement System. The CAO shall respond to request for decisions within sixty days. The response shall include a statement of appeal rights. The decision may be appealed within fifteen days to the Merit System Protection Board.
2. The response from the CAO to Counsel for the Appellant was timely but failed to include a statement of appeal rights. According to the date of receipt on the CAO's response it arrived at Appellant Counsel's office twenty one days after it was signed by the CAO. Therefore, it is the decision of the Board that Appellant's appeal was timely filed with the Board.
3. The interpretation by the CAO of Section 33-35 and Section 33-43 of the Montgomery County Code does not permit the Appellant to apply for a Service Connected Disability Retirement Benefit since the Appellant is a retiree and therefore not a member of the retirement system.
4. Section 33-35 - Definitions - Member - An employee or official of the County Government or of a participating agency or political subdivision who is contributing to this retirement system.
5. Section 33-43 (e) - Service Connected Disability Retirement. A member may be retired on a service connected disability retirement if:

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

duty; that the incapacity is not due to willful negligence, and the incapacity is likely to be permanent. In extenuating circumstances, the administrator may waive the requirement that a member's incapacity is likely to be permanent and may approve a temporary disability retirement for one (1) or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to be permanent.

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

6. The Appellant completed the necessary retirement paper-work with the Personnel Department on June 15, 1993. His scheduled date of retirement was July 1, 1993. On June 16, 1993 the Appellant injured his left knee while on duty fighting a fire and trying to escape a gas leak and subsequent building explosion. The Appellant filed a timely Supervisors Incident Investigation Report and also filed a Worker's Compensation Claim. The Appellant was unable to return to work. On July 1, 1993 his retirement took place. The Appellant through his attorney on May 10, 1995 requested an interpretation from the CAO on how to convert a regular retirement into a disability retirement. The CAO in his reply stated that the election to apply for a disability retirement must be made prior to retirement. The reply also stated that had the Appellant requested a delay between the date of his job related injury and date of early retirement, the retirement could have been rescinded until the Appellant was able to determine if the injury received was disabling.

It is the decision of the Board, based on the record, that the Montgomery County Code was properly interpreted by the CAO in his decision of June 23, 1995.

It is also the decision of the Board to deny the Appellants request for a hearing before the Board and to also deny reasonable attorney fees.

APPEALS

DISMISSAL

Case No. 93-10

In compliance with the Court of Special Appeals direction to the Circuit Court to remand this case to the Board, ordering the Board to reopen the hearing and permit introduction of new evidence consisting of a photograph and testimony concerning the location of a tool box and tools and to reconsider all of the evidence in light of the newly admitted evidence, which the Court felt the Board had wrongfully excluded in its 1993 Hearing of this Appeal. The Board was instructed to reconsider all evidence related to Appellant's dismissal and, on the basis of that evidence, to make a new determination concerning whether Appellant was wrongfully dismissed from employment. An appeal hearing concerning this matter was held on August 1 and continued to August 14, 1995.

BACKGROUND

This case involves the period from September 8, 1992 through September 25, 1992 during which the Appellant was returned to work based upon an order of this Board dated June 29, 1992 sustaining the Appellant's appeal of an earlier dismissal. On October 30, 1992, Appellant was again dismissed from his employment with Montgomery County Government.

On October 19, 1992, the Appellant was notified of his pending dismissal due to the following reasons:

1. Violation of Article 32.1 of the Collective Bargaining Agreement between Montgomery County Maryland and the Montgomery County Government Employees' Union, Local 400, - Failure to provide a "Basic Mechanics Hand Set" as required by the Agreement and described as tools necessary to satisfactorily perform mechanical work.
2. Violation of Section 27-2(e) of the Montgomery County Personnel Regulations - Failure to perform duties in a competent or acceptable manner.
3. Violation of Section 27.2(g) of the Montgomery County Personnel Regulations - Insubordinate behavior by failure to obey lawful directions given by a supervisor.
4. Violation of Section 27.2(h) of the Montgomery County Personnel Regulations - Violation of an established policy or procedure:

(a) Department of Transportation Procedure X - Absent Without Official Leave (AWOL),

(b) Article 13.3 of the Collective Bargaining Agreement,

(c) Article 13.4 of the Collective Bargaining Agreement,

(d) Article 16.6 of the Collective Bargaining Agreement.

5. Violation of Section 27.2(o) of the Montgomery county Personnel Regulations- Violation of any provision of the County Charter, County laws, ordinances, regulations, state or federal laws or conviction for a criminal offense, if such violation is related to County employment.

(a) Annotated Code of Maryland Section 10-401 of the Courts and Judicial Proceedings Article -Maryland Wiretapping and Electronic Surveillance.

The County asserts that its agents attempted to make the Appellant aware that his new assignment presented an opportunity for a fresh start and to treat him as any newly assigned worker with reasonable expectations that he would do what any newly assigned worker is expected to do. According to the County, the Appellant reported for work without the tools necessary to perform his responsibilities, was repeatedly sent home with instructions to return with the basic tools needed and, when he finally did report with tools, refused to show them to this supervisor. The County also alleges that the Appellant was insubordinate in his attempts to tape-record conversations with his supervisor despite the supervisor's refusal to have those conversations tape-recorded and, by virtue of all of the above actions, the Appellant did not show that he was ready, willing or able to assume his new responsibilities.

The Appellant argues that this dismissal is a continuation of the arbitrary and capricious actions taken by the Department of Transportation which resulted in his earlier dismissal and Board-ordered restoration to active duty status. He believes that the instructions provided to him were deliberately designed to confuse and harass him, that he did not have his tools which he alleges were located in his former work location but reported as not found by management, that no one told him that he could not use a tape recorder and that no one gave him a work plan.

Appellant further alleges that he was warned that he would be arrested for trespass if he attempted to return to his former work location. He feared for his personal safety in undertaking his new work assignment due to a negative environment at that location. He claims that this negative environment was evidenced by a petition objecting to Appellant's transfer which was signed by many of his new co-workers and instituted by the managers who recommended his termination.

Appellant produced pictures of a tool box and separately wrapped tools located under a desk which were allegedly taken at the site of his former work location long after the termination from which he was eventually reinstated. He attempted to refute management's contention that they could not locate Appellant's tool box or tools and to support his claim that his tools were located at his former work site from the time of his previous dismissal in November 1990 through his second dismissal in September 1991 through the testimony of co-workers as to their knowledge of his tools and tool box.

Following Appellant's dismissal in October, 1992, in January 1993 management at Appellant's former work location found a tool box and some tools which may have belonged to the Appellant. Following notification of this fact, Appellant claimed and removed the tools and tool box.

ISSUES CONSIDERED

1. Did Appellant report to his new work assignment ready, willing and able to perform his work duties?
2. If not, was Appellant's failure to report to his new work assignment ready, willing and able to perform his work duties justified?
3. If not justified, was Appellant's dismissal from employment an appropriate action for violation of Personnel Regulations and/or the Collective Bargaining Agreement which governed the terms and conditions of his employment?

DISCUSSION

Appellant admits to having at least one week's advance notice of the date he was to report to his new work location. When he arrived at the workplace, he brought a briefcase, tape recorder and cellular telephone. Appellant claimed the telephone was to call his wife during the workday despite the fact that employees have access to a phone for personal calls to be made during lunch and break times. He explained his purpose in having the tape recorder was to record information about the repairs to vehicles but, in fact, he used it during attempts by management to conduct his orientation to his new work location and duties. Appellant did not bring any tools upon reporting to work.

On September 8, 1992, Appellant resisted management directives to leave the premises since he did not bring any tools and, therefore, was not ready to commence work. His supervisor ordered him to go home and get his tools and then come back. Appellant requested a written note to verify this order which was provided. Appellant left the premises only after management's phone call to the police requesting their aid in removing him from the premises. Appellant did not return to work.

On September 9th, Appellant again appeared without tools and again was directed to leave and return with tools. Appellant told his supervisor that his tools were tied-up in litigation but didn't say that he did not have tools. Appellant did leave but did not return with his tools.

On September 10th, Appellant reported with a tool box but refused to show his supervisor the contents in the box which the supervisor thought was too light to contain the basic tools Appellant would need to perform his duties. The supervisor again told Appellant to get his tools and return to work and said that he would implement additional disciplinary action if he did not return with his tools. During this meeting, Appellant again refused to cease tape recording his conversation with management, initially refused to leave as directed and did not return after finally leaving. His supervisor placed the Appellant on Absent Without Leave Status.

On September 11th and 17th, Appellant presented a list of demands to management, insisted on an immediate reply, engaged in further behavior which allegedly disrupted the orientation process and refused to leave the premises without receiving a signed leave slip. Through the point of his dismissal, Appellant did not assume his new duties.

Appellant contends that all of his actions were justified. He alleges that he was entering a hostile environment as evidenced by an employee petition objecting to his transfer to an assignment on the first shift, a shift sought by a number of employees who had worked in this new location for many years. He also felt that management initiated the petition to create a hostile environment in which he feared for his personal safety in performing mechanical work requiring the cooperative efforts of fellow workers when working under heavy vehicles. However, Appellant admits that he knew of other mechanics from the Heavy Equipment Division who had transferred to this operation and who were treated cordially. Appellant presented no evidence to support the validity of his fears concerning his personal safety.

Appellant further alleges that he could not report with tools which were sufficient to perform his new duties as his tools were left at his former work location and management had not been able to locate them. Numerous co-workers appeared and testified that they knew that the Appellant's tool box and some of his tools were still at his former work location although testimony varied concerning the physical characteristics of the larger tool box identified as belonging to the Appellant. Testimony given established the fact that the Appellant also worked out of a portable tool box which he took home each evening and, in fact, took with him upon his previous dismissal which was ordered rescinded by the Merit System Protection Board. When asked why he did not return to pick-up his larger tool box after his dismissal, Appellant responded that he felt he would be reinstated within a short period of time and had been warned by management that, if he came back to his former work location, he would be arrested for trespass.

