

Merit System Protection Board Annual Report FY 2000

Members:

**Harold D. Kessler, Chairman
Robert C. Hamilton, Vice Chairman
Brenson E. Long, Associate Member**

Executive Secretary:

**Merit System Protection Board
Waddell Longus**

Prepared by:

**Susan Goldsmith
Principal Administrative Aide**

**Montgomery County, Maryland
Merit System Protection Board
100 Maryland Avenue, Room 113
Rockville, Maryland 20850
240/777-6620
FAX: 240/777-6624**

June 30, 2000

TABLE OF CONTENTS

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD	1
DUTIES AND RESPONSIBILITIES OF THE BOARD	1
APPEALS PROCESS	4

SUMMARY OF DECISION ON APPEALS

COMPENSATION.....	5
DEMOTION.....	15
GRIEVABILITY.....	22
INVOLUNTARY TRANSFER.....	43
MEDICAL.....	47
QUALIFICATION.....	60
PROMOTIONAL PROCESS.....	64
RECLASSIFICATION.....	96
TRANSFER.....	99

2000
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 2000 were:

Harold D. Kessler	-	Chairman (Appointed 2/97)
Robert C. Hamilton	-	Vice Chairman (Appointed 1/97)
Brenson E. Long	-	Associate Member (Appointed 1/99)

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 pre-hearing is given, with thirty work day's 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.

COMPENSATION

MSPB CASE NO. 99-15

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellant is a Lieutenant with the County's Fire and Rescue Service (FRS). It is undisputed that on documented occasions between October 1, 1996, and March 28, 1997, Appellant was detailed to fire stations other than the one where Appellant was permanently assigned to serve as the "sole or senior officer" on a particular shift. It is also undisputed that the senior officer duties on a shift are normally performed by a Captain.

By memo dated July 15, 1997, Appellant requested from a Deputy Chief that Appellant be granted "acting out of class pay" for listed hours between September 30, 1996 and March 30, 1997, when Appellant worked "out of class as the sole or senior officer approximately 80% of the time." By memo dated August 6, 1997, the Deputy Chief denied the request. On August 27, 1997, the Appellant filed an administrative grievance over the compensation issue, which was denied by then FRS Chief on September 24, 1997.

On March 17, 1999, the CAO issued a decision on the grievance. (The record indicates that discussion of settlement delayed issuance of a decision in this case.) The CAO noted that the Appellant had been assigned officer in charge duties approximately 80% of Appellant's time from September 30, 1996 to March 30, 1997, and assigned officer in charge duties for 60.4% of Appellant's time from March 30, 1997 until August 30, 1997. In his disposition, the CAO states, in pertinent part:

It is reasonable to assume that employees will be assigned higher level duties from time to time; however, when such assignment exceeds 50% of their work time, such assignment without additional compensation is viewed as excessive. The County's classification system defines duties and tasks which represent at least 50% of the work in a class as the primary duty of the class. The primary duty forms the normal basis for evaluation of compensation. From a classification standpoint, an employee would normally be expected to perform some duties at a level above his or her classification on an occasional basis. However, once the frequency of performing higher level duties pass 50%, the duties are considered to be regular and recurring. The regular and recurring duties would then form the basis for a classification adjustment....

In fashioning a remedy for the resolution of this grievance, the appropriate components are deemed to be:

- A threshold of 50% which, from a classification standpoint, qualifies the detail assignment as being regular and recurring duties. In order to timely capture performance of higher level duties for purposes of remuneration, measurement over a six month period of the amount of time exceeding 50% of work time spent performing higher level duties;

- Remuneration of 5% of base pay which has been employed for situations involving working out of class or temporary promotion; and

- Provision of a remedy from the date of the County being made aware of the situation, which is the date the grievance was filed (August 27, 1997).

The CAO then applied his test and granted as relief to the Appellant that if, between August 27, 1997 and the date of his decision, Appellant was assigned to a higher rank for more than 50% of Appellant's available work time, Appellant should receive extra compensation at a rate of 5% of Appellant's hourly salary for each hour above the threshold that Appellant worked at the higher rank. (The threshold was defined as a specified number of hours, depending on the type work schedule an employee works.)

ISSUES

1. Did the County err in not allowing the Appellant to have a transcribed record made of the Administrative Grievance Procedure Step 3 "fact finding inquiry?"
2. Are there issues of fact in the instant case necessitating a hearing by the Board?
3. Is the CAO's determination of pay inconsistent with law or regulation?
4. Is the CAO's resolution of the grievance appropriate and proper?
5. If the Appellant is entitled to a pay remedy, what should be the period of retroactivity, and the rate of remuneration?
6. Is the Appellant entitled to attorney fees?

ANALYSIS AND DISCUSSION

1. At the Administrative Grievance Procedure Step 3 fact finding inquiry, the Appellant requested and was denied a transcribed record. The Appellant contends that Appellant's inability to remember word-for-word the testimony and materials presented prejudiced Appellant's rights. The Board has previously found that applicable regulations do not imply

or require that a verbatim record be made at the step 3 grievance proceedings. (MSPB Case No. 97-16, Dec. 16, 1997) The Board sees nothing about the instant case which would dictate a different conclusion. In this regard, Appellant was provided a comprehensive "Findings of Fact" document, and the opportunity to provide written comments. There is no evidence that the process prejudiced the Appellant's rights in the grievance or appeal process. Accordingly, the Board sustains the determination not to grant the Appellant a transcribed record of the Step 3 fact finding inquiry.

2. The Appellant requested a Board hearing for the resolution of Appellant's appeal, which was administratively denied. Appellant has renewed the request, contending that there are factual disputes requiring resolution. Personnel Regulations, Section 30-2 provides, in pertinent part, that the Board has discretion to grant a hearing if it believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. Upon review of the record, the Board finds the record to be fully adequate to resolve the issues presented. Accordingly, no hearing is warranted.

3. In support of contentions as to entitlement to "out-of-class pay," the Appellant cites assorted regulations of general application. Specifically cited are:

County Charter, Section 401, "Salaries and wages of all classified employees in the Merit System shall be determined pursuant to a uniform salary plan";

County Code, Section 33-5, assertion that merit system employees shall be provided compensation with standard or comparability with other public agencies and the private sector;

County Code, Section 33-9, Equal Employment Opportunity and Affirmative Action and County Personnel Regulations, Section 4, which require that all personnel actions be on the basis of merit and fitness and be fair and equal;

County Personnel Regulations, Section 33-11, which authorizes the CAO to establish certain compensation policies.

None of the cited regulatory provisions contain any specific requirement that employees working at a temporary higher graded position receive anything approximating what is referred to in this case as "out-of-class pay." Rather, the practice, including the terminology, is found in the collective bargaining agreement between the County and the union representing bargaining unit employees, which is not applicable to Lieutenants and Captains. The Board sees no basis for a regulatory construction that would create an entitlement to the subject out-of-class pay.

Much of the cited regulations go to a contention of disparate treatment between the Appellant and another FRS Lieutenant, who the Appellant contends received the compensation sought by Appellant's in analogous circumstances. The County contends that in the cited circumstance, the Lieutenant was assigned to a station over a period of time, i.e., a temporary

promotion, rather than the recurring working out of class experienced by the Appellant. In the Board's view, the alleged disparate treatment is not significant to the resolution of the case. The fact that another Lieutenant may, under marginally different circumstances, have received a pay differential neither creates a regulatory right to such differential for the Appellant, nor constitutes evidence of a regulatory violation in the case of the Appellant.

4. In fashioning a remedy to resolve the grievance, the CAO noted that the County's classification system defines duties and tasks which represent at least 50% of the work in a class as the "primary duty" of the class, and that the primary duty forms the normal basis for evaluation of compensation level. The CAO stated, "...once the frequency of performing higher level duties passes 50%, the duties are considered to be regular and recurring." The Board accepts the logic and fairness of this CAO formulation, but disagrees with the limitation that the Appellant, having reached the 50% level, is entitled to the differential for time spent working at the higher level duties only for hours after having reached the 50% threshold. If the Appellant's primary duty, 50% during the period of time covered by the grievance, means that the higher graded work determined Appellant's basis for remuneration, the Board concludes that Appellant is entitled to the differential for all of the hours Appellant worked at the higher graded position during the period covered by the grievance. This is a result which the Board finds to be more logically compelling and fair. Accordingly, the Board concludes that the CAO determination to limit compensation to the hours after reaching the 50% threshold is inappropriate.

5. With respect to the remedial period, the CAO's established six month periods and, as described above, grants the differential starting after the Appellant has worked over 50% of Appellant's work time during such a period. His decision appears to start the clock for the first period with the August 27, 1997 filing of the grievance, "...the date of the County being made aware of the situation." The use of six month periods for determining whether the Appellant is performing higher level duties on a regular and recurring basis is not disputed and, in the Board's view, is a reasonable approach to the resolution of the grievance. However, consistent with our conclusion with respect to an entitlement to the differential for all of the hours worked at the higher graded position when the Appellant worked more than 50% of Appellant's hours at that position, we conclude that the start of the remedial period should be the September 30, 1996 start of the period covered by the grievance. It is not fair or reasonable in the circumstances of this case, to remedy a grievance over past conduct by limiting redress to post grievance activity. Starting September 30, 1996, through March 27, 1997, essentially a six month period, Appellant documented having worked over 50% of Appellant's hours at the higher graded position and, therefore, would be entitled to the differential for all of those documented hours. With respect to after March 27, 1997, the Appellant is entitled to the differential for all hours worked at the higher graded position during any six month period in which Appellant worked more than 50% of Appellant's hours at such a position, ending with March 17, 1999, the date of the resolution of the grievance.

The record reflects that the rate of remuneration specified in the CAO's decision, 5% of base pay, is routinely used in such circumstances as presented in this case, and it does not appear that this rate is contested by the Appellant. Accordingly, the Appellant should receive as

retroactive pay 5% of base pay for each hour worked at the higher graded position during the above-described period of time.

6. Section 33-14 of the County Code remedial authorization to the Board includes ordering the County to reimburse or pay all or part of the employee's reasonable attorney's fees, which the Appellant has requested in the instant case. In the Board's view, such remedy is appropriate in the circumstances of this case. Accordingly, the remedy in this case shall include attorney fees, determined in accordance with the factors stated in County Code, Section 33-14(c)(9).

CONCLUSION AND ORDER

On the basis of the above, the Board concludes and so orders: 1. The County did not err in not allowing the Appellant a transcribed record of the Administrative Grievance Procedure Step 3 fact finding inquiry; 2. A hearing before the Board is not required or appropriate; 3. The CAO's determination of pay is not inconsistent with law or regulation; 4. The appropriate and proper compensation for the resolution of the grievance is for all hours worked at the higher graded position during the remedial period ; 5. The Appellant should receive a 5% differential for all hours worked at the higher graded position between September 30, 1996 and March 27, 1997, and for all hours worked at the higher graded position during any six month after March 27, 1997, in which Appellant worked more than 50% of Appellant's hours at such position, ending March 17, 1999; and 6. The remedy shall include attorney fees, determined in accordance with the factors stated in County Code, Section 33-14(c)(9).

Case No. 99-17

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellant is a Lieutenant with the County's Fire and Rescue Service (FRS). It is undisputed that on documented occasions between March 6, 1997 and July 7, 1997, Appellant was detailed to fire stations other than the one where Appellant was permanently assigned to serve as the "sole or senior officer" on a particular shift. It is also undisputed that the senior officer duties on a shift are normally performed by a Captain.

By memo dated July 10, 1997, Appellant requested from a FRS Deputy that Appellant be granted "acting out of class pay" for listed hours between January 1, 1997 and July 10, 1997, when Appellant worked "out of class as the sole or senior officer approximately 76% of the time." By memo dated August 7, 1997, the Deputy denied the request. On August 27, 1997, the Appellant filed an administrative grievance over the compensation issue, which was denied by then FRS Chief on September 24, 1997.

On March 17, 1999, the CAO issued a decision on the grievance. (The record indicates that discussion of settlement delayed issuance of a decision in this case.) The CAO noted that the Appellant had been assigned officer in charge duties approximately 75.6% of Appellant's time from March 6, 1997 to August 30, 1997. In his disposition, the CAO states, in pertinent part:

It is reasonable to assume that employees will be assigned higher level duties from time to time; however, when such assignment exceeds 50% of their work time, such assignment without additional compensation is viewed as excessive. The County's classification system defines duties and tasks which represent at least 50% of the work in a class as the primary duty of the class. The primary duty forms the normal basis for evaluation of compensation. From a classification standpoint, an employee would normally be expected to perform some duties at a level above his or her classification on an occasional basis. However, once the frequency of performing higher level duties pass 50%, the duties are considered to be regular and recurring. The regular and recurring duties would then form the basis for a classification adjustment...

In fashioning a remedy for the resolution of this grievance, the appropriate components are deemed to be:

- A threshold of 50% which, from a classification standpoint, qualifies the detail assignment as being regular and recurring duties. In order to timely capture performance of higher level duties for purposes of remuneration, measurement over a six month period of the amount of time exceeding 50% of work time spent performing higher level duties;
- Remuneration of 5% of base pay which has been employed for situations involving working out of class or temporary promotion; and
- Provision of a remedy from the date of the County being made aware of the situation, which is the date the grievance was filed (August 27, 1997).

The CAO then applied his test and granted as relief to the Appellant that if, between August 27, 1997 and the date of his decision, Appellant was assigned to a higher rank for more than 50% of Appellant's available work time, Appellant should receive extra compensation at a rate of 5% of Appellant's hourly salary for each hour above the threshold that Appellant worked at the higher rank. (The threshold was defined as a specified number of hours, depending on the type work schedule an employee works.)

ISSUES

1. Did the County err in not allowing the Appellant to have a transcribed record made of the Administrative Grievance Procedure Step 3 "fact finding inquiry?"

2. Are there issues of fact in the instant case necessitating a hearing by the Board?
3. Is the CAO's determination of pay inconsistent with law or regulation?
4. Is the CAO's resolution of the grievance appropriate and proper?
5. If the Appellant is entitled to a pay remedy, what should be the period of retroactivity, and the rate of remuneration?
6. Is the Appellant entitled to attorney fees?

ANALYSIS AND DISCUSSION

The Appellant's grievance was consolidated for decision by the CAO with that of the Appellant in MSPB Case No. 99-15. A request that the two appeals be consolidated for decision by the Board was denied because the two cases were in different stages of processing. The Appellant in the instant case requested that the Board adopt and incorporate the submission made by the Appellant in Case No. 99-15, which we have done. As the facts, contentions, and issues in the instant case are essentially the same as those in Case No. 99-15, decided by the Board on July 29, the analysis and discussion set forth relies on that decision.

1. At the Administrative Grievance Procedure Step 3 fact finding inquiry, the Appellant requested and was denied a transcribed record. The Appellant contends that Appellant's inability to remember word-for-word the testimony and materials presented prejudiced Appellant's rights. The Board has previously found that applicable regulations do not imply or require that a verbatim record be made at the step 3 grievance proceedings. (MSPB Case No. 97-16, Dec. 16, 1997) The Board sees nothing about the instant case which would dictate a different conclusion. In this regard, Appellant was provided a comprehensive "Findings of Fact" document, and the opportunity to provide written comments. There is no evidence that the process prejudiced the Appellant's rights in the grievance or appeal process. Accordingly, the Board sustains the determination not to grant the Appellant a transcribed record of the Step 3 fact finding inquiry.