Management's search for Appellant's tool box and tools did not result in items being found before the Appellant was dismissed from his newly assigned job site. The search conducted by management was flawed at best in that none of the Appellant's former fellow workers were asked whether they knew the where-abouts of Appellant's tools, and some tools stored underneath the desk where misplaced tools are kept until claimed were allegedly wrapped with masking tape and marked with Appellant's name. The Board finds equally troubling the fact that fellow-workers who testified that they knew the where-abouts of Appellant's tool box and tools and one employee who even took pictures of them and was watching over them at the Appellant's request never volunteered information concerning their existence or location to management either before, during or after the search was conducted.

No convincing evidence was presented in support of Appellant's inference that management was intentionally withholding or hiding his tool box or tools. In fact, there was conflicting evidence from Appellant's own witnesses as to how they were able to identify Appellant's tool box which was similar in appearance to many other such boxes. There was further conflicting testimony as to whether Appellant's box contained a lock, was locked or was damaged. All witnesses testified that they never borrowed tools from Appellant's tool box after his dismissal and did not know what tools were contained in that box or what tools had been removed by the Appellant and taken with him following his dismissal. In addition, there was no testimony to establish that any member of management was able to identify Appellant's tool box although there was testimony that management mistook someone else's tool box for that belonging to the Appellant and that the mistake was corrected through information provided by another employee.

No convincing evidence was presented in support of Appellant's contention that he was not able to visit his former location for fear of being charged with trespass. Appellant admitted that on several occasions he had requested and received permission to visit the site for the purpose of obtaining information from his personnel file.

FINDINGS

ISSUE 1. Did the Appellant report to his new work assignment ready, willing and able to perform his work duties.?

The preponderance of evidence presented supports management's contention that the Appellant did not report to his new work assignment ready, willing and able to perform his duties. Other employees transferred from the Heavy Equipment Division to the Transit Division reported for and assumed their work responsibilities effectively.

Appellant argues that the circumstances he faced were different in that he was entering a hostile environment due to his past history of problems with management and further evidenced by the employee petition objecting to his transfer which he alleges was initiated by management. He did not have the tools he needed to perform his new responsibilities which,

he alleges, were under management's control in his former work location and, by inference, intentionally hidden to prevent his securing them.

Testimony presented establishes that Appellant took his tools with him upon being dismissed from the Heavy Equipment Division. There was no convincing testimony to establish the number and type of tools taken, even the number, type and value of tools allegedly left in the Heavy Equipment Division. Over a year prior to notification of his transfer, Appellant was offered the opportunity to come to his former work site to identify and pick-up tools allegedly left there. If, as Appellant claims, his tools at the former work site were valued at several thousand dollars, it is reasonable to assume that he would have taken them with him or, at a later date when it became apparent that his dismissal was not going to be overturned after a relatively short period of time, made an attempt to claim them. Testimony from Appellant's witnesses established that terminating employees usually took their tools with them. Testimony also established that employees often borrow tools from one another when specialty items are needed to perform repair work.

Despite having a week's notice of his transfer to a new work site and the Appellant's knowledge that he would need some tools to undertake his new responsibilities, he failed to make any attempt to secure his tools even though he apparently knew the location of said tools through information solicited from and provided through former work associates. He did, on several occasions, visit his former work site to obtain information from his personnel file. He had some tools which he had taken with him upon his dismissal from the Heavy Equipment Division. Yet, despite knowledge that he would need tools to commence his new duties, he did not bring them with him, nor did he follow instructions to go home and get his tools and report back ready to go to work. When he finally appeared with a tool box, he refused to display the tools contained in the box to his supervisor. Even if the tools contained in his tool box were not sufficient to undertake all of his new responsibilities, he could have attempted to borrow the tools he needed from other employees. If problems related to not having the tools needed did arise after commencing his new responsibilities, he could have grieved the tool issue under terms of the Collective Bargaining Agreement.

ISSUE 2. Was Appellant's failure to report to his new work assignment ready, willing and able to perform his work duties justified?

The Board finds that the preponderance of evidence presented does not justify Appellant's failure to report to his new work assignment ready, willing and able to perform his work duties.

Appellant did not report to work with his tools, never told his supervisor that he did not have the tools needed for his new assignment and refused to show his supervisor the tools contained in the tool box which he brought with him on his third scheduled day of work. He did not tell his supervisor that his tools were at his former work location and reported as not found by management. His only reference to his tools is that they were tied-up in litigation.

Appellant's demeanor in initially refusing to leave the new work site despite his supervisor's calling for police assistance in having him removed, refusal to turn-off his tape recorder when ordered to do so, insistence on an immediate response to a lengthy list of demands he presented and failure to follow orders to report back to work with the tools that he did have, support management's contention that Appellant's primary interest was to confront and test management rather than to assume his new job duties.

ISSUE 3. Was Appellant's dismissal from employment an appropriate action for violation of the Personnel Regulations and/or terms of the Collective Bargaining Agreement?

The Board finds that Appellant's dismissal was an appropriate action for the violations set forth.

Appellant's actions did violate Article 32.1 of the Collective Bargaining Agreement. They also were in violation of Section 27.2(e), (g) and (h) of the Montgomery County Personnel Regulations.

The claimed violation of Section 27.2(o) of said Regulations with specific reference to Section 10-401 of the Annotated Code of Maryland did occur but, under the context in which it occurred, is considered by the Board to be evidence of Appellant's insubordination rather than an intentional act undertaken by the Appellant in derogation of the law.

DECISION

Based upon a preponderance of the evidence presented, the Board sustains the County's action in dismissing the Appellant.

GRIEVABILITY

Case No. 96-01.

BACKGROUND

This appeal involves the issue as to whether the consolidated grievances of 156 merit system employees are grievable. The Board is not being asked at this time to determine the underlying merits of these matters, but whether the grievants have properly asserted violations of the Charter, Merit System Laws and Administrative Procedures.

On May 2, 1995, Appellant filed complaints/ grievances with the Labor/Employee Relations Manager. The relief requested by the affected employees is that privatization and contracting out of the specified programs be withdrawn and rescinded; that those programs, functions, and services continue to be performed, if at all, by County merit system employees; and that all merit system employees adversely affected by any of the privatization or contracting be restored and made whole for any losses in pay or other remuneration benefits, or adverse effects on any terms or conditions of employment.

On June 5, 1995, the County was notified that MCGEO Local 1994 was now representing the grievants.

The next day the County responded to the complaint/ grievances. The County's preliminary decision was that, at this point, the subject employees have not yet been adversely affected and, therefore, the issue is considered not grievable in accordance with the definition of a grievance in Administrative Procedure 4-4.

On June 19, 1995, MCGEO Local 1994 responded to the County's preliminary decision. the President of Local 1994, stated in his response. "If the County reasserts that decisions to contract out/privatize are not bargainable, there can be no question that these grievances have been properly maintained pursuant to the Merit Law (see Section 401 of the County Charter). As such the County is under a mandatory duty to respond to the merits of these grievances." Local 1994's response also claims that the impending loss of positions/or employment is an "adverse effect".

On July 7, 1995 the County issued its final decision. The County maintains that the complaints are not grievable under Section 29 of the Personnel Regulations. The County also maintains that the grievants are all members of the collective bargaining units and, therefore, as such, are covered under the bargaining agreements and subjects covered by the labor agreements are not reviewable under Administrative Procedure 4-4. In dealing with the Unions right to challenge the County's right to privatization and contracting out, the County's

position is that the forum for a Union challenge would be the collective bargaining contract grievance procedure. The County's final decision, was that the complaints are not grievable.

ISSUES CONSIDERED

1. Whether the consolidated grievances of 156 Merit System employees are grievable?
2. Whether the grievants have properly asserted violations of the Charter, merit system laws and administrative procedures?

DISCUSSION

The County Executive's recommended FY 1996 Budget and Public Services Program which was adopted by the County Council include programs to be privatized and programs to be contracted out.

The Grievants, in their August 2, 1995 appeal state that these privatized/contracting out programs violate the County's entire merit system, with particular reference to Montgomery County Charter Section 216, 401, 402, 409, 410, 411 and Charter transitional section I; and the entire merit system laws in the Montgomery County Code, with particular reference to Sections 33-3, 33-5, 33-6, 33-7, 33-8, 33-9 and 33-11.

The relief requested is that these recommendations made by the County Executive and approved by the Council be "withdrawn and rescinded."

The Grievants also seek access to the Merit System Grievance Procedure by using the argument that all matters not subject to collective bargaining are "terms and conditions" of employment and thus subject to review under the Merit Laws and Personnel Regulations.

The County, in its August 29, 1995 response states "that the grievances filed were not grievable under the Merit System Grievance Procedure as provided for in Section 29 et. seq. of the Montgomery County Personnel Regulations and Administrative Procedure 4-4."

The County's position is that the complaint, as written, is not grievable and arbitrable by reason of the language in Article 2 of the cited labor agreements. If the Union elects to challenge the County's right to act in this area, the forum for such a challenge is the collective bargaining contract grievance procedure. In conclusion, the County states that the grievants' argument effectively eliminates management rights.

The County requested that the Merit System Protection Board deny the appeal and find that the consolidated complaints are not appropriate for review under the Merit System Grievance Procedure.

FINDINGS

The Merit System Protection Board has reviewed the record in the above case and finds:

1. Montgomery County Charter:

a) Article 2 EXECUTIVE BRANCH, 216, Appointment of Other Employees of the Executive Branch.

b) Article 4 MERIT SYSTEM and CONFLICTS of INTEREST, Sections 401, 402, 409, 410 and 411 AND,

c) TRANSITIONAL PROVISION - Section 1, Existing officers and Employees, does not give the Grievants access to the Merit System Grievance Procedure since this subject is covered under the County Collective Bargaining Law.

2. The Montgomery County Code - Article I General. Section 33, Merit System, Paragraphs 3, 5, 6, 7, 8, 9 and 11, likewise does not give the Grievants access to the Merit System Grievance Procedure since this subject is covered under the County Collective Bargaining Law.

In addition, Section 33-12 Appeals of Disciplinary Actions; Grievance Procedures exclude the Merit System Protection Board from employee grievances for which another forum is available to provide relief or where the Board determines that the grievance is not a suitable matter for the County grievance resolution process.

3. The Montgomery County Personnel Regulations - Section 29 GRIEVANCES, also does not give the Grievants access to the Grievance Procedure since this subject is covered under the County Collective Bargaining Law.

4. The Office Professional and Technical (OPT) and Service Labor and Trades (SLT) labor agreements at Subsection 2.1 of Article 2, MANAGEMENT RIGHTS, excludes these complaints from the grievance and arbitration procedures.

5. The Montgomery County Charter Section 303, Capital and Operating Budgets and Section 305, Approval of the Budget; Tax Levies grants the County Executive the right to prepare and present to the County Council the annual budgets and the Council may add, delete, increase or decrease any appropriation item in the budget and shall approve the budgets as amended. The involuntary removal of government work and service (privatization and contracting out) is not a condition of County employment and therefore is not grievable under the County Collective Bargaining Law.

DECISION

Based upon a preponderance of the evidence presented, the Merit System Protection Board denies the Grievants' appeal that the consolidated complaints are appropriate for review under the County merit system laws and sustains the Labor/Employee Relations Manager's decision dated July 7, 1995.

Case No. 96-05

This is the decision of the Merit System Protection Board on your above referenced appeal of the County's February 9, 1996 decision that your complaint is not a proper subject for grievance under the provisions of Section 29-2 of the Personnel Regulations.

BACKGROUND

The facts in the Appellant's grievance are not in dispute. The Appellant is the Deputy Fire/Rescue Chief in the Department of Fire & Rescue Services. Upon transition to County employment in 1988, his leave balances were increased by 20% to cover his scheduled work week of 48 hours. On October 1, 1995, his work week was changed from 48 hours to 40 hours and his leave balances were reduced by 136.34 hours for Annual Leave and by 636.97 for Sick Leave in accordance with the provisions of Section 1-21 of the Personnel Regulations.

The Appellant believes that the reduction in his leave balances were arbitrary, capricious and without foundation in logic and seeks restoration of leave reductions.

The County denied Appellant's request for restoration of his leave balances and his grievance on the grounds that his grievance did not allege that Section 1-21 of the Personnel Regulations was violated, misinterpreted or misapplied and, therefore, did not meet the requirements for a grievable complaint as set forth in Section 29-2 of the Personnel Regulations or in Administrative Procedure 4-4.

In his appeal to the Merit System Protection Board, Appellant contended that his complaint is grievable because leave accruals for Firefighter/Rescuers are handled differently from other classes of County employees. This has resulted in a reduction of leave benefits for employees classified as Firefighter/Rescuers and constitutes a discriminatory application of policy concerning compensation and employee benefits.

ISSUE BEFORE THE BOARD

Did Appellant's Complaint meet the requirements for a grievance under applicable Regulations and Administrative Procedures?

DISCUSSION

Problems subject to resolution through the grievance procedure are set forth in Section 29 of The Personnel Regulations. Sub-sections of Regulation 29-2 applicable to the Appellant's complaint are set-forth below and provide that a grievance may be filed if an employee is adversely affected by an alleged:

- (a) Violation, misinterpretation or improper application of established laws, rules, regulations, procedures or policies;
- (c) Improper, inequitable or unfair act in the administration of the merit system, which may include promotional opportunities, selection for training, duty assignments, work schedules, involuntary transfers and reductions-in-force;
- (d) Improper, inequitable or unfair application of the compensation policy and employee benefits, which may include salary, pay differentials, overtime pay, leave, insurance, retirement and holidays;

The Chief Administrative Officer establishes a procedure for reviewing and processing grievances which is set-forth in Administrative Procedure 4-4. Section 2.10 of this Procedure defines a grievance as "a formal written complaint by an employee arising out of a disagreement between an employee and supervisor concerning a term or condition of employment in which the employee alleges that he/she has been adversely affected by an action or failure to act by a supervisor which is:

- (A) A misinterpretation, misapplication, or violation of any policy, procedure, regulation, law or practice which is sufficiently established to have precedential value;
- (B) A wrongful written reprimand, within-grade reduction, demotion, suspension, dismissal or termination; or
- (C) Arbitrary and capricious, i.e., without reason or merit."

Section 1-21 of the Personnel Regulations spells-out the criteria for Adjustments of Leave Balances for Operational Firefighters as follows:

In the event that an operational firefighter is no longer assigned to a work schedule of 2,496 hours per work year (48 hours per week), the leave balance at the time of the reassignment shall be reduced by a factor of 1.2 in order to be compatible with leave usage requirements of the newly assigned hours of work. In the event an operational firefighter is transferred to a work schedule of 2,496 hours per work year, the leave balance at the time of the reassignment shall be increased by a factor of 1.2 in order to be compatible with the leave usage requirements of newly assigned hours of work. (added by the Board for clarity)

FINDINGS

Appellant did not allege that Section 1-21 of the Personnel Regulations was violated, misinterpreted or misapplied. The substance of his complaint is that this Regulation unfairly establishes a policy governing leave balances for operational firefighters which is inequitable and inconsistent with the policy applied to the calculation of leave balances for other classes of County employees. Appellant contends that "No where else in County government does an employee who transfers from one work week to a work week of greater or lesser hours suffer a reduction or increase in their accrued leave balances. What is adjusted to correspond with their new work week is their leave accrual."

CONCLUSIONS

The Board agreed with the County's finding that the Appellant is disputing the equity and fairness of a County regulation rather than contending that the regulation has been violated, misapplied or misinterpreted as applied to the reduction in his leave balances. The Appellant has not established by a preponderance of the evidence presented in support of his complaint that the regulation in issue is improper, inequitable, unfair or arbitrary and capricious. The Board found no explicit or implicit restrictions on the County's right to establish policy and regulations responsive to particular operating structures and needs for the purpose of achieving efficient and cost-effective operations. As long as these regulations are applied uniformly and consistently to all employees within applicable occupational classes, there is no grievable basis for claiming disparate treatment.

The County correctly applied its regulations in this case. The Appellant was advised that if he believes that Section 1-21 should be amended, he should submit a request for an amendment to the Director of the Office of Human Resources for processing in accordance with Section 2A-15 of the Montgomery County Code.

DECISION

The Board sustained the County's finding that the Appellant's complaint was not grievable under Section 29 of the Personnel Regulations and/or under Administrative Procedure 4-4.

PROMOTIONAL PROCESS

Case No. 95-24

The Appellant appealed the decision of the Chief Administrative Officer (CAO), denying his grievance and the requested relief. His grievance alleged that the County practiced favoritism in the selection process for the position of Chief of the Traffic Operations Section in the Division of Transportation Mobility Services (DTMS), Department of Transportation (DOT). For relief, he requested that: (1) the current selection of the Chief of the Traffic Operations Section be made null and void; (2) the three applicants for the position be re-examined, re-rated and re-evaluated by impartial and independent raters; and (3) the inside promotional practices in DTMS be reviewed and monitored to prevent re-occurrence of favoritism by higher officials.

BACKGROUND

Appellant began working for the County's DOT as an Engineer II in the Sign and Marking Engineering Unit, Traffic Operations Section, Division of Traffic Engineering in January 1989. In August 1990, he was transferred to the Planning and Design Unit, Traffic Planning Section and in January 1992, he was promoted to the position of Engineer III in the Traffic Planning and Design Unit, Traffic Planning Section. In November 1994, he applied for the position of Chief, Traffic Operations Section, Division of Traffic Engineering along with two other employees. The Office of Human Resources (OHR) coordinated with the DOT on the recruitment and examination effort for this position. Because the Human Resource Specialist was not an expert in matters of traffic engineering/operations, they contacted the Chief, DTMS and the immediate supervisor of the vacant position, to assist in obtaining qualified raters whose job knowledge of the duties and responsibilities of the vacant position would enable them to accurately and equitably evaluate the applicants. The Chief recommended Mr. Blank and Mr. Blank, both DOT employees, to be raters of this position.

Messrs. Blank and Blank rated applicants A (score of 69.5) and B (score of 62) as "Well Qualified" and the Appellant (score of 51) as "Qualified. The Human Resource Specialist established the cut-off score of 61 for the rating categories. Applicants A and B were interviewed and A was selected for the position. Appellant contends that the raters were biased and practiced favoritism in reviewing and rating the qualifications of the three applicants. Because he believes his qualifications are superior to that of the other two applicants, Appellant contends he should have been selected for the position. He further alleges that the CAO's decision denying his grievance is based on distorted and false information.

FINDINGS OF FACT

1. In making his recommendations of Messrs. Blank and Blank as raters, the Chief was guided by the following OHR policies and practices pertaining to selections of raters adopted many years ago to ensure objectivity and fairness in the applicant evaluation/rating process:

a. As the immediate supervisor of the vacant position, the Chief himself may not be a rater.

b. Each rater must be in a County position which is at least the same or higher grade than the grade of the vacant position and neither may be the direct supervisor of the position he was reviewing.

c. Both raters had been previous incumbents of the vacant position and, by virtue of their work experience and engineering education, were considered by the Chief to be subject matter experts.

d. Although each rater knew the applicants they were rating, each attested to his ability to rate the candidates fairly by signing a disclaimer that such knowledge will in no way interfere with his objectivity and fairness as an examiner.

2. The education credentials of the applicants were not evaluated by the raters as part of the examination process. Rather, education credentials were examined in the initial screening of the applications to ensure that the applicants met the minimum qualification requirements of the position.

a. The minimum qualifications for the position of Chief, Traffic Operations Section was as follows: Graduation from an accredited college or university with a Bachelor's Degree in civil engineering or closely related engineering field and five (5) years experience involving the installation, modification, repair, and preventive maintenance of various traffic control devices, two (2) years of which were in a supervisory capacity.

b. An equivalent combination of education and experience may be substituted.

3. The Class Specification for Chief, Traffic Operations Section provides, inter alia, that "This is program management work involving the installation, modification, repair and preventive maintenance of various traffic control devices and street lights."

a. The Class Specifications further state that "An employee in this class is responsible for planning and coordinating the work of several work units and contractors who design, plan, install and maintain street lights, traffic signs, roadway pavement markings, barriers and computer controlled traffic signals."

b. The "Knowledge, Skills and Abilities" cited in the Specifications consist of:

(i) a thorough knowledge of: the Manual on Uniform Traffic Control Devices; modern traffic engineering principles, practices and new developments; and the design, operation and application of traffic control devices;

(ii) considerable knowledge of computer technology as it relates to a computer controlled traffic signal system; and

(iii) the ability to: plan direct and coordinate the work of several units involved in large scale and complex traffic engineering projects; communicate effectively, both orally and in writing; and to independently perform field investigations and inspections in all types of environmental conditions.