2. The Appellant requested a Board hearing for the resolution of Appellant's appeal, which was administratively denied. Appellant has renewed the request, contending that there are factual disputes requiring resolution. Personnel Regulations Section 30-2 provides, in pertinent part, that the Board has discretion to grant a hearing if it believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. Upon review of the record, the Board finds the record to be fully adequate to resolve the issues presented. Accordingly, no hearing is warranted.

3. In support of contentions as to entitlement to "out-of-class pay," the Appellant cites assorted regulations of general application. Specifically cited are:

County Charter, Section 401, "Salaries and wages of all classified employees in the Merit System shall be determined pursuant to a uniform salary plan";

County Code, Section 33-5, assertion that merit system employees shall be provided compensation with standard or comparability with other public agencies and the private sector;

County Code, Section 33-9. Equal Employment Opportunity and Affirmative Action and County Personnel Regulations, Section 4, which require that all personnel actions be on the basis of merit and fitness and be fair and equal;

County Personnel Regulations Section 33-11, which authorizes the CAO to establish certain compensation policies.

None of the cited regulatory provisions contain any specific requirement that employees working on some temporary higher graded position receive anything approximating what is referred to in this case as "out-of-class pay." Rather, the practice, including the terminology, is found in the collective bargaining agreement between the County and the union representing bargaining unit employees, which is not applicable to the Lieutenants and Captains. The Board sees no basis for a regulatory construction that would create an entitlement to the subject out-of-class pay.

Much of the cited regulations go to a contention of disparate treatment between the Appellant and another FRS Lieutenant, who the Appellant contends received the compensated sought by Appellant in analogous circumstances. The County contends that in the cited circumstance, the Lieutenant was assigned to a station over a period of time, i.e., a temporary promotion, rather than the recurring working out of class experienced by the Appellant. In the Board's view, the alleged disparate treatment is not significant to the resolution of the case. The fact that another Lieutenant may, under marginally different circumstances, have received a pay differential neither creates a regulatory right to such differential for the Appellant, nor constitutes evidence of a regulatory violation in the case of the Appellant.

4. In fashioning a remedy to resolve the grievance, the CAO noted that the County's classification system defines duties and tasks which represent at least 50% of the work in a class as the "primary duty" of the class, and that the primary duty forms the normal basis for evaluation of compensation level. He stated, "...once the frequency of performing higher level duties passes 50%, the duties are considered to be regular and recurring." The Board accepts the logic and fairness of this CAO formulation, but disagrees with the limitation that the Appellant, having reached the 50% level, is entitled to the differential for time spent working at the higher level duties only for hours after having reached the 50% threshold. If the Appellant's primary duty, 50% during the period of time covered by the grievance, means that the higher graded work determined Appellant's basis for remuneration, the Board concludes that Appellant is entitled to the differential for all of the hours Appellant worked at the higher graded position during the

period covered by the grievance. This is a result which the Board finds to be more logically compelling and more fair. Accordingly, the Board concludes that the CAO determination to limit compensation to the period after reaching the 50% threshold is set aside.

5. With respect to the remedial period, the CAO's established six month periods and, as described above, grants the differential starting after the Appellant has worked over 50% of Appellant's work time during such a period. His decision appears to start the clock for the first period with the August 27, 1997 filing of the grievance, "...the date of the County being made aware of the situation." The use of six month periods for determining whether the Appellant is performing higher level duties on a regular and recurring basis is not disputed and, in the Board's view, is a reasonable approach to the resolution of the grievance. However, consistent with our conclusion with respect to an entitlement to the differential for all of the hours worked at the higher graded position when the Appellant worked more than 50% of Appellant's hours at that position, we conclude that the start of the remedial period should be the January 1, 1997 start of the period covered by the grievance. It is not fair or reasonable in the circumstances of this case, to remedy a grievance over past conduct by limiting redress to post grievance activity. Starting January 1, 1997, through July 1, 1997, essentially a six month period, Appellant documented having worked over 50% of Appellant's hours at the higher graded position and, therefore, would be entitled to the differential for all of those documented hours. With respect to after July 1, 1997, the Appellant is entitled to the differential for all hours worked at the higher graded position during any six month period in which Appellant worked more than 50% of Appellant's hours at such a position, ending with March 17, 1999, the date of the resolution of the grievance.

The record reflects that the rate of remuneration specified in the CAO's decision, 5% of base pay, is routinely used in such circumstances as presented in this case, and it does not appear that this rate is contested by the Appellant. Accordingly, the Appellant should receive as retroactive pay 5% of base pay for each hour worked at the higher graded position during the above-described period of time.

6. Section 33-14 of the County Code remedial authorization to the Board includes ordering the County to reimburse or pay all or part of the employee's reasonable attorney's fees, which the Appellant has requested in the instant case. In the Board's view, such remedy is appropriate in the circumstances of this case, noting particularly that the record reflects the Appellant Counsel's significant involvement in the case over its protracted history. Accordingly, the remedy in this case shall include attorney fees, determine in accordance with the factors stated in County Code Section 33-14(c)(9).

CONCLUSION AND ORDER

On the basis of the above, the Board concludes and so orders: 1. The County did not err in not allowing the Appellant a transcribed record of the Administrative Grievance Procedure Step 3 fact finding inquiry; 2. A hearing before the Board is not required or appropriate; 3. The CAO's determination of pay is not inconsistent with law or regulation; 4. The appropriate and proper compensation for the resolution of the grievance is for all hours worked at the higher graded position

during the remedial period ; 5. The period of retroactivity should be from July 10, 1997 through March 17, 1999, at a rate of 5% of base pay; and 6. The remedy shall include attorney fees, determined in accordance with the factors stated in County Code Section 33-14(c)(9).

DEMOTION

CASE NO. 00-13

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

Relevant Employment History

The Appellant was hired in 1989 into the position of Environmental Protection Manager, a position at pay level grade 27. The position is managerial/supervisory over the staff of the County's Residential Engineering and Inspection Unit, Division of Building Construction, Department of Permitting Services.

A documented dissatisfaction with the Appellant's performance of duties in 1994-96, resulted in Appellant's receiving as a proposed discipline a 10% reduction in pay for five pay periods, effective July 21, 1996. Conduct specified in the Notice was a "Charge A" compilation of a number of items generally described as:

You continue to make decisions/to behave in ways which are contrary to the management and public-service objectives of this Department and of the new Department of Permitting Services(DPS). The record in this regard goes back at least seven years in your tenure in DEP

and a "Charge B," directed at Appellant's issuance of a written reprimand to a subordinate employee without the required statement of charges. This was described as a second occasion of such conduct after having been informed in writing that discipline above oral admonishment required such a statement. Appellant grieved the discipline, which resulted in the County Chief Administrative Officer reducing the discipline to a 10% pay reduction for three pay periods.

In April, 1997, the Appellant was removed as Manager of what was then called the Plan Review Unit and assigned to the office of the Director of the Department of Permitting Services (DPS) because of a perceived failure to perform duties in a competent or acceptable manner. In February 1998, Appellant was reassigned to a newly organized "residential unit" within the Building Construction Division. The February 5, 1998 memorandum from Director of DPS notes concern with Appellant's performance with such remarks as:

I also want you to understand that your assignment does nor presuppose a lessening of my concern about you as a manager. I simply can no longer have a manager of your rank in this department performing non-managerial tasks. Furthermore, I feel that you deserve the chance to demonstrate

whether or not you have improved your management capabilities since I removed you from supervision of the plan review unit in April of last year. Your removal from plan review was the culmination of several incidents which I felt demonstrated your continued inability to manage effectively and which were similar to incidents for which you had been disciplined.

There followed a list of specific incidents of perceived performance failure, with the stated intention:

In order to review your performance as temporary manager of the residential unit and to assess whether or not you have made progress in improving your management capabilities, I want to meet with you on May 15 and August 17, 1998, at 9:00 a.m. in my office.

There is no evidence in the record of any follow-up performance evaluation, with the only expression of dissatisfaction in the remainder of 1998 being a September 30, 1998 memo from the Director to the Appellant concerning an unacceptable backlog of "walk-thru plan review," which Appellant was to eliminate. Appellant was ordered to report each day on the number of plans pending review.

Current Disciplinary Action

On June 14, 1999, the Appellant had a "counseling session" with Mr. X, the person who had become his supervisor some 3-4 months earlier, wherein areas of dissatisfaction were discussed. Mr. X testified that at the time of this session, Mr. X was aware that the Director was considering taking disciplinary action against the Appellant.

On June 29, 1999, the Appellant received a "Statement of Charges for Demotion to Construction Plans Analyst III, Grade 23," carrying with it a reduction in salary from \$74,392 to \$61,540. The Statement provides that discipline was being considered:

...because the charges ... demonstrate that your performance has not improved, despite discipline, despite the counseling and written and verbal warnings that I have given you, and despite your removal from your original assignment as plan review manager.

By memo dated July 8, 1999, Mr. X provided to the Appellant a "follow-up" on their June 14 session, noting the areas of dissatisfaction that had been covered.

Following a July 16 response from the Appellant, on August 23, 1999, the Director issued a "Notice of Disciplinary Action" demoting the Appellant from Environmental Protection Manager, grade 27 to Construction Plans Analyst III, Grade 23,

and reducing Appellant's salary in the amounts set forth in the Statement of Charges. The Notice sets forth two reasons for it being taken. The record circumstances of the two reasons are as follows:

1. Issuance of a reprimand without a statement of charges

This charge is based on a June 8, 1999 "written reprimand" from the Appellant to a Residential Field Inspector, which was delivered to the Inspector's desk, with a "cc" being Appellant's supervisor Mr. X. The County contends that this was the third occasion where the Appellant attempted to take disciplinary action outside the scope of his authority and without the proper statement of charges.

Appellant does not deny preparing the document, but contends that it was intended as a "draft" for Mr. X to review and Appellant doesn't know how it got to the Inspector. Appellant submits as evidence a "Statement of Charges" from Appellant to the Inspector, also dated June 8, which Appellant contends Appellant sent to Mr. X for review. The County disputes Appellant's account, noting that: at a meeting to discuss the reprimand Appellant did not dispute preparing it, but contended that a statement of charges was not necessary; the June 8 statement of charges submitted into evidence by the Appellant appears to be a different word processing font than the June 8 reprimand; and a search of Appellant's computer system drives discloses no evidence of the existence of the statement of charges.

2. This charge was based on three allegations

A. The County contends that in September 1998, the Appellant had permitted a backlog of unassigned "walk-through" inspections to develop, including instituting an unacceptable five-day goal. The Appellant contests whether there was a "backlog," as opposed to an acceptable assignment and processing procedure, and contends, essentially, that the time target system was an effective management tool. Testimony at the hearing disclosed that while the Director had expressed his dissatisfaction in this area to the Appellant in September 1998, at the time of Appellant's demotion, there was no backlog in the work load.

B. The County contends that Appellant's staff had complained about Appellant's "management style," described as "intimidating atmosphere," "abrupt, impersonal, and seemingly censorious," and "lack of communications." Witnesses at the hearing testified about Appellant's unwillingness to listen to their input on office procedures. The Appellant denies the characterizations of Appellant's management style, contending that none of Appellant's employees have ever complained to Appellant and noting that Appellant manages three opinionated, long-time, experienced supervisors who are known for speaking their mind "Not one of them has ever said to Appellant that I have been intimidating or abrupt."

C. The County contends that the Appellant instituted a policy of awarding employees with annual leave without the Director's approval, and in violation of applicable regulations. It is also alleged that Appellant's contention that no one had ever actually taken leave as a result of these awards

was not true. Appellant does not deny "awarding" a small number of employees with "leave," but characterizes it more as "compensatory time" for "overtime" work and views it as within Appellant's supervisory authority.

The Notice of Disciplinary Action concludes:

As I have previously stated, "I have done my best to bring you to terms with what I see as your shortcomings as a manager. I have given you specific examples of incidents and complaints which exemplify these shortcomings. Almost without exception, your responses to my efforts have been quibbling, evasive, and non-constructive." I am taking this demotion action because, as the continuing record of your performance indicates, your performance has not improved, in spite of disciplinary actions/my suggestions, admonitions, and observations which were intended to bring you to terms with your poor performance as a manager.

Scope of Reduction

The County contends that the Appellant was reduced to the next highest grade, Grade 23, which it was felt Appellant could perform. The County contends in this regard that a Grade 26 is a senior engineer position, which the Director initially stated he would not put the Appellant in because that position had supervisory responsibilities. The Director later testified that the senior engineer position description had been revised to require engineering education which the Appellant did not have, although there are incumbents in those positions who would not meet the current educational requirement. There is no Grade 25 position. The Grade 24 position requires an engineering degree, which the Appellant does not possess.

POSITIONS OF THE PARTIES

Appellant

The Appellant contests the facts relied upon by the County to support the discipline, and argues that past history was "dredged up" to support a desire to remove Appellant from Appellant's position. In this regard, it is argued that there was no attempt by the County to give Appellant an opportunity to correct any perceived performance defects and that the supervisory counseling session was a sham as the decision to remove Appellant had already been made.

Apart from whether there was a basis for discipline, the Appellant contends that the disciplinary action taken, demotion from Grade 27 to 23, violates Personnel Regulation Section 28, which provides, in pertinent part, "Except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary actions must be progressive in severity," and point to the fact that aside from dismissal, demotion is the most serious form of discipline found in the Section 28-3 list of types of discipline. In this regard, the Appellant also notes the amount of the permanent loss of salary, which on an annual basis would be more than a one month suspension.

The Appellant also contends that the allegation that Appellant performed Appellant's duties at an unacceptable level was a pretext, as evidenced by Appellant's regular receipt of service increment awards.

County

The County contends that the record supports the Appellant's demotion from supervision and that the Grade 23 Construction Plans Analyst was the only option the County had, short of dismissal. In this regard, the County disputes Appellant's alleged defenses as to the circumstances surrounding the reprimand to Blank, including the validity of the statement of charges, and contends that the facts support all of the bases for the discipline. As to the progressivity of Appellant's demotion, the County points to the prior disciplinary removal from supervision, and argues that Personnel Regulation Section 28-1 says that severity should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, work record, and other relevant factors. In the County's view, all of these factors were considered.

ISSUES

1. Has the County demonstrated sufficient cause to justify Appellant's discipline?
2. Is the penalty of demotion from the position of Environmental Protection Manager, Grade 27, to Grade 23 appropriate?
3. Is an award of attorney fees appropriate?