4. The raters evaluated the applicants for knowledge and experience directly related to the duties and responsibilities of the position of Chief, Traffic Operations Section.

5. For those applicants meeting the minimum qualifications, the promotional applications and any attachments were reviewed to assess the extent and relevance of their training and experience based on the following selection criteria stated in the vacancy announcement:

(1) Demonstrated thorough knowledge of modern traffic engineering principles, practices and developments;

(2) Demonstrated thorough knowledge of the design, operation and application of traffic control devices for signing, pavement markings and work zone control;

(3) Experience in planning, directing, supervising and coordinating large scale and complex traffic operations projects;

(4) Demonstrated knowledge of and experience in personnel management activities of a large and varied workforce; and

(5) Direct contact in dealing with a variety of individuals (i.e., employees, citizens, contractors, community associations and officials.)

6. Based on the review of their applications, applicants were rated "Well Qualified" or "Qualified" according to the average of their numerical scores. The descriptive ratings for each of the above areas was divided into five (5) categories: SUPERIOR (S) - highly qualified in functional area; expert level of knowledge/experience; ABOVE AVERAGE (AA) - well qualified in functional area; considerable experience, although not an expert; AVERAGE (A) - adequately prepared in functional area but not with a high level of expertise; BELOW AVERAGE (BA) - marginal level of experience; not enough to assume

responsibility in this area; UNACCEPTABLE (U) - no substantive experience in area under review; not capable of performing responsibilities of position.

7. Using the five (5) areas of selection criteria listed above in Paragraph five (5), raters Blank and Blank separately rated each of the applicants in each of the listed selection areas. Appellant received numerical ratings of 55 and 47, averaging 51, which was considered as "Qualified". B received numerical ratings of 55 and 69, averaging 62, which was considered as "Well Qualified". A received numerical ratings of 69 and 70, averaging 69.5, considered to be "Well Qualified". OHR determined that the cut-off rating for "Well Qualified" would be 61, which was above Appellant's average score of 51.

8. The Eligible List was certified on December 5, 1994 and given to DOT to conduct selection interviews. Rating letters were prepared on this date. The two applicants who were rated "Well Qualified" were interviewed. A was offered the position, which he accepted, on or about December 7, 1994. Appellant was not interviewed because his numerical score was below the cut-off rating of 61.

ANALYSIS AND DISCUSSION

Although Appellant contends that the raters Blank and Blank were not properly selected, there is no evidence that they were selected by the Chief for reasons other than their objective qualifications based on the long-standing policies and practices of OHR for the selection of raters for competitive positions. Similarly, contrary to Appellant's assertions, there is no evidence that either rater was biased in reviewing the qualifications of the three applicants and rating them for the position of Chief, Traffic Operations Section. Further, there is no objective evidence to show that the raters were unable to abide by their disclaimer that their knowledge of the applicants would not interfere with their responsibility to be fair and objective raters.

The evidence discloses no procedural defect in the processes used to review and rate the qualifications of the three applicants and Appellant has not demonstrated that there was any procedural defect. Rather, the evidence shows that the longstanding OHR rating policies/practices were followed by OHR, the Chief, and raters Blank and Blank throughout the rating processes.

Appellant appears to rely heavily on his contention that he is more qualified than the selectee because of his alleged superior educational credentials. However, the educational credentials of the applicants were reviewed during the initial stages to determine whether they met the minimum qualifications but were not reviewed thereafter by the raters. The education credentials of each of the applicants was considered to be minimally acceptable based on either an engineering degree or a combination of education and experience.

Appellant's naked assertion that the raters were biased is not supported by any evidence of record. Appellant also contends that the speed with which the selectee was appointed shows that the appointment was based on deception. However, it is usual for an appointment to be quickly processed when there is only a small number of candidates who applied for the position. The expeditious appointment of the selectee was also due to a concern by DOT that the new County Executive would soon announce a hiring freeze.

Although Appellant claimed that he perceived "favoritism" and an "old boys network" within the DOT which factored into the selection process, he presented no objective evidence that such factors existed either in the rating or selection process. Appellant also alleged that discrimination, based upon his national origin, may have been a factor in the selection process. If this is the basis of his grievance, such complaints must be filed directly with the Montgomery County Office of Human Relations in accordance with Section 4-2 of the Personnel Regulations.

CONCLUSION

It is not the function of the Board to "second guess" the rating panel or the selecting official's judgment as to the qualifications of the applicants. That is the function of the raters and the selecting official who have the expertise in the technical areas involved in the position. Suffice it to say that the selectee's application shows that he has held an Engineer III position, Traffic Operations Section, Traffic Control and Lighting Engineering Unit, since 1992 and a supervisory position as a Senior Engineer Technician from 1988 - 1992. There is no evidence to show that the selection criteria for the position of Chief, Traffic Operations Section, were not considered by the raters or that the applicants were not fairly and objectively rated against such criteria.

Based on the evidence of record, the Board finds no violation of procedure, policy or law in the selection and rating processes for the position of Chief, Traffic Operations Section, in the Division of Transportation Mobility Services (DTMS) of DOT. The appeal and requested relief were denied.

Case No. 96-06

The Chief Administrative Officer denied Appellant's grievance because they did not meet a 2-year time in-grade requirement by the closing date of a Promotional Examination for the Rank of Police Lieutenant. Appellant appealed because they believed the County established an arbitrary cut-off date for meeting time in-grade requirements in violation of Montgomery County Personnel Regulations 5-4, 5-10 and 7, and 33-5 of the Merit Law.

Although Appellant was allowed to take the examination, the test results would remain sealed pending the decision of the MSPB on this appeal. For relief, Appellant requested that

the examination results be unsealed; that they be placed on the eligible list and be eligible for selection; that they be made whole; that the CAO transmit the entire record to the Board; and that they be afforded all appropriate, fair and equitable relief.

ISSUE

Whether the County's establishment of a closing date prior to the examination for determining minimum experience and education qualifications for taking the promotional examination for the Rank of Police Lieutenant violates the County's Personnel Regulations or is otherwise arbitrary and capricious.

FINDINGS OF FACT

1. Appellant was promoted to the rank of Sergeant on September 5, 1993. Therefore, he would meet the 2 year in-grade requirement for promotion to Police Lieutenant on September 5, 1995.

2. The Personnel Bulletin announcing the 1995 promotional examination for the Rank of Police Lieutenant was issued May 15, 1995 with a closing date of August 1, 1995. The Bulletin stated that in order to be eligible to take the promotional examination, a candidate must meet the following experience and education requirements "by the closing date of August 1, 1995":

A. Experience: A candidate must currently be a Montgomery County Police Sergeant and have completed a minimum of two years sworn experience in the rank of Sergeant as of August 1, 1995.

B. Education: Candidates must have satisfactorily completed 120 semester hours or 180 college quarter hours by August 1, 1995.

3. The Bulletin provided that the examination process was tentatively scheduled to be held between September 7-14, 1995 and was administered during that period. Test dates are tentative and may change due to availability of personnel or development and finalization of materials.

4. The minimum qualifications relating to education and experience for the rank of Police Lieutenant as stated in the class specifications are 2 years of experience as a Police Sergeant with the County Police and possession of a Bachelor's degree or equivalent from an accredited college or university.

5. The Grievant was determined by the Office of Human Resources (OHR) to be not qualified to take the promotional examination for Police Lieutenant because he did not meet the 2 year in-grade requirement for having served as a Police Sergeant by the announced closing date of August 1, 1995.

6. Grievant tried to informally resolve the matter on May 31, 1995 by sending a memorandum to the Chief, Field Services Bureau, and on June 7, 1995 by sending a similar memorandum to a Senior Human Resources Specialist requesting assistance in that he will have the in-grade requirement prior to the examination date.

7. In a June 5, 1995 communication to Grievant, stated that, after a discussion of the matter, it was decided that the eligibility date of August 1, 1995 would remain the same.

8. On June 13, 1995, in response to Grievant's memorandum to the Office of Human Resources, the Director of OHR denied Grievant's request stating that the August 1, 1995 date was to allow sufficient time for staff to review minimum qualifications, provide written notice to applicants, finalize production of test materials, and complete administrative tasks associated with test administration.

9. In a written request to Chief Administrative Officer dated July 28, 1995, Grievant requested that he be allowed to participate in the promotional process pending resolution of his grievance.

10. In a Step 2 level response to this grievance, dated August 2, 1995, the Director of OHR permitted Grievant to participate in the promotional examination process with results sealed. It was provided that, should Grievant ultimately prevail in this complaint, the examination results will be opened.

11. OHR stated that prior to the issuance of a promotional announcement, the time-in-grade status of the current list of sergeants was reviewed to avoid establishing a closing date that would eliminate a potential promotional candidate by virtue of "a few days" but to accommodate Grievant, the cut-off date would have had to be adjusted by 5 weeks.

12. OHR has been consistent in its practice of establishing the closing date of the promotional announcement, prior to the date of the examination or certification of the eligible list, as the date on which public safety applicants must meet the requirements for promotion, as evidenced by promotional examinations held in 1993, 1994, and 1995.

CONCLUSIONS OF LAW

1. Section 5-4 of the Personnel Regulations requires that each application be reviewed and evaluated to determine if the applicant is eligible to compete in the examination. Contrary to Grievant's contention, there is no stated or implied requirement that the examination date be utilized as the cut-off date for having met the minimum qualifications for participation in the examination process.

2. Although Section 5-10 of the Personnel Regulations requires upon completion of the examination the certification of the names of all qualified individuals for placement on the

eligible list, it does not preclude the establishment of an announced cut-off date for all applicants to meet the minimum qualifications to participate in the examination process.

3. Grievant did not meet the minimum qualifications for participation in the examination by 5 weeks. Grievant requested that the examination date or eligible list certification date be considered as the cut-off date to accommodate his September 5, 1995 eligibility date. Although efforts were made by the OHR, prior to the establishment of a closing date for the Police Lieutenant promotional examination, to preclude the elimination of a promotional candidate by a few days, it was not required nor realistic to adjust the closing date to accommodate the 5 weeks the Grievant needed to be eligible to take the promotional examination.

4. The requirement that the minimum age for the job classification of Police Officer Candidate be not less than 21 years at the time of graduation from the academy is not an appropriate comparison to the experience and educational requirements for promotion to Police Lieutenant. This is because the date of birth for each applicant is known and not subject to change while all other requirements, such as possession of an Associate degree, must be met at the time of application submission; otherwise, they could be subject to change thereafter.

5. In a similar case, Lewis T. Roberts et al. v. the Merit System Protection Board and Ronald A. Ricucci, Law 64239 consolidated with Law 64108, the Circuit Court for Montgomery County, Maryland addressed the issue of whether a 2 year minimum in-grade experience requirement for promotion was arbitrary and capricious. In that case, the minimum experience requirement for examination was 2 years as Sergeant as of August 31, 1982. Sergeant Ricucci did not meet the 2-year minimum until November 9, 1992. In ruling on this issue, Judge Blank stated that the Chief Administrative Officer, under the Montgomery County Charter, must develop adequate safeguards to assure the proper administration of the merit system. Judge Blank's analysis in Ricucci is instructive and applicable to this case:

A two-year minimum in-grade experience requirement for promotion is such an adequate safeguard properly established by the CAO. Montgomery County Personnel Regulations, Section 5-4. It is a neutral and articulable criterion, but one which Sergeant Ricucci simply could not meet. Further, it was equally applied to all candidates for promotion, not just the one heard to complain.

6. Section 5-3 of the Personnel Regulations provides that the CAO may "establish a reasonable deadline for receipt of applications for announced vacancies." Applications may be accepted at any time for future consideration but "must not be considered if submitted after the announced deadline for a vacancy."

7. In accordance with Personnel Regulations, management is charged with the administration of the recruitment and examination program for all merit system positions. Management's establishment of an announced closing date as the benchmark upon which to

base the evaluation of minimum qualifications is a necessary part of the administrative process. Closing dates need to be specific and announced in advance in order to determine the eligibility for all potential candidates. A closing date which is conditioned on examination dates or eligibility list certification dates, as suggested by Grievant, is uncertain and subject to change. Thus, such dates cannot be used to determine eligibility for all candidates.

DECISION

In light of the above, the Board agrees with the CAO that the closing date of August 1, 1995 established by management for applicants for the 1995 Police Lieutenant promotional examination to meet the minimum experience and educational requirements to participate in the examination process is in accordance with the Personnel Regulations and consistent with existing practices. Moreover, the cut-off date of August 1, 1995 established by management to meet the minimum qualifications required to participate in the examination is fair, appropriate and equally applicable to all candidates. The Board denied Appellant's appeal.

RETIREMENT DISABILITY

Case No. 95-19

The Appellant was granted a Service Connected Disability Retirement Benefit. The Plan Administrator determined that the Appellant was 100% permanently disabled and the disability was job related.

Under Section 33-43(f) of the Montgomery County Code, the Administrator may require disability retirees to undergo periodic physical examinations. After a review of the medical evidence as well as the results of an independent medical examination, the Administrator determined that the Appellant was no longer disabled and was able to return to work in his former occupation

The Appellant noted an appeal from the Administrator's decision as permitted by Section 33-43(k) of the Montgomery County Code. A hearing was held before the Administrator's Hearing Examiner on August 11, 1994. In a written decision dated September 21, 1994, the Hearing Examiner concluded that the Appellant was not disabled. The Administrator adopted the recommendation of the Hearing Examiner.

BACKGROUND

The Appellant was hired by Montgomery County in 1986 as a truck driver's helper for the Department of Liquor Control. His duties included loading and unloading trucks, delivering kegs of beer, and stacking beer with the assistance of a hand truck. At age 30, in 1990 the Appellant retired from the County as a result of three incidents resulting in severe back injury.

The first incident occurred in June, 1987 when the Appellant slipped on a step while moving kegs. His doctor kept him off work for three to four weeks. The Appellant returned to work and alternated between light and full duty. Between 1987 and 1990 the Appellant suffered two further accidents. In one he slipped on an icy spot in a beer refrigerator and in the second he slipped in a keg box. The County requested that he take a Service Connected Disability Retirement Benefit since they could not find a permanent light duty assignment for him.

As a result of these incidents, the Appellant suffered back and leg pain as well as numbness in his buttocks. The Appellant testified during the August 11, 1994 hearing, before the Administrator's Hearing Examiner, that he continues to experience pain "24 hours a day every day, cannot walk more than two blocks, can sit for short periods of time and has difficulty driving and bending."

For a short period of time in 1990 and 1991, the Appellant worked for two courier services, but his position was terminated. In 1994 the Appellant started to work part time for his father-in-law's cleaning service business. According to the Appellant, he only works about three days a month at this job. He works anywhere from two to six hours a day. The

job requires him to drive the company vehicle to work sites, help unload the truck and assist in the cleaning. When asked for more detail, the Appellant told the Hearing Examiner that he would dust the furniture, clean the bathrooms, vacuum the carpets, and remove the trash. He admitted to lifting a regular upright household Hoover vacuum cleaner, which Appellant estimated to weigh only seven to ten pounds. He also carries buckets containing cleaning products. The Appellant claims that he cannot work regularly, because if he did, the pain would "be so bad that I'd have to be laid up in the bed."

In addition to the testimony presented at the hearing, medical records were also placed into evidence. At the request of the County, the Appellant was examined by an orthopedic surgeon. At the time of this examination, the Appellant was complaining of constant stiffness of his lower back and daily numbness of his buttocks. However, in his observations of the Appellant, the doctor observed no restriction or hesitation in the movements of the Appellant's trunk and extremities while he was undressing and dressing. While undressing, the Appellant "sat and flexed his legs against his chest/abdomen to remove his shoes and socks. He stood and pulled his trousers off each lower extremity briskly and had good balance on each lower extremity." The Appellant was able to squat fully when asked to do so. The doctor found no objective evidence to support the Appellant's subjective complaints concerning any physical impairment of his lower back. The Appellant was found to have no permanent physical impairment of his lower back and the doctor was unable to find that the Appellant had any current disabling condition. The doctor did recommend activity such as swimming for general physical conditioning due to the Appellant's prolonged period of inactivity.

The Appellant was also seen by Dr. Blank for an orthopedic examination. The Appellant advised Dr. Blank that he could not walk or run, that he could not sit or stand for any extended period of time without pain and that he could not do housework of any kind. Dr. Blank diagnosed the Appellant as having chronic lumbar degenerative disk disease without evidence of radiculopathy. It was Dr. Blank's opinion that the Appellant would not benefit from further treatment. No evidence was found from a recent MRI to suggest that the Appellant had a significant structural lesion which would prevent improvement in his condition. Dr. Blank felt that participation in a rehabilitation course of exercise was all that was required.

The Appellant was also seen between February, 1993 and August, 1994 by Dr. X, who is also an orthopedic surgeon. As recently as August 1, 1994, Dr. X stated that the Appellant was totally disabled for any gainful employment. Treatment notes of Dr. X reflect a number of visits by the Appellant in 1993 and 1994. Throughout this time, the Appellant was complaining to Dr. X of lower back and leg pain. However, Dr. X's notes from April 27, 1993, show that Dr. X reviewed earlier x-rays of the Appellant's lower spine and did not find any major abnormality. In his notes from October 27, 1993, Dr. X states that he has been unable to find out why the Appellant is having the problems he was reporting. Dr. X's note from April 13, 1994, shows that it was Dr. X's understanding that the Appellant was not working. This is consistent with the Appellant's testimony that he could not recall telling Dr. X that he had in fact been employed and working since he retired from the County.

The Appellant was also seen by Potomac Valley Orthopedic Associates on three occasions in 1992. After his last visit in November 1992, it was noted in his records that while the Appellant was continuing to do poorly, his level of symptoms could not be explained.

The Appellant also submitted records from Shady Grove Adventist Hospital dated May 19, 1993. (The Appellant went to the hospital after he was a passenger in a van which was involved in a head-on collision.) The Emergency Physician's report noted that the Appellant had been ambulatory at the scene of the accident and that at the time he was seen by the doctor, the Appellant was complaining only of neck pain. An x-ray of his cervical spine was normal.

The Appellant was not the only witness at the hearing. The County called Mr. Blank from Target Investigations, a private investigation company. In addition to hearing the testimony of Mr. Blank, videotapes of the Appellant were introduced as were still photographs taken from the videotapes and investigative summaries prepared by Mr. Blank. Mr. Blank observed the Appellant's activities on three different dates: May 10, May 31, and August 5, 1994. On each of these dates, the Appellant was observed working for the cleaning firm operated by his father-in-law. Mr. Blank testified that he saw the Appellant running, bending and reaching, getting into and out of vans without any apparent difficulty, loading and unloading cleaning supplies from vans, lifting and carrying an upright vacuum cleaner with one hand, carrying other cleaning supplies and equipment, and assisting in cleaning chores. In general, Mr. Blank saw no signs that Appellant's movements were restricted or impaired. Mr. Blank's testimony was supported by the videotapes he made of the Appellant.

After reviewing the evidence, the Hearing Examiner concluded that the Appellant was not a believable witness, neither as to his description of his pain and limitations, nor as to his descriptions or explanations of what was clearly viewable on the tapes.

On September 21, 1994 the Hearing Examiner rendered his opinion that the Appellant is not disabled, and therefore, disability retirement benefits are denied, whether service-connected or non service connected.

ISSUE

Whether the preponderance of evidence presented established that the Appellant had a change in physical condition which warranted revocation of his Permanent Service-Connected Disability Retirement Benefit?

FINDINGS OF FACT

Section 33-43(e) of the Montgomery County Code sets forth the criteria upon which a member may obtain a Service Connected Disability Retirement as follows:

(1) The member is totally incapacitated for duty or is partially and permanently 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; that the incapacity is not due to willful misconduct or willful negligence, and the incapacity is likely to be permanent. In extenuating circumstances, the administrator may waive the requirement that a member is likely to be permanent and may approve a temporary disability retirement for one (1) or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to become permanent.

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

Section 33-43(f) of the Montgomery County Code sets forth the criteria for medical re-examination of disability retirees.