ANALYSIS AND CONCLUSIONS

1. The first alleged basis for the discipline, issuance of a reprimand without a statement of charges, presents a credibility issue, as Appellant contends that the reprimand was only a draft sent for supervisory review and that Appellant had also prepared a draft statement of charges. The Board finds Appellant's account to be unconvincing. If Appellant had in fact prepared a June 8 draft of a Statement of Charges for supervisory review, Appellant would have certainly mentioned it in Appellant's July 16 response to Appellant's Notice of Disciplinary Action, rather than reciting a not credible tale as to why Appellant didn't think one was necessary. Moreover, the testimony concerning the font used to type the tendered "draft" statement of charges, and the fact that such a document was not found on his computer, adds additional doubt to his story. As for the reprimand itself, if it was intended as a draft, it is reasonable to assume that it would have been so identified, or have some sort of cover document, and wouldn't have been initialed off as a final document. In the Board's view, the County has provided sufficient bases for sustaining the allegation that, counter to specific prior instructions, Appellant issued an unapproved reprimand without a statement of charges.

The other three bases for the discipline are less compelling. Appellant had been warned about the development of a backlog, but had taken steps to comply with his supervisor's instructions and there is no evidence that this issue remained a problem. Appellant did have subordinates who had complained about his management style, but the extent of this as a problem is not substantiated, and the Appellant had never been warned or counseled about this issue prior to the decision to demote him. The Appellant had "awarded" employees time off in violation of regulations, but this was an isolated event, and arguably within his discretion as a supervisor. In the Board's view, these three additional bases for the discipline have not been substantiated as cause for demotion, noting particularly that they were not the subject of any warning or counseling.

The Board concludes as to this issue that the County has sustained its burden of proof that there was a basis for discipline in that despite specific instructions to the contrary, the Appellant issued an unapproved reprimand without a statement of charges.

2. The Appellant had previously been disciplined for issuing disciplinary actions without a statement of charges and been very specifically warned about this conduct. Notwithstanding that warning, the evidence substantiates that Appellant did it again. The Board concludes that this conduct substantiates the appropriateness of the County's removal of the Appellant from a supervisory position.

While the Board concludes that removal from supervision, pay grade 27 position, the Board does not believe that the County has substantiated that the appropriate reduction was to the grade 23 position. The County's contended goal was to remove the Appellant from the supervisory position, but it argues that once having decided to take this action, the grade 23 position was the next available position. The reason given for the unacceptability of a non-supervisory senior engineer grade 26 position is that such a position now has engineering education requirements that the Appellant could not meet. While true, the engineering educational requirements are new and there are admittedly incumbent senior engineers who do not meet that requirement. The Appellant contends that Appellant has some engineering college course work and, more importantly, believes Appellant could perform the duties of a senior engineer grade 26. Given the nature of the offense, the Board is of the view that a more appropriate downgrade would be to the senior engineer, grade 26 position, with the Appellant having a reasonable opportunity to perform the duties of that position. If, after a reasonable period of time and training opportunities, the County believes that the Appellant is not satisfactorily performing the duties of the position, it can be addressed, as appropriate.

While concluding that the Appellant's reduction in grade should be to grade 26, rather than 23, the Board believes that further discipline is appropriate to address what it believes is misconduct both as to the issuance of a reprimand without a Statement of Charges, and the fabricating of an explanation, the latter, in our view, being a very serious offense. The Board concludes that an appropriate discipline for this action is a ten (10) percent reduction in pay for eight (8) pay periods, and so orders in this decision.

3. Section 33-14, Hearing authority of the board, in providing remedial authority, empowers in subsection (c) , that the Board may “Order the County to reimburse or pay all or part of the employee’s reasonable attorney fees” (emphasis added). While the Appellant has prevailed to the extent that Board has modified the penalty, we have sustained the County’s discipline of the Appellant. In this regard, the Board is of the opinion that a reimbursement of all reasonable attorney fees is not appropriate. Because the Board has concluded that the Appellant did not prevail in seeking the reversal of his demotion from his position of Environmental Protection Manager Grade 27, but did receive a significant mitigation of the penalty, the Appellant shall be reimbursed by the County for one-half of all allowed attorney fees.

To request such payment, Appellant must submit a detailed application for attorney fees to the Board, with a copy to the County Attorney, who shall have ten (10) days from receipt to file a response. Fees will be determined by the Board in accordance with the factors stated in County Code section 33-14(c)(9).

ORDER

The Board orders:

- Appellant’s demotion from Appellant’s position, Grade 27 is sustained.
- Appellant’s demotion to a Grade 23 position is revised to demotion to a Grade 26 position.
- Appellant should receive as a discipline a ten (10) percent reduction in pay for eight (8) pay periods, to commence with Appellant’s placement in the Grade 26 position.
- Appellant shall be reimbursed by the County for the difference in pay between a grade 26 and a grade 23 for the period from the date of Appellant’s reduction to the date of Appellant’s placement in the Grade 26 position.
- Appellant shall be reimbursed by the County for one-half of all allowed attorney fees.

GRIEVANCE

CASE NO. 99-21

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellant accepted employment with Montgomery County Sheriff's Department on July 14, 1986. Appellant had previous employment with the State of Maryland as a police officer with the University of Maryland Police Department and had earned seven years of retirement benefits while employed with the State. The Annotated Code of the State of Maryland allows for the transfer of service between retirement systems within the State. One of the stipulations in the State law requires applicants to transfer service within one year of entry into the accepting system. This requirement was covered during new employee orientation. Since the Appellant accepted employment with the County on July 14, 1986, Appellant had until July 13, 1987, to submit an application. Appellant did not submit an application within this time frame to transfer his State service into the County's retirement system.

In 1990, the State Legislature enacted legislation (House Bill 687) to provide for a one time window of opportunity for individuals who had not previously transferred retirement service credit, to transfer such service provided it was requested by June 28, 1991. Notification of this special opportunity was distributed by the Office of Human Resources (OHR) in May 1991. There is no record that Appellant requested the transfer.

On April 9, 1998, the Appellant wrote to the OHR requesting a transfer of service from the State of Maryland to the County's Retirement System. In a letter dated April 22, 1998, OHR denied Appellant's request citing the State law that allows for transfer of service between retirement systems within one year of entry into the accepting system.

On February 10, 1999, Appellant wrote to the Sheriff's Office concerning the denial and Appellant filed a complaint on the "Grievance/Open Door Review Form." On February 19, 1999, the Sheriff's Office forwarded the complaint to the LER Manager, OHR. In a letter dated March 17, 1999, the LER Manager determined that the "Open Door Review" process in which employee alleges that an established law, policy or procedure is unfair or inequitable was removed from the Montgomery County Administrative Procedure 4-4, Grievance Procedures, in May 1992. That policy, when it existed, limited the appeal to the CAO for a final decision. He also determined that if the complaint was filed as a grievance that it exceeded the required 20 calendar day period from the date that the grievable event occurred and would be untimely filed. He also informed the Appellant that final decisions are subject to appeal to the Merit System Protection Board within 10 work days of receipt. In a letter dated March 29, 1999, to the

LER Manager, the Appellant requested that Appellant's case be reviewed on its merits and stated that the April 22, 1998, letter denying Appellant's request did not provide Appellant's appeal rights nor did it stipulate a time requirement in which to appeal. In a letter dated April 6, 1999, the LER Manager informed the Appellant that the preliminary denial was based on the fact that the Appellant failed to file a grievance within the 20 calendar day period after the denial of the transfer of Appellant's retirement credits. He also informed Appellant that decisions denying the transfer of retirement credits does not require that appeal rights be stated. He concluded that the Appellant's complaint is not timely filed and cannot be further processed. He provided Appellant with his appeal rights to the MSPB and the required time limitations.

APPLICABLE REGULATIONS

There is no law, regulation or administrative procedure requiring a statement of grievance rights to accompany a denial of retirement credits or every personnel decision. An employee may file a grievance under Administrative Procedures 4-4, "within 20 calendar days from the date the employee knew, or should have known, that the problem existed." Personnel Regulations section 29-3. Procedure provides that the grievance procedure must provide for: (b) "Specific and reasonable time limits for each level of review or step in the process, including a provision that a grievance may be dismissed...if it is not filed within 20 calendar days from the date the employee knew or should have known of the occurrence upon which the grievance is based."

ISSUE

Is the County determination that Appellant's grievance was not filed within 20 days of the April 22, 1998, determination correct when the determination did not advise Appellant of Appellant's grievance rights?

ANALYSIS AND DISCUSSION

The Appellant stated that the April 22, 1998, letter from OHR failed to reference a right of appeal nor did it stipulate the period of time in which to file such an appeal. Appellant believes that OHR should have provided Appellant with grievance rights and a period of time in which to file a grievance on their April 22, 1998, letter to Appellant denying the transfer of Appellant's retirement service.

The statute on transfers of retirement service includes no provision that government denying transfers of credits must advise transfer applicants of a right to appeal the denial of transfer. There is no law, regulation or administrative procedure that required the April 22, 1998, correspondence from OHR to include any advice on grievance rights. Specifically, Administrative Procedures (AP) 4-4 includes no provision requiring a statements of grievance rights accompany every personnel management decision. An employee may file a grievance under the provisions of AP 4-4 when the employee knew or should have known that a problem existed. The general assumption embodied in AP

4-4 is that an employee who fails to receive a requested benefit or has been adversely affected by an action understands that she or he may file a grievance under AP 4-4.

When the Appellant received the April 22, 1998, letter from OHR Appellant knew that Appellant's request for the transfer of Appellant's retirement credit had been denied. If Appellant believed that Appellant had been adversely affected by the denial, Appellant should have initiated a grievance challenging the denial. Under the provisions of AP 4-4, the Appellant had 20 calendar days to file a grievance if Appellant wished to challenge the denial. There is no record to support that Appellant filed a grievance within the 20 calendar day time period but the record does show that Appellant filed a grievance about 9 months later on February 10, 1999. In the Board's view Appellant's grievance was untimely filed.

The Appellant filed the initial complaint on a Montgomery County Form that included Grievances and "Open Door Reviews." Since the current Administrative Procedures adopted in 1992 deleted the "Open Door Review" process, the Appellant can not use this process. If the Appellant considers Appellant's complaint a grievance, then it is untimely filed because it did not meet the required 20 calendar day period. In the Board's view there was no requirement to inform the Appellant of grievance rights or the 20 calendar day period for filing a grievance.

CONCLUSION

In conclusion, the Board did not find any extenuating circumstances that prevented the Appellant from submitting a grievance within the required 20 calendar day period. In the Board's view, the grievance was untimely filed and the appeal is therefore denied.

Case No. 00-05

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

On April 19, 1996, the Appellant filed a written request for compensation for "working out of class" as a Captain. The Appellant filed a written request for compensation according to instructions contained in Directive #96-11. Appellant's action was prompted by a Classification and Compensation Occupational Class Series Study of Fire and Rescue Officer Classes. The study allowed for officers who had worked at certain stations to apply for retroactive compensation for "working out of class." Appellant did not work at one of the stations named in the study as being a station assignment which would warrant compensation for "working out of class." On May 3, 1996, the Fire Chief denied Appellant's request for retroactive compensation. The Appellant filed the grievance on March 3, 1999, which is the subject of the appeal, which Appellant states

Appellant did when Appellant “recently learned of a grievance filed by other Fire/Rescue Lieutenants in reference to working out of class request for back pay.”

POSITION OF THE PARTIES

Appellant’s

The Appellant contends that Appellant’s grievance was timely filed from Appellant’s recent knowledge of the resolution of a grievance similar to Appellant’s. Appellant states, “I was unaware that sufficient grounds may exist to warrant a grievance complaint. I learned of other officers who had filed for relief on similar grounds, but have not yet been granted any such relief and the issue is unresolved.”

County

Relying on Administrative Procedure 4-4, Section 6.0 which states, that a grievance must be filed within 20 calendar days from the date the employee knew or should have known that the problem existed, the County contends that the Appellant knew or should have known that a problem existed when Appellant received the Fire Chief’s May 3, 1996, denial of Appellant’s request for retroactive compensation. The time period from March 30, 1996, to December 20, 1998, for which the Appellant requested compensation was also deemed to exceed the 20 calendar day time frame provided to file a grievance. It is further contended that the Board has held that learning of another employee’s grievance cannot be used as a “triggering date” of an otherwise untimely filing.

ISSUE

Was the grievance timely filed?

ANALYSIS AND CONCLUSIONS

Administrative Procedure 4-4, Section 6.0, provides as to the timeliness of a grievance that it must be filed within 20 calendar days from the date the employee knew, or should have known, that the problem existed. At issue is the application of this standard to the facts of the case.

The Appellant made a request for retroactive compensation for “working out of class” and that request was denied on May 3, 1996. If the Appellant wished to grieve the Chief’s decision denying Appellant’s request for compensation or if Appellant believed that additional stations should have been covered by the Chief’s retroactive compensation directive, Appellant should have filed within 20 calendar days of Appellant’s receipt of the Chief’s denial in May of 1996.

Further, Appellant stated that a decision was made on December 20, 1998, to staff Station 14 on A, B and C shifts with Captains. Appellant claims that this decision solidified Appellant's contention that exclusion of certain stations from the provisions of the 1996 directive regarding retroactive compensation was incorrect and unfair, yet Appellant did not file a timely grievance after the staffing changes at Station 14. Appellant's March 3, 1999 grievance is not timely filed regarding either of these incidents. The Appellant is attempting to use a triggering event for the grievance, which is, Appellant only recently learned that other employees had filed similar grievances. With respect to the Appellant's attempt to rely on finding out about other employees filing grievance as a timely trigger for the grievance, the Board has previously rejected this theory, and does so in this case. In Larry Lofland, MSPB Case No. 87-55, the grievant argued that the grievance was timely filed because Appellant filed it within 20 calendar days of becoming aware that another firefighter won a grievance on the same issue. The Board rejected this argument reasoning that Mr. Lofland should have filed his grievance within 20 calendar days after becoming aware of the underlying personal decision that affected his individual case. The Board held that an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.

The Board has ruled consistently that a grievance must be filed within 20 calendar days from the date the employee knew, or should have know that the problem existed. (See MSPB Case No. 89-02, the Appeal of Diane Kilcullen; MSPB Case No. 97-11, the Appeal of Anne Brown et. al; MSPB Case No. 98-04, the Appeal of John Feissner; and MSPB Case No. 99-21, the Appeal of Robert Aument) In all of these cases, the Board ruled that the complaints were not timely filed.

Accordingly, the Board concludes that Appellant's grievance was untimely filed.

CONCLUSION

Having concluded that the grievance was not timely filed, the appeal is denied.

Case No. 00-09

DECISION AND OPINION OF THE BOARD

GRIEVANCE OF July 22, 1996

FINDINGS OF FACT

Prior to the Appellant's assignment to the Technology and Records Division, the creation of a position of Director of Technology was underway because the Montgomery County Police Department (MCPD) believed that in house technological expertise was lacking and a technological expert was needed. The creation of the Director of Technology position would effectively split the Technology Division and recognized the rapidly growing technological needs

of the MCPD. It was determined that the position was going to be filled with a civilian rather than a sworn status employee.

In July 1996, the Technology Director position was advertised in the Washington Post as a civilian position, grade of 28. The Appellant did not apply for the position and it was filled in February 1997.

POSITION OF THE PARTIES

Appellant's Position

Appellant contends that given Appellant's assigned responsibilities, span of control, personnel complement and the rank of prior incumbents in the position, the Records and Technology Division Director position should have been assigned the rank of Captain. Furthermore, the Appellant contends that when the duties of Technology Director were removed from the Records Division and established as a new position, the Appellant, as the previous incumbent, should have been afforded an opportunity to make written comments and apply for the position as a sworn officer.

County's Position

The County maintains that they have the right and responsibility to determine the appropriate organizational structure. The County contends that MCPD has the discretion and latitude to assign and move incumbents of the rank of Lieutenant and Captain based on organizational needs. Prior to the Appellant assuming the duties and responsibilities of the Records and Technology Division, a decision had been made to split the Records and Technology Division. Therefore it was a reasonable decision to staff the Records and Technology Division with a Lieutenant. However, in recognition of the responsibility assumed by the Appellant's during the transitional period Appellant was provided a temporary 10% salary increase for the period of March 5, 1995, through February 23, 1997.

The County contends that the Appellant had the opportunity to apply for the Technology Director position but chose not to do so. The County also contends that the Appellant had responsibility of the Records and Technology Division and had an option to request a classification study of Appellant's positions but elected not to do so.

ISSUES

1. Should the County have afforded the Appellant an opportunity to make written comments on the Technology Director position?
2. Was creating the Technology Director position as a civilian position violative of any rule, regulation or law or otherwise improper?

3. When the Appellant was assigned to the Records and Technology Director position, should Appellant had been assigned as a Captain and was Appellant's assignment as a Lieutenant violative of any rule, regulation or law or otherwise improper?

ANALYSIS AND CONCLUSIONS

1. Montgomery County Personnel Regulations (MCPR) 7-5 Administrative Review states:

Before the Personnel Director makes a final classification decision on a position or class, all incumbents and their supervisors must be given an opportunity to provide written comments....

Although the Appellant was the incumbent of the Records and Technology Director position, Appellant was not the incumbent of the newly established Technology Director position. Based on MCPR 7-5 Administrative Review, only incumbent's and their supervisors must be given an opportunity to provide written comments and the Appellant did not fall into either category. Accordingly, in the Board's view, the County was not required to provide the Appellant an opportunity to provide written comments.

2. Administrative Procedures (AP) 4-2, Section 5.5 Classification Procedures, provides for the responsibilities of the Director of Human Resources and states:

As delegated by the Chief Administrative Officer, develop, maintain, and administer the County government's classification plan, including creation and abolishment of classes, assigning occupational classes to pay grades, and assigning individual positions to classes.

Based on AP 4.2, Section 5.5, the County created the Technology Director position as a civilian position and had legitimate reasons for doing so. The County was not obligated to create a Technology Director position as a police officer position. In the Board's view, the County's creation of the Technology Director position as a civilian position was for legitimate reasons and did not violate any rule, regulation or law, or was otherwise improper.

3. Montgomery County Personnel Regulations (MCPR) 7-4 a Position Classification states:

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

It is undisputed that the Records and Technology Director position was formerly managed by police Captains. What is disputed is whether the assignment of the Appellant to this position required that Appellant be promoted to a Captain. In the Board's view, it was not unreasonable for the County to fill the position with a Lieutenant because of its previous decision

to split the duties of the Records and Technology Director position. The assignment of the Appellant to this position as a Lieutenant did not, under applicable law or regulation, entitle Appellant to a promotion as a Captain. Rather, the issue of Appellant's proper rank was a classification question, which Appellant could have sought to resolve pursuant to MCPR 7-4. Therefore, in the Board's view, the assignment of the Appellant as a Lieutenant to the Records and Technology Director position did not violate any rules, regulations, or laws or was otherwise improper.

On the basis of the above, the Board concludes that the appeal of the Grievance of July 22, 1996, should be denied.

GRIEVANCE OF MARCH 4, 1997

FINDINGS OF FACT

In July 1996, the Technology Director position was advertised in the Washington Post as a civilian position with a grade of 28. Two police Sergeants were involved in the selection process.

POSITION OF THE PARTIES

Appellant's Position

Appellant contends that Sergeants were included in the selection process for the new Technology Director position in violation of regulations.

County's Position

Since the Technology Director position was a civilian position and not a police officer position, having Sergeants participate in the selection process does not violate any rule, law or regulation.

ISSUE

Was including two police Sergeants in the selection process for the Technology Director position violative of any rule, regulation or law or otherwise improper?

ANALYSIS AND CONCLUSION

Typically, announcements for police officers contain a requirement that the recommending officers must be at least equal in rank to the promotion position. However, in the Board's view, since the Technology Director position was a civilian position, that

requirement was not applicable and there were no violations of a rule, regulation or law.

On the basis of the above, the Board concludes that the appeal of the Grievance of March 4, 1997, should be denied.

GRIEVANCE OF AUGUST 22, 1997

FINDINGS OF FACT

In April 1997, a Major called the Appellant and informed Appellant that effective April 27, 1997, the sworn personnel complement of the Central Processing Unit (CPU) was being placed under Appellant's command. The complement consisted of five Sergeants and eight police officers. On August 10, 1997, the Appellant assumed sole command of the CPU.

POSITION OF THE PARTIES

Appellant's Position

Appellant contends that being in command of the Records Division and the CPU warrants the assignment of a Captain in that position. Prior responsibility for the CPU was assigned to incumbents at grades of 28 or 30, which the Appellant determined to be comparable to a police officer's Captain position.

County's Position

The County maintains that management has the right and responsibility to determine appropriate organizational structure. As a matter of practice in the MCPD there is considerable discretion and latitude in moving ranks of Lieutenant and Captain. Ranks are interchangeable and the assignment to a position is based on organizational need.

ISSUE

When the Appellant assumed command of the CPU along with the Records Division, should Appellant had been assigned as a Captain and was the assignment violative of any rule, regulation or law or otherwise improper?

ANALYSIS AND CONCLUSIONS

The assignment of the Appellant to this position did not under applicable law or regulation entitle Appellant to a promotion as Captain. Rather, it created a classification question which the Appellant could have sought to resolve pursuant to MCPR 7-4. In the Board's view the assignment of the Appellant to the position as a Lieutenant was not improper and did not violate any rule, regulation or law, nor was there an entitlement to being promoted to Captain.

On the basis of the above, the Board concludes that the appeal of the Grievance of August 22, 1997, should be denied.

GRIEVANCE OF AUGUST 17, 1998

FINDINGS OF FACT

On June 10, 1998, the County Office of Human Resources issued Personnel Bulletin Number 447, announcing the promotional examination for the rank of police Captain. The Bulletin provided for minimum qualifications, examination date and process information, scoring procedures, and use of the eligibility list. As to the latter, the Bulletin stated, in pertinent part:

In accordance with Personnel Regulations, Section 6.3, when a position is to be filled, the appointing authority shall be provided an eligible list that has been certified by the Office of Human Resources. Subject to the County's diversity objectives, the appointing authority shall be free to choose any individual from the highest rating category.

In making promotion decisions, the Chief of Police may consider the following: examination results, past performance evaluations, length of service, time in current rank, commendations, reprimands, disciplinary actions, and other information pertinent to the candidate's suitability and potential for successful performance in the higher rank. Information may be obtained by a review of personnel files, examination results, personal interviews or recommendations from supervisors. The selection process must be conducted in a consistent manner at each stage of consideration. The Chief of Police may formally delegate to others the authority to review and consider the Departmental personnel file, Office of Internal Affairs summary and the above listed factors for each person in the highest rating category and, based on the information, to recommend officers for promotion. Examination results, for the purpose of selection decisions, will be defined as the adjectival rating (Well Qualified, Qualified or Not Eligible for Promotion). Recommending officers must be at least equal in rank to the promotion position. Several individuals may serve as a recommending panel. Panels should include minorities and women when possible.

The individual examination scores remain in the possession of the Office of Human Resources and are not being released to the Department and therefore will not be a matter of consideration in the promotional selection decision for any candidate. This procedure is consistent with the Personnel Regulations, Section 6-3, Selection Procedures. Pursuant to the Bulletin's schedule, an examination was conducted and, based on the examination scores, the Office of Human Resources provided to the Department of Police the names, in alphabetical order, of the seven candidates rated "Well Qualified" including the Appellant.

In a memorandum dated July 21, 1998, the Police Chief, who was the selecting official, informed a Lt. Colonel, and three Majors of a promotion selection committee meeting (for vacancies at the Captain, Lieutenant, Sergeant, and Corporal ranks) scheduled for later in the week. The Chief requested that the committee review personnel files, resumes, and Office of Internal Affairs summaries for the referenced ranks. The Chief indicated that this information should be reviewed prior to the meeting.

On July 29, 1998, a meeting was held to discuss the seven promotional candidates competing for the Captain rank. Present at the meeting was the Chief, a Lt. Colonel and three Majors. A Major participated by speakerphone. Candidates were discussed based on the notes taken by each committee member from the documentation review. Opinions and Recommendations were voiced by the committee members for the Chief to consider. The grievance record sets forth the committee members' individual recollections of the meeting, their understanding of the process, and their own bases for reaching recommended conclusions. The examination scores of the candidates under consideration were not available. At the conclusion of the meeting, the Chief left the room for approximately 20 minutes. The Chief returned, and announced a decision to select Lt. Blank for promotion to the rank of Captain.

POSITION OF THE PARTIES

Appellant's Position

The Appellant contests what is described as the "abandonment of the use of competitive scores" in the selection process, contending that the procedure used was unregulated and a complete breakdown of the promotional process. In this regard, Appellant relies on the decision of the Court of Special Appeals of Maryland (Court) in the matter of Joseph Anastasi v. Montgomery County, Maryland. 123 Md. App. 472 (1998) (Anastasi II), wherein the Court reviewed and approved the Department's use of a "rank order with exception" promotional procedure. That is, a promotional process that relied on examination scores, with the exception of disqualifying an applicant because of negative information in Appellant's personnel file. Additionally, the Appellant contends that the selection procedure violates County Charter and Code merit system requirements, noting in this regard the lack of specific selection criteria, as illustrated by the varying consideration bases cited by the members of the selection committee.

County's Position

The County contends that Anastasi II is court approval of only one-way of making selections, but does not stipulate that it is the only way. The County further contends that the selection process used is consistent with the merit principles, noting that the Department developed a formal selection process that solicited input from senior staff, rather than being casual and unrecorded; that all members of the selection committee reviewed the same documents; that the review was documented and the committee's notes were used for the

selection meeting; that the selection committee was familiar with all the candidates prior to the meeting; and that all of the members of the committee participated in the meeting and voiced their recommendations to the Chief of Police.

ISSUE

Was the process used in selecting a candidate for promotion to the rank of Captain violative of law or regulation, or in any other manner improper?

ANALYSIS AND CONCLUSIONS

The Board has previously considered the application of Anastasi II to the selection process contested by the Appellant (See Case Number 00-07 dated December 1, 1999). As the Board stated previously, the rank order by exception procedure approved in Anastasi II is not the only acceptable process for selecting candidates for promotion. The Appellant in Anastasi II contested being passed over for promotion because of negative information in his personnel file, notwithstanding his test score being higher than the selectee. The Court concluded that the procedure used, complied with the dictates of the County Charter and Code, noting the fact that promotions were made primarily by rank order, and the fact that problems with each candidate were discussed and analyzed by a committee of high-ranking officers was sufficient to assure that each candidate was considered equally and according to relevant, rational criteria. The Board sees nothing in Anastasi II which would stand for the proposition that the only acceptable selection procedure is one that would rely on test scores.

What the Court did say in Anastasi II is that the selection process used must be one that "ensured open, equal, and rational consideration of each candidate. In the Board's view, the process used in that matter met this requirement. The Well Qualified list was developed independently by the Department by Human Resources, on the basis of examination scores. Once a Well Qualified list was established, a procedure was followed that provided for each member of the selection committee to be provided the same information on all candidates, and at the selection committee meeting each was permitted to fully participate in the discussion, including the opportunity to make recommendations on the basis of whatever they felt were appropriate considerations. It is demonstrated that each candidate received equal consideration by each committee member, based on the method they chose to evaluate the candidates. After receiving the input of the senior officers, the Chief made a selection.

Finally, with respect to the Chief's selection, which the Appellant contends had no relationship to relative scores of the individuals on the Well Qualified list, the procedure utilized provided for a selection from among those candidates with the highest test scores. The senior officers on the selection committee were given an opportunity to provide input into the process, and to make recommendations on their choices. The fact that the Chief's selectee may not have been recommended by members of the committee, and the fact that the Chief did not reveal the reasoning to staff, as the Appellant argues, does not render

the procedure flawed. As noted above, what is required is a process that ensures open, equal, and rational consideration, which, in the Board's view, took place in the instant circumstances.

Accordingly, in the Board's view, the selection process in the matter before us was not violative of law, regulation, or in any other manner improper.

On the basis of the above, the Board concludes that the appeal of the Grievance of August 17, 1998, should be denied.

CONCLUSION

Based on the facts and conclusions stated above, the appeals are denied. In the Board's view there are no issues of fact necessitating a hearing.

Case No. 00-14

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellant is a Captain with the County's Department of Fire and Rescue Services (DFRS). In July 1998, a Governor requested through the Emergency Management Assistance Compact (EMAC), a state to state agreement, assistance from the State of Maryland, through Maryland Emergency Management Agency (MEMA), to help combat wildland fires in Florida. Appellant volunteered and served as a member of the Florida Task Force. The task force left the Washington area for Florida on July 5, 1998, and returned on July 16, 1998.

While in Florida, employees generally worked 12 hours "on duty" followed by 12 hours "off duty". When employees were "off duty" they remained in a "standby" status. While in a "standby" status, employees were free to leave the facility where they stayed, so long as they remained in contact.

While employed with DFRS, Appellant's usual work schedule was 24 hours on and 48 hours off, with one "kelly day" off every three weeks. On days when Appellant would have worked 24 hours (based on Appellant's normal work schedule in the County), Appellant was paid for 24 hours straight time, even though Appellant's work schedule in Florida was 12 hours on and 12 hours off (standby). On days when Appellant would have been off (based on 24/48 schedule), Appellant was paid at the overtime rate for all hours on duty, which was usually 12 hours.

In a letter dated December 29, 1998, Appellant was advised that Appellant would be compensated for the hours worked over and above the hours normally scheduled to work in the July 5, 1998 to July 16, 1998 time period. This revision resulted in an additional 40 hours of overtime being paid to the Appellant, for a total of 111 hours of overtime.

On May 20, 1999, a grievance meeting was held. In a decision dated September 21, 1999, the CAO determined that members of the Florida Task Force should have been, but were not compensated for, time spent in a “standby” status. Subsequently, Appellant was awarded additional compensation for hours served in a “standby” status that were outside the Appellant’s regular work schedule. Administrative Procedure 4-15, Stand-By Status and Compensation, provides an employee 15% of their hourly rate for each hour in a standby status. Appellant believes Appellant is entitled to an additional 71 hours of overtime compensation.