(f) Medical reexamination of disability retiree. The Administrator may require a member receiving disability pension payments to undergo a yearly physical examination during the five-year period, thereafter, until age fifty-five (55) if a member of group B or E, or age sixty (60) if a member of group A. The Administrator will review the findings of the physical examination and take appropriate action, which may include a hearing. Should a member refuse to submit to the examination, the Administrator may reduce or discontinue pension payments.

The parties agreed that the Appellant was granted a Service Connected Disability Retirement Benefit on July 17, 1990 in accordance with the provisions of Section 33-43(e) of the Montgomery County Code and that the County has the right under Section 33-43(f) of the Montgomery County Code to request medical re-examinations, reviews and possible hearings.

The County, after such a re-examination and review, notified the Appellant on February 24, 1994 that it decided that he was no longer disabled and that his benefits would cease after the March 1994 payment.

The Appellant requested a hearing before the Administrator's Hearing Examiner who issued his decision in September, 1994. The Appellant then filed a timely appeal to the Merit System Protection Board.

The Board decided to render a decision based upon the record, and not conduct a hearing. The report of Dr. Blank's found no objective evidence to support the Appellant's subjective complaints concerning any physical impairment of his lower back. Dr. Roberts also found no permanent impairment of his lower back and found that the Appellant did not have any current disabling condition.

The report of Dr. X by contrast, which covers visits and renewal of prescriptions for the period February, 1993 through April, 1993, stated that the Appellant was totally disabled from any gainful employment.

A review of the transcript and exhibits including both the videotapes and still photographs along with Target Investigator, Mr. Blank's testimony indicates that the Appellant was not being truthful about his purported physical limitations. The transcript indicates that the Appellant never told Dr. X that he had in fact been employed and was working since he retired from the County.

DECISION

Based upon a preponderance of the evidence considered in the record in this Appeal, the Merit System Protection Board finds that the County has met its burden of proof required under Section 2A-10 (b) of the Montgomery County Code. The Appellant is no longer disabled and his Service Connected Disability Retirement Benefits were properly revoked in compliance with the requirements as set forth in Section 33-43 (e) (f) of the Montgomery County Code.

The Board is not persuaded that a preponderance of the evidence presented by the Appellant that he meets the requirement for a Permanent Service Connected Disability Retirement Benefit.

The Board concurred with the Administrator's decision and also denied the Appellant attorney's fees, and any related medical expenses.

Case No. 95-20

Appellant appealed a denial of his claim for disability retirement benefits by the Disability Retirement Administrator for Montgomery County, the Prudential Insurance Company of America. Temporary Service Connected Disability Retirement Benefits had been granted to the Appellant effective May 15, 1991 and subsequently terminated in September, 1993.

The Administrator's decision from which this Appeal is taken was based on an opinion resulting from a *de novo* hearing held before Prudential's Hearing Examiner on January 12, 1995. On January 25, 1995, the Examiner issued an opinion finding that the Appellant did not have a service connected disability and should be awarded a non-service connected disability retirement if he had five years of credited service with Montgomery County. As the Appellant did not have the required five years of service, he was terminated without retirement benefits.

On June 12, 1995, the Board invited both parties to submit by June 26th written responses to the April 21, 1995 denial of benefits. Respective submissions were received and entered in the record. A Motion to Re-open the Record filed with the Board by Montgomery County on July 20, 1995 and Appellant's response thereto were evaluated by the Board. On August 14, 1995, the Board advised both parties of its denial of the County's Motion.

BACKGROUND

The Appellant was a 22 year old male at the time he was employed as a Public Service Worker II for Montgomery County in February, 1989. His duties consisted primarily of manual tasks involving the use of a shovel, pitchfork, rake and jackhammer.

The Appellant alleged suffering an on-the-job injury on November 12, 1989 when he felt something pull in both of his forearms while he was turning wet leaves with a pitchfork. He subsequently sought treatment at Sibley Memorial Hospital's emergency room for the pain in his arms and was examined by Dr. Blank who diagnosed "probable carpal tunnel syndrome" and told the Appellant to stay off from work until November 15, 1989 and take medications as directed. The Emergency Service Record states that the Appellant had experienced a "similar episode [approximately] 3-4 [years] ago."

Dr. Blank referred the Appellant to Dr. X of the Washington Clinic. Dr. X's progress notes dated November 17, 1989 state that the Appellant "develops dysesthesia and discomfort in his forearms" when he uses shovels and pitchforks and that this problem "has been occurring now over a three-year period."

On December 28, 1989, the Appellant returned to Dr. X. In his progress notes for that examination, Dr. X states that "as long as [the Appellant] has not been doing the exercises that caused him the problem to begin with, he has had none of the symptoms in the forearms." (emphasis added).

Due to the possibility of surgery helping his condition, Appellant applied for and was granted a temporary service connected disability which commenced on May 15, 1991 and continued until September 23, 1993.

During this period and between visits to Dr. X, the Appellant was referred to doctors Y and Z for independent medical examinations. Doctor Z examined the Appellant on May 17, 1991 and diagnosed carpal tunnel syndrome which he felt was disabling but not attributable to a preexisting condition. As stated in his correspondence dated May 21, 1992, Dr. Y found that the Appellant had, inter alia, "mild right carpal tunnel syndrome.. related to his on the job injury and there is no evidence of a pre-existing problem."

On May 21st, the Appellant again was examined by Dr. X who noted that as of that date the tests performed "show absolute resolution" of his ailment.

Appellant was next examined by a Dr. A who reported on May 4, 1993 that the Appellant's symptoms could not be explained by simple carpal tunnel syndrome and did not need any on-going treatment or therapy.

The Appellant apparently sought no further treatment until June 29, 1993 when he consulted Dr. X due to "a marked increase in pain in the forearm and dorsum area of the thumb." There was "no history of [a] specific injury," as the problem "just began."

Based upon his medical history and progress, Appellant's temporary service connected disability status was reviewed and was subsequently terminated on September 23, 1993 when the County's Disability Retirement Administrator determined that the Appellant was no longer disabled from performing his job.

The Appellant sought reinstatement of his Temporary Service Connected Disability Retirement Benefits or, alternatively, an award of service connected disability retirement benefits. The Disability Retirement Administrator referred Appellant's claim to an independent Hearing Examiner for a full evidentiary hearing. Between the point that his temporary disability status had been discontinued and the hearing on his claim, Appellant sought further treatment for his condition.

On March 24, 1994, Dr. X determined that the Appellant had "local tenderness over the dorsum of the thumb, [but] no suggestion of [the] symptoms associated with carpal tunnel [syndrome]."

Appellant developed apparent symptoms of severe pain in the upper forearm while working at a nursing home and, on April 22, 1994, again sought treatment from Dr. X. Dr. X prescribed Naprosyn and suggested that the Appellant should reduce the stress on his forearms. Appellant last consulted Dr. X on November 17, 1994.

The hearing on Appellant's claim was conducted on January 12, 1995. The Hearing Examiner found that the Appellant's disability, namely his injury to his forearms, preceded his

employment with the County and was, in fact, caused by some form of injuries to Appellant's forearms were resolved and that the Appellant's injury to his thumb was unrelated to his employment with Montgomery County.

On January 26, 1995, The Hearing Examiner rendered his opinion that the Appellant did not have a Service Connected Disability and should be awarded a Non-Service Connected Disability Retirement if it was determined that he had the required five years of credited service with the County.

On May 17, 1995, Appellant filed an Appeal to the Merit System Protection Board from the Disability Retirement Administrator's denial of Service Connected Disability Retirement Benefits based upon the Hearing Examiner's January 26th opinion and the fact that the Appellant did not have the necessary five years of credited service needed to be eligible for a Non-Service Connected Disability Retirement.

ISSUES CONSIDERED

1. Whether the Appellant's disability is service connected and meets County requirements for a Service Connected Disability Retirement?

FINDINGS OF FACT

Section 33-43(e) of the Montgomery County Code sets forth the criteria upon which a member may obtain a Service Connected Disability Retirement as follows:

- (1) The member is totally incapacitated for duty or is partially and permanently 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; that the incapacity is not due to willful misconduct or willful negligence, and the incapacity is likely to be permanent. In extenuating circumstances, the administrator may waive the requirement that a member's incapacity is likely to be permanent and may approve a temporary disability retirement for one (1) or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to become permanent.
- (2) The member is unable to perform the duties of the occupational classification to which assigned at the time the disability occurred or a position of comparable status within the same department if qualified.

The parties agree that Appellant was, at the time of his being approved for temporary disability benefits, unable to perform the duties required in his job. They disagree as to whether that disability was the result of an injury suffered during employment with Montgomery County, whether the injury was subsequently resolved through medical treatment and/or the passage of time, and whether Appellant's disability following the termination of his temporary disability benefits was caused by subsequent incidents unrelated to his employment with Montgomery County.

When treated by Sibley Hospital on November 13, 1989 for his alleged on-the-job injury, Appellant referred to a similar episode which took place prior to his employment with Montgomery County. During the hearing on Appellant's claim for disability retirement conducted by an Independent Examiner, Appellant explained that while at the hospital, he had

referred to an injured thumb and not to the job-related injury for which he sought medical assistance. However, Dr. X's statement on December 28, 1989 concerning the "exercises [serious weight lifting] that caused him [Appellant] the problem to begin with" supports the Examiner's conclusion that the original injury occurred before the Appellant had become a County employee.

If the Appellant aggravated a pre-existing condition through a work-related injury on November 13, 1989, ENG/nerve conduction studies done on May 20, 1992 showed that the Appellant's neuropathy symptoms had gone and that the Appellant could resume work. Appellant attempted to return to work but was not able to meet the physical requirement of available jobs which he was qualified to perform and did not see a doctor to treat his physical problem(s) for an additional 13 months.

On June 29, 1993, Appellant sought treatment from Dr. X for an injury which he could not tie to any specific causal event. Although Dr. X treated Appellant with an injection for a specific thumb problem and put him in a wrist splint with instructions to come back for another appointment in a week or 10 days if the pain was not resolved, Appellant did not return until nine months later when he sought treatment for the same problem. In that examination, Dr. X found no suggestion of symptoms associated with carpal tunnel but did recommend other surgery.