ISSUES

1. Was Appellant properly compensated for the emergency deployment in Florida?
2. Are there issues of fact necessitating a hearing before the Board?

ANALYSIS AND DISCUSSION

1. There is no dispute as to the time period that volunteers were deployed with the Florida Task Force. What is of dispute, is the manner in which that deployment, should be compensated. Appellant contends that Appellant should be compensated on an hour for hour basis from the start of deployment, to finish. The County maintains that there is nothing in the Personnel Regulations which requires that compensation be provided on a continuous 24 hour basis. While this may be true it is not unreasonable to rely on a level of reimbursement to continue to pay employees at the rate they would have received if not deployed.

There have been past deployments of DFRS employees who are members of the Collapse Rescue Team. Those deployments were governed by a Memorandum of Agreement between the Federal Emergency Management Agency (FEMA), the State of Maryland, and Montgomery County Fire and Rescue Department Urban Search & Rescue (US&R) team. When the Collapse and Rescue Team has been activated, team members are under the control of FEMA agreement, and employee compensation costs are reimbursed by the Federal Government. When Collapse and Rescue Team members have participated in a FEMA deployment, they have been compensated for all hours worked.

The deployment of the Florida Task Force was through the EMAC agreement, and not under control of FEMA . EMAC provides for compensation based on what the employee would have been paid as a County employee. Based on the EMAC agreement, the County would not be eligible for reimbursement at a level that would provide hour for hour compensation for employees who participated in the Florida Task Force deployment.

The evidence does not support the contention that the parameters of one agreement must be superimposed on another to maintain parity in pay rates. In the Board’s view, the determination to pay firefighters on the Florida Task Force consistent with the parameters of the EMAC agreement versus the FEMA agreement is not unreasonable or inconsistent with rules and regulations.

2. Although there is conflicting testimony about what Appellant was told regarding pay rates, the Board concluded that the language of the EMAC Agreement is the deciding factor in determining the rate of pay, and sees no issues of fact necessitating a hearing.

CONCLUSION

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal.

Case No. 00-17

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

PIL PROGRAM AND DISPOSITION OF REQUEST

Professional Improvement Leave (PIL) is provided for by the Department's publication "Training Selection Committee Procedures for Requesting Travel," Function Code 341 (Code 341). Code 341 provides for PIL requests to be reviewed by the "Training Selection Committee," who are to make recommendations to the Chief of Police. The specified criteria for approval/ disapproval provide:

1. Approval will be based on one or more of the following:
 - a. Value of training session
 - b. Relevance to the needs of the Department
 - c. Cost of training/travel
 - d. Follow-up training
 - e. Relevancy of the requested training to employee's current duty assignment as supported by written endorsement from the employee's supervisor and manager. This endorsement shall attest to the employee's suitability for the training.
 - f. Relevancy to the employee's career goals as documented on the employee's career development form. In considering this factor, the selection committee shall review the employee's training record maintained by the academy.

2. Disapproval will be based on one or more of the following:
 - a. Lack of funds
 - b. Same or similar session offered at a lesser expense
 - c. Years of service remaining

- d. Training identified as inadequate
- e. Lack of endorsement by management
- f. Likelihood of transfer
- g. Transferability of knowledge acquired.

By memorandum dated June 22, 1999, the Appellant, requested PIL "to act as an adult leader at the Endless Mountains Workcamp, Forest City, Pennsylvania, July 25,- 31, 1999." The request contends that the activity "...is directly in line with the Chief's Youth Initiative." "I will be supervising and working with youth from Montgomery County and other areas to provide home repair service to the less fortunate residents in the work camp area." The request briefly describes the program, including that there will be approximately 25 youths from the County. Appellant states that no request is being made for the \$325 registration fee, which had already been pre-paid.

On June 24, Appellant's supervisor, forwarded the request to a Major with the remark on the routing slip stating:

I recommended the denial of Appellant's similar request last year. Appellant is under the impression that other officers receive approval for similar requests, i.e., Boy Scout trips, etc.

On July 9, Appellant received a form memorandum dated July 8 from a Major "Chairperson Training Selection Committee," which states, "Your request for Appellant to attend the Endless Mountains Workcamp in Forest City, Pennsylvania, is disapproved for the following reason," with a checkmark next to "Applicability to assignment/relevance to Department."

In the grievance, Appellant referenced the "Chief's Youth Initiative," "established to bring the increasing juvenile problem under control," and that one of the goals of the Department is that "Special emphasis will be placed upon trust building with the youth of the County." Appellant referenced known occasions when PIL had been granted for comparable activity. The grievance also describes a meeting to attempt an informal resolution.

In the Chief's response to the grievance, the negative nature of an endorsement is noted. As to the argument that, in the past "a few similar requests have been approved," it is stated, "a review of past approvals fails to yield any evidence that approvals for such activities has been systematic." The response concludes:

The approval of professional improvement leave is not automatic and it is granted on a case by case basis, only after a number of factors have been considered. The committee has been tasked with the responsibility of ensuring that professional improvement leave is given only for proper reasons. To that end, requests will be closely scrutinized to ensure that the approval criteria are

met. In the Grievant's case, a review was done and it found the request to not be appropriate for professional improvement leave.

Past Practice

Appellant was provided by the Department with a sanitized list of all training requests approved over the two-year period prior to the disapproval of Appellant's request. In the findings of fact relied upon by the CAO in reaching his decision, there is a list of 14 instances, apparently derived from the total list, which are described as "where individuals were approved PIL where no direct relationship existed between the program and their assigned duties." In the CAO's conclusion, it is stated, "It is clear from the evidence presented that PIL was approved in a few cases where the mission or program objective was similar in nature to that of the Grievant's program choice."

CAO'S CONCLUSIONS & DISPOSITION

The CAO's conclusions supporting his disposition provide, in pertinent part, that:

- The program for which the Appellant sought approval was not a sanctioned program for the Department, and was not relevant to the Grievant's position.
- "No evidence was presented by the Department to indicate that a formal decision was made to adhere to the PIL approval standards outlined in Code 341 or that PIL requests were going to be scrutinized more closely."
- While requests similar to the Appellant had been approved, "If mistakes were made in the past, admittedly, this does not somehow bind or establish a precedent thus requiring the department to continue making the same or similar approval decisions in error."
- The policy initiative on trust building with County youth does not dictate approval of the requested PIL.

The CAO's disposition was that the Department did not violate the intent or spirit of the PIL approval/disapproval factors; no reimbursement of annual leave or mileage shall occur; and approval of PIL leave to attend the Endless Mountains Workcamp would be contrary to the intent of the program. The disposition concludes:

However changes on the proper enforcement of policies should be communicated to the individuals it expects to affect. A notice shall be issued by the Chief of Police or designee that reinforces that the criteria for the approval/disapproval of PIL outlined in Function Code 341 will be strictly enforced. Therefore, this grievance and the relief requested are denied in part and granted in part.

The record contains no indication as to whether the notice which the CAO directed the Department to issue, has in fact been issued.

POSITION OF THE PARTIES

Appellant

The Appellant contends that the denial of Appellant's request was arbitrary and capricious. In this regard, Appellant contends that while the PIL requested might not be "directly related" to Appellant's assignment, the purpose was to assist and guide youth, which is a goal of the Department; and that there are considerable examples of PIL approvals for activities similar to that requested by Appellant.

County

The County contends that the PIL requested was not a sanctioned County program, and that while, admittedly, the Department incorrectly approved PIL in a few instances in prior years, "the incorrect approvals should not bind or establish a precedent thus requiring the Department to continue making the same or similar approval decisions in error."

ISSUES

1. Was the disapproval of Appellant's PIL request to act as an adult leader at the Endless Mountains Workcamp inconsistent/violative of regulation, and/or arbitrary and capricious?
2. What is the appropriate remedy for a finding that the disapproval of the PIL request was improper?

ANALYSIS AND CONCLUSIONS

1. In the Board's view, the disapproval of the subject PIL request was not inconsistent or violative of the Code 341 approval/disapproval criteria. Two of the criteria were relied upon by the Department to deny approval of the request. With regard to relevancy to current duty assignment, the Appellant does not argue such relevance, acknowledging that the PIL might not be directly related. The Appellant primarily argues the criteria of relevancy to the needs of the Department, pointing to the Department goal of having officers bond with County youth. While certainly an opportunity to "bond" with the 25 County youth that would attend, the Board concurs that repairing homes in Pennsylvania is sufficiently removed from County/Department scope to justify a determination that it was not relevant to the needs of the Department.

ANALYSIS AND DISCUSSION

1. Appellant contends that the grievance is not over the September 29 denial of transfer, but over the Station Chief's retaliating against Appellant for insisting that the choking event of August 29, 1999, be reported, and that the December 15, 1999 date on which Appellant became aware of the Station Chief's actions constitutes the triggering event of when Appellant knew that a problem existed.

The County contends that the denial of a voluntary transfer is not a grievable issue, citing Montgomery County Personnel Regulations (MCPR), Section 29, Grievances, and Section 22, Transfers, Subsection 6, Appeal of Transfer. The County further contends that even if it were a grievable issue, the grievance is not timely filed, because it stems from a denial of transfer which occurred on September 28, 1999. AP4-4, Section 6.0, states that a grievance must be filed within 20 calendar days from the date that the employee knew or should have known that a problem existed.

In the Board's view, Appellant's grievance itself reflects that it involves a complaint of retaliation, and not a complaint of denial of transfer. The County's reliance on a complaint regarding transfer is not the issue. Appellant's grievance states "Violation of Transfer - Arbitrary and Retaliatory" and the accompanying document describes events stemming from the alleged comments made on December 15, 1999. In that regard, a complaint filed on December 29, 1999, would be timely filed. As the County acknowledges in its submission to the Board, should the Board decide that the allegation of retaliation is viewed as a separate issue from the September 28 denial or transfer, the matter is grievable under Personnel Regulation Section 29, and would be timely filed from the alleged comments the Appellant heard on December 15. Having found that the grievance is over retaliation, the Board concludes that the grievance was timely filed and should be remanded to the County for processing on the merits.

2. Appellant seeks as relief, reinstatement of the grievance; an order granting immediate transfer to the first available position; and attorney fees. As described above, the Board has concluded in a grievability determination that the grievance should be remanded for processing on the merits. While it is alleged that subsequent denial of transfer was retaliatory, the Board rejects the request that an appropriate remedy for its determination of grievability would include ordering an immediate transfer. With regard to the awarding of attorney fees, it has ordinarily been the Board's practice to award attorney fees when a party prevails on the merits of a matter grieved. Such is not the case here, where the case is remanded to the County for further processing.

CONCLUSION AND ORDER

In consideration of the reasons stated above, the case is hereby remanded to the County for further processing, and the request for ordering immediate transfer and the awarding of attorney fees is denied.

INVOLUNTARY TRANSFER

Case No. 00-16

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

Appellant's career began with the Department in 1983, and was transferred to the Records Division in 1995. In April 1996, Appellant was selected to fill the temporary position of Program Manager, following the retirement of the then incumbent Program Manager.

On November 11, 1997, MCGEO Local 400 Union filed an Unfair Labor Practices (ULP) Complaint on behalf of the civilian employees of the Records Division. The Appellant was expressly named in that complaint, along with the County Executive, the CAO, the Chief of Police, the Management Services Bureau Chief, and the Director of the Records Division. A hearing was scheduled for February 19, 1998, to hear the allegations and responses thereto.

In early February 1998, a Deputy Police Chief presented an affidavit to the Management Services Bureau Chief, (MSBC). In the affidavit, signed, notarized, and submitted by the former Program Manager, it was alleged that Appellant had used the computer system to make an improper search. Attached to the affidavit was a photocopy of a 1995 computer printout of a search on an individual.

On February 10, 1998, the MSBC sent a memorandum to the Director, MILES/NCIC Quality Assurance, asking that an investigation be conducted regarding alleged improper utilization of computer access by Appellant. The MSBC also sent a memorandum to the Director of the Office of Internal Affairs (OIA). The memorandum referred to the affidavit, and asked the OIA to start an investigation to determine if Appellant had violated any administrative rules or regulations. The MSBC also advised that they had already asked the Maryland State Police to start a criminal investigation, and that it was the MSBC's understanding that the criminal investigation would take priority and that the administrative investigation would begin upon completion of the criminal investigation. The MSBC also advised that this was done in conjunction with Appellant's temporary transfer.

On February 11, 1998, the MSBC told Appellant that Appellant would be transferred out of the Records Division, to the Office of Policy and Planning (OPP). The MSBC also told Appellant about the affidavit, and the pending investigation. Appellant was given written confirmation of the transfer in a memorandum from the MSBC later that day.

On February 23, 1998, Appellant asked the MSBC for a transfer to another building, noting that Appellant found it humiliating to work in the same building as Appellant's previous position. On the same day, the MSBC informed Appellant that Appellant would be transferred to a Program Manager I position with the Volunteer and Community Resources Division.

On March 30, 1998, Appellant filed a grievance under Administrative Procedure 4-4, requesting as relief that Appellant be reinstated to Appellant's position with the Records Division, removal from Appellant's records of all references to the investigation of allegations that Appellant misused the MILES/NCIC computer system three years ago, removal from Appellant's records of all references to the prohibited practice charge filed against Appellant and others, and attorney's fees.

On September 9, 1998, the Police Chief responded to Appellant's grievance. In the Chief's response, the Chief stated that Appellant was transferred from the Records Division while an investigation was conducted into allegations of improper conduct on Appellant's part. The Chief denied that the County made an agreement with the Union or anyone else about Appellant's work assignment, and maintained that the transfer is justified under Department Directive No. 325 and Montgomery County Personnel Regulations (MCPR) Section 22-2. The Chief also stated that, if Appellant is not returned to the Records Division after the investigation is completed, that decision will be based on reasons that are in accord with the MCPR and the prerogative to transfer that is reserved to management by MCPR Section 22 and Department Directive.

Grievance meetings were held on October 2, 1998, November 16, 1998, November 25, 1998, and December 7, 1998, by the CAO's designee. In attendance were Appellant, Appellant's attorney, Police Labor Relations Officer, and an Assistant County Attorney. Also present were a Major and a Lieutenant.

On November 12, 1999, the CAO denied the grievance, noting that Appellant has not shown that the reason given by the Department for the transfer was a pretext for other reasons or that the transfer was arbitrary, capricious, or discriminatory.

ISSUES

1. Was the decision to transfer Appellant arbitrary, capricious, discriminatory, or retaliatory, or violative of regulations?
2. Are there issues of fact necessitating a hearing by the Board?

ANALYSIS AND CONCLUSIONS

1. Appellant contends that the transfer was contrived and part of an agreement between the Department and the Union to settle the ULP filed by MCGEO against the Appellant on

November 11, 1997. Appellant additionally contends that the transfer was arbitrary and capricious.

The County maintains that the transfer was made pending an investigation into allegations that Appellant misused the computer to do an unauthorized search. Appellant's transfer to (OPP) was effected on February 11, 1998, one day after MILES/NCIC Quality Assurance and OIA was requested to conduct investigations into Appellant's alleged unauthorized use of the computer. The County additionally maintains that the terms of the written agreement between the County and the Union to settle the ULP did not cover Appellant's transfer.

The authority to initiate a transfer is clearly granted by Section 22 of the (MCPR). Section 22-1 "Transfer" states in pertinent part:

"Transfer of employees is a prerogative of management and is the movement of an employee from one position or task assignment to another position or task assignment at the same grade and salary levels either within a department/office/agency or between departments/offices/agencies."

The MSBC exercised that prerogative in transferring Appellant from the Records Division to (OPP) on February 11, 1998.

Section 22-6 (MCPR) "Appeal of Transfer" states in pertinent part:

"A merit system employee may appeal an involuntary transfer in accordance with Section 29 of these regulations. The employee must show that the action was arbitrary, capricious, or discriminatory."
(Emphasis Added).

In the Board's view, the evidence presented supports the County's contention that the transfer was made while, and because of, the investigation of the Appellant's alleged misconduct. The Appellant does not dispute the existence of the investigation, but essentially relies on the proximity of the ULP meeting and Appellant's transfer to support the contention that the transfer resulted from some secret agreement with the union to settle the ULP. In the Board's view, the record does not support Appellant's contention that Appellant's transfer was in fact part of a settlement between the County and the Union, as opposed to resulting from the investigation of Appellant's conduct. No other basis is put forward to support the contention that the transfer was pretextual, or in any manner arbitrary and capricious. Accordingly, Appellant has not met the burden of proof in presenting any evidence to support that contention.

2. Appellant's request for a hearing is based upon Appellant's contention that Appellant has been handicapped in sustaining the burden of proof in the grievance, because the County has made no real effort to obtain witnesses or documents that Appellant requested. In the Board's

view, the record findings of fact, which the Appellant had the opportunity to reply to, provides an adequate basis for deciding the case and no hearing is required.

ORDER

In consideration of the reasons stated above, and based on the evidence in the record, the appeal is hereby denied.

MEDICAL

Case No. 00-02

DECISION AND OPINION OF THE BOARD

BACKGROUND

As part of the application process, certain job classifications are given pre-employment physical examinations to determine their medical acceptability for the position. The County has developed a medical program that includes medical guidelines for each job. An Applicant must meet these guidelines in order to be appointed.

FINDINGS OF FACT

On May 6, 1999, in conjunction with an application for the position of Firefighter/Rescuer I with the Montgomery County Department of Fire and Rescue Services, Applicant was given a medical examination by the Employee Medical Examiner, (EME). As part of the medical examination, Applicant also filled out a medical history questionnaire. On the questionnaire, Applicant indicated that Applicant had insulin-dependent diabetes, and that Applicant used an insulin pump to deliver the estimated insulin dosage. Applicant was informed that additional medical information would be required from Applicant's treating physician, regarding Applicant's diabetes.

Applicant's treating physician's report essentially confirmed Applicant's diagnosis of insulin-dependent diabetes mellitus. It also indicated a Hgb Alc of 7.2% (normal = 6.4%) showing less than optimal control. The Hgb Alc is a blood test that measures the degree of blood sugar control for the previous 3-4 months. A Fasting Blood Sugar test, only reveals current blood glucose level and can be manipulated by taking insulin before the test is done. The Hgb Alc test, is therefore, a more reliable test of blood glucose level. The report also indicated that Applicant sustained a hypoglycemic emergency that required treatment by medical emergency personnel, within the past year.

On the basis of the EME's evaluation, in a letter dated June 24, 1999, the Office of Human Resources informed Applicant that Applicant did not meet the medical requirements for the position of Firefighter/Rescuer I. Additionally, Applicant was informed that the County could not accommodate Applicant's condition by altering the requirements of the Firefighter/Rescuer I job.

In a June 30, 1999 letter to the Board, Applicant noted intent to appeal the County's decision, indicating Applicant's request to learn the medical reason for the decision, and stating

an intent to rectify the decision so that Applicant might be considered in the future. Applicant's appeal petition was filed on July 16, 1999.

In response to Applicants appeal, the Office of Human Resources included in their response a letter from the EME, dated August 5, 1999, which noted a concern regarding the hypoglycemic episode suffered by the Applicant in the past year. The EME also stated that the insulin pump used by the Applicant to control Applicant's blood sugar "is not automatic, in that the user has to estimate how much insulin is to be given. The insulin pump is no panacea in the treatment of insulin-dependent diabetes mellitus. Rather, it is a convenient alternative mode of delivering a dose of insulin. The insulin pump is, therefore, subject to errors in dose estimation; it is vulnerable to the physiological insulin demands in body states of physical exertion, emotional stress, fatigue and/or infection". In the EME's opinion "one medical emergency episode occurring in the line of duty as a Firefighter/Rescuer I is one episode too many."

ISSUE

Were the procedures followed and a decision made with respect to the determination of Applicant's medical unacceptability for the position of Firefighter/Rescuer I consistent with the regulations and otherwise proper?

ANALYSIS AND CONCLUSIONS

The establishment of "medical standards," the requiring of a medical examination of Applicants for employment, and the disqualification of Applicants based on physical condition are all specifically provided for by sections 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards. Applicant contends that Applicant is able to control Applicant's blood sugar level through the use of an insulin pump, and therefore the County's determination is incorrect.

In the Board's view, the County's management should be afforded substantial latitude to assess the impact of a particular medical condition on the duties of a specific position. Accordingly, the County's determination on qualifications should be given significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by the facts.

The procedure followed in response to the application for employment was consistent with regulations, and Applicant was given the opportunity to provide information from Applicant's treating physician. Based on that information and a review of the essential functions of the position, it was determined that Applicant was medically unacceptable for the position of Firefighter/Rescuer I with Montgomery County. While Applicant may disagree with the conclusion reached, there is no showing that the County's procedures were improper or that the disqualification is not supported by a preponderance of the evidence. The appeal is therefore denied.

Case No. 00-04

DECISION AND OPINION OF THE BOARD

BACKGROUND

As part of the application process, certain job classifications are given pre-employment physical examinations to determine their medical acceptability for the position. The County has developed a medical program that includes medical guidelines for each job. An Applicant must meet these guidelines in order to be appointed.

FINDINGS OF FACT

On May 3, 1999, in conjunction with an application for the position of Firefighter/Rescue I with the Montgomery County Department of Fire and Rescue Services, Applicant filled out a medical history questionnaire. The County Medical Examiner, (CME) had been made aware by OHR of the fact that Applicant had previously been examined for the same position approximately a year earlier, and had been assigned a medical rating of "Not Acceptable."

On May 6, 1999, Applicant had a medical exam and medical history forms of May 3, 1999 and March 11, 1998, along with previous examination results, reviewed by the CME. The CME noted several inconsistencies to identical questions on the two medical history questionnaires, and by memorandum dated June 3, 1999, so advises OHR. Inconsistencies noted were:

On page 2 of both history forms is the following question:

Have you consulted or been treated by physicians, therapists, chiropractors, or other practitioners within the past five years? If yes, explain:

Applicant's answer on May 3, 1999 - "Yes, common cold/flu, spring hay fever."

Applicant's answer on March 11, 1998 - Yes, "private physician consulted on hay fever allergies, asthma, and knee pain (upon resuming a physical fitness program)." It should be noted that Applicant was rated "medically unacceptable" due to asthma on Applicant's March 11, 1998 medical exam.

On page 4 of both history forms are the following questions:

Wheezing/Asthma - ___ Yes ___ No

Applicant's answer on May 3, 1999 - "No."

Applicant's answer on March 11, 1998 - "Yes, asthma diagnosed 12/96 not

currently on any meds except Albuterol PRN, use 2X1 month.”

Rheumatism or bursitis - ___ Yes ___ No

Applicant’s answer on May 3, 1999 - “No.”

Applicant’s answer on March 11, 1998 - “Yes, developed while waitressing during summer of 1993. No current problem (hips).”

On page 5 of both history forms are the following questions:

Do you take any prescription medications? If yes, please list:

Applicant’s answer on May 3, 1999 - “Ortho Cyclen, Claritin.”

Applicant’s answer on March 11, 1998 - “Orhto Cyclen, Claritin, Albuterol inhaler PRN.”

Have you ever had a problem with alcohol use?

Applicant’s answer on May 3, 1999 – “No.”

Applicant’s answer on March 11, 1998 – “Yes, DUI in June 1990, attended alcohol awareness class at court’s direction.”

As part of the exam process, the CME questioned the Applicant regarding the differences in Applicant’s answers on the two questionnaires. Applicant responded that they really didn’t have asthma, this was a misdiagnosis. The CME then asked the Applicant to account for a letter received from Applicant’s treating physician, who indicated that Applicant’s “diagnosis and treatment” was asthma. Applicant gave no answer to the question, asking only how this would affect Applicant’s application for this job?

On June 16, 1999, Applicant was notified in a letter from OHR, that further processing of Applicant’s application for the position of Firefighter/Rescue I was being discontinued, “...Based on contradictory information which appears on your medical history forms...” Applicant was further advised that this action was being taken pursuant to Section 5-4 (b) of the Personnel Regulations, which states in pertinent part:

Applicants may be disqualified from further consideration or competition for the following reasons:

(b) Willful and material falsification of application.

In Applicant’s appeal, dated July 22, 1999, Applicant requests that processing of

application be continued, and to remove all information referencing “willful and material falsification” of the application.

In a letter dated August 31, 1999, the Director, OHR, responded to the Applicant’s appeal. The Director, relying on the information from the CME, sustains the action taken to discontinue processing of the application based on factual contradictions and inconsistencies, judged to represent a “willful and material falsification” of the application. Additionally, the Director noted contradictory information between the Applicant’s responses on the 1998 medical history form and progress notes supplied by Applicant’s treating physician. The physician’s progress notes of May 22, 1998, indicate that Applicant was using Albuterol as of that date, in apposite to Applicant’s written response that Applicant hadn’t used Albuterol in over a year. Also noted in the physician’s letter of May 19, 1998 in which the doctor states that Applicant has a long history of asthma which is treated with Atrovent prior to exercise and Albuterol as need.

ISSUES

1. Was Applicant’s disqualification for consideration for employment on the basis of a willful and material falsification on Applicant’s medical history form/employment application proper?
2. Is Applicant entitled to a hearing before the Board?

ANALYSIS AND DISCUSSION

1. Applicant’s position is that although there are inconsistencies between the two medical history forms, the inconsistencies don’t rise to the level of “willful and material” falsification, and that Applicant is being held to a higher standard than other Applicants. The County’s position is that the inconsistencies and factual contradictions are too numerous to be mere oversights, and that the inconsistencies represent a “willful and material attempt to falsify the application.”

In the Board’s view, the inconsistencies, if not “willful”, certainly rise to the level of “material” with regard to the differences in answers given by Applicant on Applicant’s medical history forms. To the question “have you been treated by physicians, therapists, chiropractors, or other practitioners within the past five years?”, Applicant fails to note that Applicant had been treated for asthma and knee pain on Applicant’s 1999 medical history, although listed on Applicant’s 1998 medical history. To the question, “have you ever had, wheezing/asthma?”, Applicant answers “NO” on Applicant’s 1999 medical history. Applicant explains the answer by noting that they were misdiagnosed with asthma in 1996, and didn’t feel that it was necessary to list it in 1999. In the Board’s view, the question requires disclosure of the original diagnosis, even if Applicant could contend, based on a more recent diagnosis, that Applicant did not have asthma. Additionally, Applicant’s explanation is contradicted by a May 19, 1998 letter from Dr. Blank, Applicant’s childhood doctor, who states in pertinent part:

“ patient has had a long history of ASTHMA which is treated with Atrovent prior to exercise and Albuterol as needed.”

Although a second letter from Dr. Blank in July 5, 1999 appears to draw a different conclusion, it does not erase the 1998 prognosis which appears to support the 1996 diagnosis of another doctor.

To the question, “have you ever had a problem with alcohol use?”, Applicants answer in 1999 is “NO”, which contradicts Applicant’s answer in 1998, which was ”YES, DUI in June 1990.” The Board does not view the issuance of a DUI citation, a subsequent court appearance, and attendance in alcohol awareness classes as insignificant or as something that would be easily forgotten.

2. With respect to Applicant’s request for a hearing, Section 30-2 of the Personnel Regulations states in pertinent part:

“A merit system employee has the right of appeal and a hearing before the Merit System Protection Board from a demotion, suspension, dismissal, or involuntary transfer. In all other cases, including grievances, after development of a written record, an employee’s appeal must be reviewed and a hearing may be granted or referred to the hearing officer at the discretion of the Merit System Protection Board if it is believed that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the Board denies the request for a hearing, a decision on the appeal must be rendered based on the written record.”

CONCLUSION

In the Board’s opinion, there were material inconsistencies and contradictions in the medical history forms filled out by the Applicant in 1998 and 1999. The Board is not convinced that omissions of such substantive information is easily overlooked or forgotten in such a short period of time. While Applicant may disagree with the conclusion reached, there is no showing that the County’s procedures were improper or that the disqualification determination is not supported by a preponderance of the evidence. The County’s position is therefore sustained, and the appeal denied.

The Board’s review of the record does not indicate that it is incomplete or inconsistent, and therefore sees no need for oral testimony to clarify the issues. The request for a hearing is denied.

Case No. 00-06

DECISION AND OPINION OF THE BOARD

BACKGROUND

As part of the application process, certain job classifications are given pre-employment physical examinations to determine their medical acceptability for the position. The County has developed a medical program that includes medical guidelines for each job. An Applicant must meet these guidelines in order to be appointed.

FINDINGS OF FACT

On June 1, 1999, in conjunction with an application for the position of Firefighter/Rescuer I with the Montgomery County Department of Fire and Rescue Services, Applicant submitted a medical history questionnaire signed by the family physician, Dr. Blank, documenting back, leg, and knee injuries resulting from a motor vehicle accident on May 15, 1993. As part of the medical evaluation and to seek clarification, the County Medical Examiner, (CME) requested additional information from Dr. Blank.

Dr. Blank's response described the nature of the Applicant's injuries, and Applicant's subsequent physical therapy program, "which left Applicant completely functional without disability." Dr. Blank stated that the Applicant had resumed normal gainful employment, and that while Applicant had a "mild relapse after poor compliance with an exercise program," Applicant had responded again to a program of back strengthening exercises. Dr. Blank concluded, "(Applicant's) prognosis for the job stated as per job description is excellent and I see no contraindication to Applicant's ability to comply with the requirements."

Additionally, at the request of the CME, an independent orthopedic evaluation was conducted by Dr. X on June 24, 1999, to determine the extent of all injuries and the impact, if any, on Applicant's current ability to perform essential firefighter duties safely under hazardous conditions. Dr. X in essence made a similar conclusion, stating in pertinent part:

"patient is at a significantly increased risk for injury if engaged in the rigors of a fire fighting cadet and/or a firefighter. Patient is at increased risk for developing back pain due to the history of prior fracture. Applicant has an anterior cruciate ligament deficient knee. This places Applicant at significant risk for repeat injury to the knee. Applicant is also at increased risk for developing post-traumatic arthritis without any additional injury to the left knee.