Appellant was again treated by Dr. X for physical problems similar to the problems for which Appellant was initially treated. On April 22, 1994, Dr. X reported that the Appellant was working in a nursing home which required use of his hands and arms and, other than Appellant's symptomatic complaints, "there is not much to see."

Appellant relies upon the reports of Dr. Y and Dr. Z to support his contention that his physical problems were the result of an on-the-job injury suffered while employed with Montgomery County.

On May 17, 1991, Dr. Y reported:

"Impression at this time is carpal tunnel syndrome, bilateral, by history confirmed by electrodiagnostic studies in the left hand... [t]he condition and incapacity is likely to be permanent if surgery is not done... I would have to way with reasonable certainty that it is attributable to the continual working of his wrist using a pitchfork to hurl leaves. Snow shoveling and leaf raking, all would have the same effect... The disabling condition was not preexisting."

On June 3, 1992, after reviewing additional materials submitted by the Disability Plan Administrator, Dr. Y reiterated his previous opinion.

Appellant was examined by Dr. Z on May 21, 1995. Dr. Z opined that "his [Appellant's] entrapment syndrome is related to his on the job injury and there is no evidence of a pre-existing problem."

The Board considers that the medical history taken at Sibley Hospital and the information reported by Dr. X over an extended course of examinations and treatments administered to the Appellant has more probative value than the opinions rendered by Drs. Y and Z who had limited contact with the Appellant and did not have the benefit of historical

medical information concerning a pre-existing injury or physical problem. It also concurs with the independent Examiner's opinion that the Appellant's present disability was incurred while at work in a nursing home after the Appellant had been examined and shown to be free of symptoms associated with carpal tunnel syndrome which was allegedly caused by his injury on November 13, 1989 while working for the County.

DECISION

Based upon a preponderance of the evidence, the Board concludes that Appellant's present disability was, more likely than not, caused by events which occurred after his temporary disability retirement in 1991 and which are not attributable to his alleged injury suffered while employed by Montgomery County. His alleged injury suffered while employed by Montgomery County was, more likely than not, caused by activities undertaken and symptoms experienced prior to Appellant's employment with the County.

The Merit System Protection Board is not persuaded by a preponderance of the evidence presented that the Appellant meets the requirements for a Permanent Service Connected Disability Retirement. Since he lacks the necessary five years of employment service with the County, the Appellant does not qualify for a Non-Service Connected Disability Retirement.

The Board concurred with the Disability Retirement Administrator's denial of Appellant's claim for disability benefits.

Case No. 96-04

This is the final decision of the Merit System Protection Board on the above Appellant's claim for a Service Connected Disability Retirement.

BACKGROUND

Appellant appealed the denial of a claim for a Service Connect Disability Retirement. He has worked for the Montgomery County Department of Liquor Control for over 20 years. The Appellant's position was that of TRUCK DRIVER HELPER/ WAREHOUSE WORKER, Grade 9. The Position Description defines the job as manual work loading and unloading trucks and general warehouse duties. It requires heavy physical effort in recurring lifting, pushing, bending and pulling cases of beer, liquor and wine weighing up to 60 pounds and using hand trucks or carts to deliver kegs of beer weighing up to 160 pounds.

On May 10, 1994, while in the course of his employment, the Appellant was injured when he caught a case of wine which had been thrown to him while he was in an awkward twisted position. From the date of his injury until he received notice of his termination from the County on March 5, 1995, he either remained off of work or returned to work with "work restrictions". The Notice of Termination indicated that, since the Appellant "needed permanent work restrictions"..."you will be unable to perform the duties of your position and cannot be accommodated in another position at the Department of Liquor Control. Therefore,

it is necessary to terminate your employment." "Your claim for Workman's Compensation is not affected by this action." As a result of the above action, the Appellant filed a claim for a Service Connected Disability Retirement Benefit.

On April 18, 1995, the County notified the Appellant that the Administrator, The Prudential Insurance Company of America, has denied his claim for a Service Connected Disability Retirement Benefit. The Appellant filed a timely appeal to the Administrator's decision pursuant to Section 33-43(k) of the Montgomery County Code, as amended.

A hearing was held on September 7, 1995 before the Administrator's Hearing Examiner. On October 25, 1995, the Examiner issued a written opinion finding that the Appellant "is not incapacitated for duty, and disability benefits, whether non-service connected or service-connected, therefore, are denied."

In addition, the Examiner addressed the issue of "willful negligence". The Examiner stated that he would have found, not as a matter of law, but from the evidence in this particular hearing, that the Appellant was negligent in catching cases of wine thrown from a considerable distance, knowing them to be heavy, knowing them to be the size that they were, and knowing or being expected to know that the practice was or could have been dangerous and could have caused injury. His doing so was negligent. His doing so while knowing that he could have moved the cases by walking closer and carrying them or by putting them on a hand cart, or through the use of roller racks. The Examiner would have found evidence that the Appellant was injured because of his willful negligence but concluded that he did not reach that decision because it is his opinion and view of the evidence that Appellant is not incapacitated for duty.

On November 29, 1995, the County notified the Appellant that his appeal was denied, and that he was not entitled to a Service Connected Disability Retirement Benefit. The Appellant filed a timely appeal to the Merit System Protection Board.

ISSUE BEFORE THE BOARD

Whether the Appellant qualifies for a Service Connected Disability Retirement Benefit under Section 33-43(e) of the Montgomery County Code, as amended.

FINDINGS OF FACT

1. The Appellant was injured on May 10, 1994 while in the course of his employment. After he caught one of the cases while in an awkward position, he felt pain in his right leg extending up through his arm.

2. Because Appellant's "regular physician" Dr. A was out of the office on medical leave, the Appellant was seen by Dr. B on May 12, 1994. Dr. B examined the Appellant, issued a disability certificate requesting excuse from work May 11, 1994 to May 12, 1994. The doctor also referred the Appellant to Community Radiology Associates for lower back x-rays. Their report indicated "no significant radiologic abnormality".

3. On May 18, 1994, the Appellant came under the care of Dr. A, his family physician. The Appellant's chief complaint was pain in his lower back. During the next

several months, the Appellant followed up with several visits with Dr. A and remained off work pursuant to medical certificates issued by Dr. A. He was treated conservatively, with numerous medications, and referred to physical therapy. His treatment also included moist heat. In June 1994, Dr. A encouraged the Appellant to return to work with work restrictions. Upon returning to work, he was given his regular duties. His return lasted approximately five hours, since he was unable to continue this type of unrestricted work.

4. On August 12, 1994, the Appellant was evaluated by a physical therapist. The Appellant commenced physical therapy in September. He was treated using moist heat, electric stimulation, ultrasound, soft tissue massaging, joint mobilization and therapeutic-postural exercise. The treatment was designed to reduce pain in the lumbosacral region as well as in the right sacroiliac joint. At the same time, Dr. A attempted to treat the Appellant with trigger point injections in his back, with little success.

5. On September 9, 1994, the Appellant was referred by the County's Occupational Physician to Dr. C, certified by the American Board of Orthopaedic Surgery, Dr. C's report dated September 15, 1994, states that the Appellant indicated to the doctor "that while the pain in the right leg has almost disappeared, he continues to have chronic soreness across his lower back and intolerance for any prolonged positioning." The examination revealed no acute discomfort though the Appellant protested general discomfort in motion of his back. There was no gross deformity to structure or posture and no curvature or spasm. The x-rays and films taken May 12, 1994 are reported as normal. Dr. C's recommendations were that the patient's history is typical of an episode of sciatica due to a ruptured disc and has left the patient with residual back pain. The doctor's conclusions were that this type of problem normally heals in three months and since the symptoms still persist, an MRI study is reasonable. The doctor further concluded that the Appellant can return to work with a lifting limit of 25 pounds for the next three months and avoid repetitive bending. Presently, the doctor thinks that the Appellant will need permanent work restrictions.

6. At the same time, on September 21, 1994, Orthopaedic Surgeon, Dr. D also examined the Appellant, at the request of the Maryland Workman's Compensation Board. Dr. D's report shows that he had Dr. A's notes and the physical therapy records for review. The surgeon diagnosed the Appellant as having a transient lumbosacral strain and sprain. His report also indicates that he could not explain the Appellant's current complaints from a strictly medical standpoint. The doctor concluded that there is no objective evidence of any pathology. The doctor concluded, in his opinion, the Appellant may return to work full time, full duty immediately. There are no medical restrictions whatsoever.

7. The Appellant returned to work without any restrictions in early October, 1994. After only one day of work, the Appellant could not get out of bed and did not return to work. The Appellant then returned to his family doctor who ordered the Appellant not to return to work until after the MRI.

8. The MRI was taken on October 27, 1994 and the Appellant was sent to a Neurologist, Dr. E, for a physical examination and review of the MRI. Dr. E concluded that the Appellant was suffering mainly from focal low back pain and that he appeared to have pars defect, spondylolysis and listhesis. The doctor recommended that lumbar x-rays be taken and a corset and facet joint injections if his pain did not improve. The MRI examination revealed degenerative disc space disease with broad based disc bulging. Mild facet arthritics was also noted. On November 30, 1994, the x-rays were taken. The results were normal.

9. The Appellant returned to light duty work on October 20, 1994 where he was assigned to do filing and/or sit at the security desk. The Appellant claimed that he could not do filing because it hurt his back. The Appellant's work attendance between October 20, 1994 and February 1995 was "sporadic". On March 15, 1995, the Appellant received a termination notice from the County. The notice referred to the October 14, 1994 memorandum from the County's Occupational Physician, as well as the independent medical consultant, Dr. C, that the Appellant be temporarily assigned light duty. The notice also informed the Appellant that the Department of Liquor Control had set up an appointment for the Appellant to apply for a Service Connected Disability Retirement Benefit since he was unable to perform the duties of his position and could not be accommodated in another position in the Department. Therefore, it was necessary to terminate his employment with the Department.