In summary, in my opinion this patient is a poor candidate for participation in the rigors of fire fighting. The residual from Applicant's significant traumatic injuries in the past places Applicant at this increased risk. If employed, this patient should be placed on permanent restrictions. These restrictions would include, but not be limited to, the avoidance of kneeling, crawling, and climbing of ladders."

Following receipt of the information, the CME advised the Office of Human Resources (OHR) that Applicant was rated as Medically Not Qualified for the position of Firefighter/Rescuer I. In a letter, dated July 9, 1999, the CME states in pertinent part:

"The Applicant has an orthopaedic condition that could pose an increased risk for injury and incapacitation if engaged in the rigorous duties of a firefighter/rescuer. Due to the residual from traumatic injuries in the past, the Applicant should be placed on permanent restrictions such as avoidance of kneeling, crawling, and climbing of ladders. However, these activities are a necessary part of the essential functions that can not be avoided as a firefighter/rescuer."

On the basis of the CME's evaluation, in a letter dated July 19, 1999, OHR, informed Applicant that Applicant did not meet the medical requirements for the position of Firefighter/Rescuer I at that time, and that the County could not accommodate Applicant's condition by altering the work requirements of the Firefighter/Rescuer I job.

In Applicant's appeal, dated August 16, 1999, Applicant states that they work as a pre-hospital emergency response medical rescuer, and as a volunteer firefighter with the local fire department. Applicant additionally notes that they have not had any problems with the "old injury" or the "repair" since returning to work.

In responding to the appeal, OHR included in their response a second letter from the CME, which stated in pertinent part:

"I conclude that the Applicant's current residuals from multiple traumatic injuries are not disabling but they do place Applicant at significant risk for sudden injury and incapacitation which poses a direct and immediate threat to the health and safety of Applicant and others in the performance of firefighter tasks. Kneeling, crawling, and climbing ladders are functional abilities required for essential firefighting tasks and cannot be avoided or modified on a permanent basis. Therefore, I recommended a medical disqualification."

ISSUES

Were the procedures followed and a decision made with respect to the determination of

Applicant's medical unacceptability for the position of Firefighter/Rescuer I consistent with regulations and otherwise proper?

ANALYSIS AND DISCUSSION

The establishment of "medical standards", the requiring of a medical examination of applicants for employment, and the disqualification of applicants based on physical condition are all specifically provided for by Sections 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards. Applicant contends that Applicant's injury has been repaired and that Applicant has not experienced any problems with the injury or the repair.

In the Board's view, the County's management should be accorded substantial latitude to assess the impact of a particular medical condition on the duties of a specific position. Accordingly, the County's determination on disqualification should be given significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by the facts.

The procedure followed in response to Applicant's application for employment was consistent with the regulations, and Applicant was given an opportunity to have Applicant's private physician provide input. Based in large part on that input and the job requirements of the position for which Applicant was applying, it was determined that Applicant's condition could be aggravated in a fire fighting environment. While Applicant may disagree with the conclusion reached, there is no showing that the County's procedures were improper or that the disqualification determination is not supported by a preponderance of the evidence. Applicant's appeal is therefore denied.

Case No. 00-19

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

As part of the application process, Applicants for positions in certain job classifications are given pre-employment physical examinations to determine their medical acceptability. The County has developed a medical program that includes medical guidelines for each job. An Applicant must meet these guidelines in order to be appointed.

Applicants for positions as Correctional Officers I must pass a medical evaluation, including a cardiovascular fitness test involving a standardized (Bruce Protocol) exercise treadmill test. All Applicants are subject to the same testing procedures and must demonstrate a minimal entry level of functional aerobic exercise capacity consistent with the physical demands of the job. The standardized testing protocol and passing exercise capacity level is based upon a job analysis study.

The Applicant received the usual job-related medical evaluation required of all Correctional Officer I Applicants and was unable to pass the minimal entry level of functional aerobic exercise capacity after two attempts and also demonstrated abnormal blood pressure readings during the exercise test.

During the Applicant's physical examination, it was apparent that Applicant had limited range of motion in the right elbow, which is Applicant's dominant arm. The Applicant received injuries to this arm in a motor vehicle accident in September 28, 1991, which required several surgeries. Based on the limited range of motion in the right elbow, the County's Employee Medical Examiner (CME), requested additional information from the Applicant's orthopedist, Dr. Blank. Dr. Blank's medical reports included an orthopedic consultation dated October 23, 1991, and progress notes dated April 19 and November 25, 1994.

The CME wanted to assess the Applicant's current function and ability to perform the essential functions of a Correctional Officer I position; therefore, the CME scheduled the Applicant for an independent orthopedic consultation, with Dr. X. The CME requested that Dr. X focus on the Applicant's right elbow and give a diagnosis, recommended treatment, prognosis, and opinion of the Applicant's fitness for duty as a Correctional Officer I based on the job specifications. Dr. X was sent the medical records provided by the Applicant as well as the Class Specification for a Correctional Officer I position. The Applicant was instructed to take any x-ray film or additional reports, if available, to the appointment.

Dr. X reviewed the records, obtained a medical history from the Applicant and conducted a physical examination on November 18, 1999. Dr. X noted that the Applicant's right elbow lacks 30 degrees of full extension and has a 9% impairment of the right upper extremity. The prognosis is for the arthritic condition to worsen with time. In regard to the essential functions of a Correctional Officer I, Dr. X states that on the basis of limitations on the elbow "Applicant is only capable of operating, checking and inspecting security devices as long as it did not necessitate the continuous use of the right arm and did not involve pushing, pulling, or heavy lifting. Applicant would not, in my opinion, be able to intercede in disputes between inmates or restrain combative inmates."

The CME determined that the Applicant did not meet the applicable requirements at the time of the medical evaluation and that the Applicant's condition is not correctable in the immediate future. In a letter dated January 19, 2000, Office of Human Resources, informed the Applicant that they did not meet the medical requirements for the position of Correctional Officer I. Additionally, Applicant was informed that the County could not accommodate the condition by altering the work requirements of the Correctional Officer I position and that Applicant's name would be removed from the eligible list.

The initial medical evaluation to the Office of Human Resources only cited the condition of Applicant's right elbow as the reason that Applicant was "medically not qualified" for the position of Correctional Officer I.

In the letter of March 15, 2000, from the Director, Office of Human Resources to the Board, an attachment was included. It was a letter of March 15, 2000, from the CME which provided a more detailed explanation for the Applicant being "medically not qualified" for the position. It not only included information about the Applicant's right elbow but also included information about the cardiovascular fitness test results.

After reviewing the medical reports of the Applicant's orthopedist, the orthopedic consultation by Dr. X and the results of Applicant's exercise treadmill test, the CME concluded that the Applicant has inadequate aerobic exercise capacity and cardiovascular fitness to perform the physical demands of a Correctional Officer I. The CME also concluded that the permanent impairment of Applicant's right elbow prevents Applicant from performing many essential functions of a Correctional Officer I. The essential functions impacted by these functional impairments include pushing, pulling, heavy lifting, or repetitive use of Applicant's dominant arm to operate security devices; to physically intercede in disputes between inmates; to physically prevent escapes, assaults, suicides, and injuries of inmates; to physically control, restrain, move and secure hostile inmates; to use a weapon; and to conduct personal, room, vehicle and facility searches.

The CME states:

The Correctional Officer position is hazardous and inability to perform the above essential functions places the employee and others at significant and immediate risk. There are no reasonable accommodations available to enable the Applicant to perform these tasks safely. Although the Applicant may be able to improve Applicant's cardiovascular fitness and aerobic exercise capacity, the functional impairment of Applicant's dominant elbow is permanent and affects performance of all the above mentioned essential functions. Therefore, I recommend that the Applicant be medically disqualified for the position of a Correctional Officer I.

ISSUE

Were the procedures followed and a decision made with respect to the determination of Applicant's medical unacceptability for the position of Correctional Officer I consistent with regulations and otherwise proper?

POSITION OF THE PARTIES

Applicant

In Applicant's letter dated January 26, 2000, the Applicant contends that Applicant was able to successfully complete all of the physical requirements for the position, and showed no limitations in performing those requirements. Applicant contends that the CME's decision was unjust and was based more on Applicant's size and physical stature.

In Applicant's letter dated February 11, 2000, the Applicant contends that the CME's recommendation to "medically disqualify" Applicant for the position of Correctional Officer I was based on the CME's concern for Applicant's size and physical stature rather than for the condition of Applicant's right elbow.

In Applicant's letter dated April 20, 2000, the Applicant states that during the medical examination Dr. X stated that Applicant did not see any problems with Applicant's right elbow that would prevent Applicant from performing the duties of a Correctional Officer I. The Applicant also contends that the CME used information from medical records provided by Dr. Blank and that this information is seven years old and outdated.

The CME examined the Applicant and determined that Applicant had blood pressure problems. The Applicant selected Dr. Y to treat Applicant's blood pressure problems. Dr. Y is a cardiologist with over twenty-five years of experience. Dr. Y provided the Bruce Protocol treadmill test which is the same test given by the County to the Applicant and the Applicant passed the test. The Applicant contends that the County should use the results from the test administered by Dr. Y and that Applicant is willing to retake the test if necessary to bring this issue to a conclusion.

County

The County contends that the Applicant was not "medically qualified" for the Correctional Officer I position.

Although the Applicant passed the exercise treadmill test administered by Applicant's doctor, the County contends that the maximum exercise capacity allowed by the Applicant was less demanding than is required for the Correctional Officer I position and therefore it is not acceptable.

Based on the comments of Applicant's orthopedist, the orthopedic consultation by Dr. X, and the results of the Applicant's exercise treadmill test, the County contends that the Applicant is unable to perform the physical demands of a Correctional Officer I.

ANALYSIS AND DISCUSSION

The establishment of "medical standards," the requiring of a medical examination of Applicants for employment, and the disqualification of Applicants based on physical condition are all specifically provided by Section 5-12 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards.

In the Board's view, the County's management should be afforded substantial latitude to assess the impact of a particular medical condition on the duties of a specific position. Accordingly, the County's determination on qualifications should be given

significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by the facts.

The procedure followed in response to the application for employment was consistent with regulations, and Applicant was given the opportunity to provide information from Applicant's treating physician. Based on that information, the orthopedic consultation by Dr. X, and the results of Applicant's exercise treadmill test, the CME concluded that the Applicant has inadequate aerobic exercise capacity and cardiovascular fitness to perform the physical demands of a Correctional Officer I and that the permanent impairment of Applicant's right elbow prevents Applicant from performing many essential functions of a Correctional Officer I. While the Applicant may disagree with the conclusion reached, there is no showing that the County's procedures were improper or that the disqualification is not supported by a preponderance of the evidence.

Although the County did not provide the Applicant with the information on Applicant's exercise treadmill test in their initial letter to Applicant, there is no evidence indicating that the test results were not valid or had been tampered with. In fact, the County provided the Applicant with the results of Applicant's test in a subsequent letter. The Board did not find any improprieties in the procedures used.

CONCLUSION & ORDER

In conclusion, the County followed the proper procedures and the Applicant's disqualification was supported by a preponderance of the evidence.

Based on the facts and conclusions stated above, the Applicant's appeal is denied.

QUALIFICATION

CASE NO. 99-12

DECISION AND OPINION OF THE BOARD

BACKGROUND

On March 26, 1987, The Montgomery County Department of Social Services, Department of Human Resources (Department), filed charges for removal against Applicant. The charge for removal alleges violation of Code of Maryland Regulation 06.01.01.47 D insubordination, and L, that the employee willfully made a false official statement or report. Applicant appealed this action to the Secretary of Personnel.

After several postponements, a hearing was held on August 13, 1987, and the charges for removal were sustained pursuant to Code of Maryland Regulation 06.01.01.61 C-1. The hearing officer ordered that the Applicant be permanently removed from Applicant's position as Social Worker III with the Montgomery County Department of Social Services, effective May 28, 1987. It was further ordered that the Unsatisfactory Report of Service be amended to prohibit the Applicant from seeking employment with the Department of Human Resources until May 29, 1990. On November 2, 1987, an exception hearing was held by the designee of the Secretary of Personnel, Montgomery County, who having heard oral arguments and having reviewed the record in the case, adopted all the proposed findings of fact and proposed conclusions of law as final findings and conclusions.

FINDINGS OF FACT

The Applicant submitted an application for the position of Social Worker III, under Announcement Number 28068010 that closed November 18, 1998. On page 4 of the County's Standard Employment Application, just above the signature line, Applicant checked the no box in response to the question "Affirmative responses to the following will not automatically exclude you from employment consideration. Have you ever been dismissed or asked to resign from any position?"

In late November 1998, 14 applications including the Applicant's were forwarded to the Department of Health and Human Services for rating. During the application rating process a rater, who had worked in the Department of Social Services during the Applicant's tenure, questioned the correctness of the Applicant's answers. The rater forwarded a note and the application to the Department of Social Services. The Human Resources Manager in the Department of Social Services, Ms. Blank, was able to produce an Order issued by the Secretary of Personnel which directed that Applicant

be permanently removed from Applicant's position of Social Worker III with the Montgomery County Department of Social Services, effective May 28, 1987. Once Ms. Blank was able to verify that the Applicant had provided false information on Applicant's application, Ms. Blank requested that the Applicant's application for the position of Social Worker III, be removed from consideration for employment, pursuant to Montgomery County Personnel Regulations, Section 5-4 (b). Review of Applications, "Willful and material falsification of application." The Director, Office of Human Resources, after reviewing the documentation provided by Ms. Blank, wrote a letter dated January 25, 1999, to the Applicant notifying Applicant of disqualification from further consideration for the position of Social Worker III with the Department of Health and Human Services. In a letter to the Applicant, the Director, Office of Human Resources states:

In answer to the question on Page 4 of the Montgomery County Application Form, **"Have you ever been dismissed or asked to resign from any position?" you checked "No." This answer was false because on May 28, 1987, you were removed from** your position as Social Worker III with the Montgomery County Department of Social Services by the designee of the Maryland State Secretary of Personnel. (see attached). When you signed your application dated November 17, 1998, you certified that the information provided was true and complete to the best of your knowledge, and you acknowledge that your application could be rejected if any of your statements proved false, misleading or erroneous. In light of this information,...I am disqualifying you from further consideration for the position of Social Worker III, Announcement Number 28068010.

ISSUE

Was the disqualification of the Applicant in violation of regulation or in any manner improper?

ANALYSIS AND DISCUSSION

The Applicant alleges that Applicant has been improperly denied an opportunity to compete for Social Worker III and higher positions because Applicant did not mention the prior dismissal and contends that Applicant did not have to mention Applicant's dismissal on Applicant's application because Appellant left the County over 10 years ago. There is no dispute that Applicant was separated from the position. There is a dispute in that the Applicant contends that Applicant did not have to indicate this on Applicant's employment application because it was over 10 years ago. On the employment application under "General Information," the following question was asked "Affirmative responses to the following questions will not automatically exclude you from employment consideration. Have you ever been dismissed or asked to resign from any position? If yes, please explain." The Applicant answered the question NO. Above the signature line, the employment application contained the following statement:

“I, the undersigned, certify that I have read and fully comprehend this form in its entirety and that the information herein provided is true and complete to the best of my knowledge. I understand that, should any statement I have made prove to be false, misleading or erroneous, it may result in the rejection of my application or in my discharge from the County service. In submitting this application, I further understand that it becomes the property of Montgomery County and will not be returned.”