10. The Hearing Examiner also had before him an exhibit dated March 16, 1995 from Dr. F. Dr. F's orthopaedic evaluation report's primary diagnosis was bilateral posterior-superior iliac spine bursitis. The doctor concluded, after reviewing the Appellant's job description, that there were no objective findings to substantiate the Appellant's claim that he was disabled. Dr. F prescribed only one restriction which was that the Appellant NOT FOLLOW THE METHOD OF UNLOADING CASES OF WINE THAT CAUSED HIM TO INJURE HIS BACK IN May, 1994. For residual pain, the doctor recommended use of an ice pack as well as participation in a regular swimming program. The transcript also indicates that the Appellant continued to see his family doctor until approximately July 1995, still complaining of the same symptoms. At the hearing, the Appellant was asked to describe his current physical complaints. He stated that it was daily back pain, occasional pain in his arms, and sometimes a tingling sensation in his leg. The Appellant also added that he now takes Daypro, a pain killer pill and walks with a limp.

CONCLUSIONS OF LAW

1. Section 33-43(e) of the Montgomery Code, as amended, requires that a member may be retired on a Service Connected Disability Retirement if:

(1) The member is totally incapacitated for duty or is partially and permanently 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; that the incapacity is not due to willful misconduct or willful negligence, and the incapacity is likely to be permanent. In extenuating circumstances, the administrator may waive the requirement that a member's incapacity is likely to be permanent and may approve a temporary disability retirement for one (1) or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to become permanent.

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

2. Contrary to the Appellant's contention, a preponderance of the evidence presented has demonstrated that the Appellant is not disabled and could return to work with no medical restrictions. Both Dr. D and Dr. F reached this conclusion. In addition, both the MRI and the lumbar x-rays were normal. The Appellant's family doctor and Dr. C stated that the Appellant could return to work with a restriction on lifting more than 25 pounds.

3. Section 2A-10(b) of the Montgomery County Code, as amended, requires the County to meet the burden of proof. A review of both the transcript and the detail exhibits indicates that the County has met the burden of proof.

4. It is the opinion of the Board that the Appellant's testimony at times exaggerated the extent of his problems and, therefore, his credibility is in question. The Board finds it hard to believe that the Appellant could not perform the light duty work assigned to him from October, 1994, to March, 1995.

5. Section 33-43(e) also requires that the members accident is not due to willful negligence. The term "willful neglect" was construed in Singer Co. v. Baltimore Gas and Electric Company, 79 Md. App. 461, 558 A.2d 419, 428 (1989), to suggest intentional, conscious or known negligence; in other words, a knowing disregard of a plain or manifest duty. By trying to catch a case of wine thrown to him from a distance of several feet, the Appellant should have known, based on his years of experience, that he was exposing himself to possible injury. The Appellant admitted that he could have moved closer to the truck's driver, who was working with him to unload the cases of wine, but stated that he did not do so because they were in a hurry and were trying to save time. At no time did the Appellant object to having the cases thrown to him.

6. The Board finds that the Appellant was negligent in catching cases thrown from a considerable distance, knowing them to be heavy, knowing them to be of the size that they were, and knowing or being expected to know that the practice was or could have been dangerous and could have caused injury. His actions were negligent. His actions, while knowing that he could have moved the cases by walking closer and carrying them or by putting them on a hand cart, were deliberate and, to both the Examiner and the Board, willful.

7. It is the Board's opinion that neither Montgomery County v. Buckman 333 Md. 516, 636 A.2d 448 (1994 (Buckman II)) nor Sweeney v. Montgomery County, 107 Md.App. 187, 667 A.2d 922 (1995) is applicable in this case since it is the Board's decision that the Appellant is not entitled to a Service Connected Disability Retirement Benefit.

DECISION

Based upon a preponderance of the evidence, the Merit system Protection Board concludes that the County has demonstrated that the Appellant is not entitled to a Service Connected Disability Retirement Benefit. The Board is not persuaded, by a preponderance of the evidence presented by the Appellant, that he meets the requirement for a Service Connected Disability Retirement Benefit. The County has met the burden of proof as required by Section 2A-10(b) of the Montgomery County Code.

The Board concurred with the Administrator's decision and also denied the Appellant attorney's fees and any related medical expenses.

SUSPENSION

Case No. 95-06

The Appellant appealed a notice of suspension issued on August 25, 1994 imposing a 32 hour suspension effective September 6, 1994 and an October 26, 1994 notice of dismissal, dismissing him from his position as a Therapist II from the DWI Treatment Services Program in the Department of Addiction, Victim, and Mental Health Services (DAVMHS). The Board held hearings on March 14, March 27 and June 26, 1995, witnesses testified, and exhibits were introduced on behalf of both parties. The Board also received written closing arguments from both parties.

ISSUE

Whether Appellant committed the acts alleged by the County in the charging documents and, if so, is the discipline imposed supported by just cause. In considering whether there was just cause, the Board will also consider whether Appellant had a justifiable defense to the discipline imposed.

FINDINGS OF FACT

There is no dispute as to the basic facts described in the October 26, 1994 Notice of Dismissal and facts admitted into the record:

1. Prior to and on September 6, 1994 progressive disciplinary actions were imposed on Appellant for failure to obtain appropriate authorization for requested leave, which Appellant did not appeal, as follows:

- (a) December 6, 1993 - Written Reprimand
- (b) April 3, 1994 - 5% Reduction in salary for 6 pay periods
- (c) July 10, 1994 - 10% Reduction in salary for 12 pay periods
- (d) September 6, 1994 - Thirty-two hour suspension without pay

2. On May 27, 1994, Appellant took 4 hours of unauthorized leave, 12 hours of unauthorized leave from June 23 through June 24, 1994, and 16 hours of unauthorized leave from July 22 through July 25, 1994. On each of these occasions, Appellant had submitted leave requests to his Section Chief who instructed him to have his clinical supervisor, sign his leave request in accordance with the agency policy and designation.

3. Appellant refused to present his leave slips to Mr. Blank for approval and proceeded to take a total of 35 hours of unauthorized leave over a two-month period.

4. Previously, Appellant had been advised on numerous occasions that he was expected to submit all leave requests to his clinical supervisor, the Therapist III assigned to his agency in accordance with the directive and policy of his Section Chief.

5. On September 2, 1993, the Chief, Court Services, issued a written directive to all Therapists II, which included Appellant, advising them to adhere to certain guidelines when requesting leave, including the following:

"Submit leave requests to Blank. Only submit them to me if he is out of the office and will not be back prior to the onset of your leave."

6. By memorandum of September 9, 1993, Appellant advised the Chief after his leave request of August 30, 1993 had been returned to him by the Chief unsigned, and he was advised to take it to Mr. Blank, that Blank was not and could not be his supervisor and that the Chief could "Write me up" if he thought that his taking leave on September 3, 1993 was improper.

7. The Chief returned Appellant's September 24, 1993 request for leave from October 12 through October 13, 1993 to him with a note stating, "Please submit your leave request in compliance with agency and County policy", and attached his September 2, 1993 directive on requests for leave.

8. On October 26, 1993, the Chief again returned Appellant's leave slip dated October 22, 1993 requesting 12 hours of leave from October 29 through November 1, 1993 with a note stating, "Please adhere to the policy that I have established regarding leave request." He again attached a copy of his September 2, 1993 directive.

9. Appellant requested a written memorandum from Mr. A stating that A reinstated Blank as a "supervisor". In a July 13, 1993 memorandum, Appellant and two other Therapists in the DWI Treatment Services Program advised the Director, DAVMHS, of several grievances filed against Blank and requested clarification of Blank's supervisory status.

10. In an October 28, 1993 memorandum to the Director, Appellant and two other Therapists again questioned the status of Blank as the supervisor's "designee" to approve leave under Administrative Bulletin 4-25, stating that they would not comply with the Chief's September 2, 1993 memorandum to submit all leave slips to Blank until they receive a written designation signed by the proper authority.

11. During this period, Appellant and the other two Therapists had filed work-related grievances against Blank.

12. Appellant received, in connection with his 10% reduction of pay for 12 pay periods, a statement that reiterated that "...the Therapist III in your unit, Blank, has been delegated responsibility by your supervisor to be the approval authority for leave..."

13. In the July 13, 1993 memorandum to the Director, Appellant and two other Therapists indicated that, because Blank is a member of the County's collective bargaining unit, "he is not allowed to engage in supervisory activity."

ANALYSIS AND DISCUSSION

There is no question that Appellant refused to comply with his supervisor's numerous written and oral directives to submit all requests for approval of leave with his supervisor's designee, Blank. Consequently, he took unauthorized leave. This happened on many occasions. Appellant's defenses may be summarized as follows:

Since Mr. Blank had been stripped of his supervisory status by Mr. A, Mr. Blank had no authority to approve leave. Appellant also contended that Section Chief had not indicated in writing that Blank was his "designee" to approve leave. Appellant argued that because Mr. Blank was a member of the collective bargaining unit, he was not permitted to be a supervisor or to approve leave. Appellant also alleged that his dismissal was the result of retaliation but there is no evidence to support this allegation.

In fact, none of Appellant's defenses have any merit. Section 33-102(4)(r) of the Montgomery County Code defines the duties of a "supervisor" as having certain authorities, which do not include that of approving leave. Further, Section 4.0 of Administrative Procedure 4-25 concerning annual and compensatory leave provide: "Employees must obtain approval for annual or compensatory leave use from their supervisor or designee." (emphasis supplied)

The evidence in this case conclusively shows that Appellant's supervisor, the Section Chief, explicitly directed Appellant on numerous occasions, to submit his leave slips to Blank, a Therapist III. The many written and oral directives were clear and no reasonable person could possibly misunderstand them. Certainly, under the circumstances here presented, Appellant knew or should have known that Blank was the "designee" of the Section Chief to approve leave. Since the Section Chief designated Blank to approve leave and advised Appellant of this in a general memorandum and each time Appellant submitted a leave slip to him, there was no question that Appellant must be considered to have knowledge of such designation.

CONCLUSION

The facts are undisputed that Appellant was properly charged with failure to obtain prior approval for leave taken and for being absent without authorized leave in accordance with applicable regulations and contract provisions, and his supervisor's specific designation. It is immaterial whether Blank exercised any supervisory duties and, besides, approving leave is not an indicia of supervisory status. It is also immaterial whether Appellant had any grievances or complaints against Blank, or that Blank may be included in the collective bargaining unit. Since Appellant had been subject to prior discipline for the same conduct, and continued to take unauthorized leave without approval from his supervisor's designee, the County's actions in first suspending and then dismissing Appellant from his Therapist II position were for just cause, and were not arbitrary and capricious. Appellant's appeal was dismissed.