The Applicant signed and dated (November 17, 1998) Applicant’s application.

The Applicant contends that there should have been a specified time limitation of 10 or 12 years for disclosing information on the application. The question did not specify any time limitations and the application did not contain a statement that established time limits on disclosing information on resignations and dismissals. In the Board's view, the question was clear and unambiguous.

Applicant’s answer to the question is false because Applicant was removed from Applicant’s position. In Case Number H(S)-4514, the Order of the Secretary (The Department of Human Resources) of September 2, 1987, ordered that the Applicant be permanently removed from Applicant’s position as Social Worker III with the County effective May 28, 1987. The record clearly shows that Applicant was removed from Applicant’s position for cause in 1987. There was no time limitation placed on providing accurate and complete information concerning resignations and dismissal because the question did not specify a time limitation and no time limits were stated in the application. In the Board's view, the passage of time provides no basis for ignoring clear instructions on the application.

Montgomery County Personnel Regulations, Section 5-4 (b). Review of Applications.

Each application submitted for an examination must be reviewed and evaluated to determine if the applicant is eligible to compete in the examination. Applicants may be disqualified from further consideration or competition for the following reasons:... (b) Willful and material falsification of application...

In the Board’s view the Applicant did willfully and materially falsify the application and based on this willful and material falsification of the application the County properly disqualified Applicant for consideration for the position that Applicant applied for. The County informed Applicant of the disqualification and the reasons for their action. In the Board’s view, the Applicant’s argument that the County disqualified Applicant’s application based on Applicant’s prior separation from the County is not supported by the record. There is no evidence that the County’s action was for any reason other than stated in their January 25, 1999 letter to Applicant.

CONCLUSION

In conclusion, the Applicant was removed from Applicant's position for cause not for disability and the County properly disqualified Applicant for willful and material falsification of the application. There is no evidence to support that the County improperly disqualified the Applicant or disqualified Applicant for any reason other than that stated. There was no established time limit for disclosing information on resignations and dismissals on the application. The instructions were clear and the passage of time provides no basis for Applicant ignoring clear and unambiguous instructions. Based on the facts and conclusions stated above, the appeal is denied.

PROMOTIONAL PROCESS

Case No. 96-08 - REMAND

DECISION AND OPINION OF THE BOARD

The Court of Special Appeals on October 28, 1998, ordered that the Circuit Court's judgement in this case was reversed, and ordered the Circuit Court to remand this case to the Merit System Protection Board (Board) for further proceedings consistent with the Opinion of the Court of Special Appeals. On March 24, 1999, Martha G. Kavanaugh, Judge, Circuit Court for Montgomery County, Maryland remanded the case to the Board.

The Court ordered that Appellant be allowed to respond to the adverse memorandums in Appellant's file in accordance with the procedures under Administrative Procedure 4-8, Review of Employee Personnel Records.

The questions raised by the Court:

1. Whether Appellant should have to wait for the start of a new promotional cycle,
2. Which eligible list should Appellant be placed on and,
3. What should Appellant's ranking be on the eligible list?

The Court stated that these considerations are best left to the discretion of the Merit Board.

BACKGROUND

The Appellant, a Sergeant in the Montgomery County Police Department applied for a promotion to the rank of Police Lieutenant pursuant to a promotional announcement made on July 13, 1993. After taking the examination, Appellant was rated as "Well Qualified" and certified to the promotional eligible list for the rank of Police Lieutenant effective October 1, 1993. Appellant was skipped over for promotion to the rank of Police Lieutenant. Nine candidates with lower test scores than the Appellant were promoted prior to the September 30, 1995 expiration date of the eligibility list.

The July 13, 1993 promotional announcement for Police Lieutenant, taken verbatim from Departmental Memorandum 89-14, states in pertinent part:

In making promotional decisions the Chief of Police may consider examination results, length of County service, time in rank and other information pertinent to

the candidate's suitability and potential for successful performance in the higher rank. The Chief may also consider for up to a maximum of five years, personnel evaluations, commendations, reprimands, and disciplinary actions. Information may be obtained by a review of personnel files, examination results, personal interviews or recommendations from the supervisors of those on the eligible list. The selection process must be consistently conducted at each stage of consideration.

The Chief of Police may formally delegate to others the authority to review and consider the above listed information and, based on that information, to recommend officers for promotion.

The process utilized by the Department for selecting applicants from the eligible list for promotion to Police Lieutenant was "rank order with exception".

The Police Chief, stated that an act of dishonesty, which occurred on May 24, 1994, was the reason the Appellant was not promoted. A decision was made to bar the Appellant from promotion until further notice.

The written record of the incident upon which Appellant's promotion was denied, consists of: a May 25 and May 26 1994 explanation of the incident from the Appellant; a June 2, 1994 investigation of the incident from a Lieutenant; a July 21, 1994 memorandum from a Captain regarding Appellant's promotional potential; and a July 25, 1994 memorandum from then a Major to the former Chief of Police regarding Appellant's promotional potential.

The documents referenced above were not maintained in any personnel files as provided for in Administrative Procedure 4-8, but were kept by in the Office of the Chief of Police. Appellant stated that Appellant had never seen the documents referenced above, except for Appellant's own explanation of the incident, until the day prior to a grievance hearing that was held on November 21, 1995.

ISSUES

1. Whether Appellant should have to wait for the start of a new promotional cycle?
2. Which eligible list should Appellant be placed on?
3. What should Appellant's ranking be on the eligible list?

ANALYSIS AND CONCLUSION

1. The Court rejected the Appellant's request that Appellant be promoted to Lieutenant retroactive to the Spring of 1995, when promotions occurred pursuant to the promotion cycle giving rise to the instant case. The extent of the Court's remedy is that Appellant be considered after having the opportunity to respond to the adverse memorandums in Appellant's file. The Board is of the view that consistency with the Court's decision requires

that this opportunity should be made available to the Appellant prior to the next regularly scheduled promotional cycle so that any consideration of the Appellant for promotion will be consistent with Administrative Procedures.

2. The Board does not interpret the Court's decision as compelling any expedited or special consideration of the Appellant for promotion. Promotion examinations are conducted on a periodic basis, and, following such examinations, eligibility lists are developed. In the Board's view, it would be beyond the scope of the Court's decision to direct that the Appellant be placed on the "Well Qualified" eligibility list. Rather, Appellant should be placed on the list that is commensurate with the results of the next promotional cycle examination.
3. As discussed under issue 2, the Board does not interpret the Court's decision as compelling any special consideration for the Appellant for promotion. Appellant's ranking should be commensurate with the results of the next promotional cycle examination.

CONCLUSION

In consideration of the reasons above, and based on the evidence in the record, the Board directs the County to afford Appellant the opportunity to respond to the adverse memorandums in Appellant's file, and thereby restore Appellant's rights under Administrative Procedure 4-8. Further, Appellant's placement on eligibility lists and rankings should be commensurate with Appellant's taking of the next regularly scheduled promotion examination, and the results thereof.

Case No. 99-14

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

Personnel Bulletin 443, dated January 30, 1998, announced the 1998 promotional exam for the ranks of Master Police Officer and Sergeant. The Appellant applied to sit for the Sergeant examination as instructed by Personnel Bulletin 443. In May 1998, Appellant sat for the written, multiple choice examination, the first part of the examination process. All of the 16 Sergeant candidates who sat for the written examination were allowed to continue into the next phase of the examination process. Appellant's score on the multiple choice examination ranked 14th out of the 16 candidates.

On May 28, 1998, Appellant attended an orientation session for the assessment component of the 1998 Police Sergeant examination process. The session was conducted by a Human Resources specialist, and detailed what an assessment center is and how the assessment center would be conducted. Time was allowed for questions and answers after the presentation.

Disputed is the Appellant's contention that the specialist stated that the "role player" would be a stranger.

On June 16, 1998, Appellant reported to the Holiday Inn in Gaithersburg, Maryland to take the Oral Interview and Structured Oral Exercise component of the assessment center. As part of this component, Appellant was given a packet to prepare for the oral exercise ("role play"), where the Appellant would act as a "role player's" Sergeant and counsel the "role player" regarding job performance.

The "role player" for this component of the assessment center was a Lieutenant of the Department of Fire and Rescue Services (Department). As a "role player", the Lieutenant filled out a disclosure form which stated in pertinent part:

"I have reviewed the list of individuals scheduled to compete in the examination procedure(s) for the above-mentioned position in which I will act as role player. There are individuals competing in this examination whom I work with directly or individuals whom I feel I should not role play with based upon personal knowledge or affiliation. I have listed below the names of these individuals and the nature of the affiliation."

The Lt. did not identify Appellant on this form, because the Lt. didn't recognize Appellant's last name, which is different from that of Appellant's Blank, whom the Lt. does know. Further, according to the Lt., the Lt. did not recognize the Appellant when the Lt. entered the room and accomplished the exercise.

According to the Appellant, when the Lt. entered the room, Appellant recognized the Lt. as a friend of Appellant's Blank and that while Appellant had not been in a social situation with the Lt., Appellant had been introduced to the Lt. in the early 1990's. Appellant contends that Appellant's surprise at seeing the Lt. negatively impacted Appellant's performance in the role playing exercise and the assessor's questions that followed. Appellant's reason for not saying something immediately was that Appellant had been told that there could be no talking once the exercise started.

By letter dated June 18, 1998, Appellant was notified by the specialist that Appellant was not eligible for promotion to Sergeant, and also stated that Appellant was weakest on the written portion of the exam, not the oral exercises.

On July 14, 1998, Appellant filed a grievance under Administrative Procedure 4-4, stating in pertinent part:

"...the examination was not based on a written plan, was not administered in good faith, and was not properly and accurately evaluated. The process was procedurally flawed to Grievant's detriment, and it was not fair and competitive."

On August 28, 1998, the Director, OHR, denied the grievance and Appellant by letter dated September 9, 1998, appealed the decision to the (CAO).

On October 22, 1998, the (CAO) designee, a Human Resources Specialist, conducted a Step 3 hearing with the Appellant in attendance. On March 17, 1998, the (CAO) issued a grievance disposition regarding the outcome of the Step 3 hearing, denying Appellant's grievance. Stating in pertinent part:

“...there was no violation of the Personnel Regulations, therefore, the grievance is denied. In addition, the CAO rejected a challenge to the fact-finding portion of the grievance procedure being conducted by a subordinate of the Director. As the Director of the OHR had no input or influence in the preparation/processing of the grievance disposition subsequent to the Step 2 response. Therefore, there is no reason to reassign this case to another designee outside the Office of Human Resources.

Regarding Appellant's request for an in camera inspection of materials by the (CAO) designee which were not provided to the Grievant, the CAO stated that limited review of test materials by the designee was designed to maintain the integrity of the examination process. The CAO further stated that refusal to provide such materials is permitted under Maryland public information law, and that as the materials reviewed contained substantive portions of the exam which will be used in future examinations; therefore, release of these materials would create an unfair advantage if released to the Appellant.”

ISSUES

1. Was the 1998 Police Sergeant Promotional Examination violative of Personnel Regulations?
2. Did Appellant's previous acquaintance with the “role player” in the Oral Interview and the Structured Oral Exercise component of the assessment center render that process procedurally flawed?
3. Is the Appellant entitled to review the test materials?
4. Does the choice of the CAO designee from the Labor Relations staff render the grievance procedure flawed?

ANALYSIS AND DISCUSSION

1. A review of the record regarding the examination process does not support Appellant's contentions that the examination was not based on a written plan, was not administered in good faith, and was not properly and accurately evaluated. The record indicates that the promotional examination was designed and administered according to the requirements as set

forth in the Personnel Regulations and the County Code. Personnel Bulletin No. 443 was distributed to all eligible candidates and identified the requirements for promotion, the minimum qualifications, application and scoring procedures, information on use of the eligible list, information concerning the examination process itself, and the dimensions being tested. As required by Section 5 of the Personnel Regulations, the examination was based on a written plan resulting from a job analysis. The rating process is designed as a consensus process wherein all raters pool their information to arrive at a decision regarding the performance of the candidate, and no one rater can unduly influence the final score given a candidate. There is no evidence that Appellant was treated unfairly or differently than any of the other applicants who participated in the promotional process.

2. Part of the Oral Interview and Structured Oral Exercise component of the assessment center is a "role playing" exercise, where the candidates counsel a subordinate. The "role players" receive a full day of training concerning the "role play" exercise. They also complete a disclosure form at the beginning of their training, that is intended to determine whether the "role players" know any of the candidates and if so, the nature of their affiliation. If they know any of the candidates, they must indicate if they can be fair and impartial.

The "role player" in the instant case was a Lt. The Lt.'s testimony reveals that the Lt. didn't recognize the Appellant's name when given a list of candidates in the "role playing" exercise. The Lt. also testified that the Lt. did not recognize the Appellant when the Lt. entered the room for the "role playing" exercise, and that the Lt. conducted the "role plays" the same and Appellant was no different than any other.

In the Board's view, while the Lt. may have known Appellant's Blank well, the Appellant has a different name and the fact that the Lt. may have met the Appellant some years back does not affect the credible testimony that the Lt. did not recognize Appellant when the Lt. entered that room and conducted the exercise. Further, the procedure followed is not intended to guarantee that the participants will be complete strangers, but that the role player not participate with someone who he feels he should not role play based upon personal knowledge or affiliation. The fact that the Appellant may have felt some degree of awkwardness upon recognizing the Lt. does not render the exercise procedurally flawed.

3. With respect to Appellant's request that the County provide Appellant with the assessor's training manual used to prepare raters for the assessment center, and to provide exercise content and assessor's notes, pursuant to AP-4, Section 4.4, which states in pertinent part:

"Each person who is responsible for presenting or responding to a grievance, or who holds information pertinent to the resolution of the grievance, must provide full disclosure of evidence relating to the grievance, provided that such disclosure is not precluded by law, policy, or regulation."

The County refused to accommodate Appellant's request, citing the policy and consistent practice of the County to deny the release of materials, such as test questions and scoring keys, which would either compromise the integrity of future exams or give candidates an unfair advantage in future exams, and relying on Section 10-618C of the Public Information Act which provides:

- (1) subject to paragraph (2) of this subsection, a custodian may deny inspection of test questions, scoring keys, and other examination information that relates to the administration of licenses, employment, or academic matters.

The Board does not see the relevance or necessity of releasing these documents to the Appellant, noting particularly that the Appellant's contentions address the narrow question of the impact of the Lt.'s participation in the role playing. Nor, does the Board view any violation of procedure with regard to the County's discretionary reliance on Section 10-618 of the Public Information Act, and their long standing policy and consistent practice of denying the release of these documents.

4. The Board sees no merit to Appellant's contention that because the CAO designee in the step 3 investigation is a subordinate of the Director, Office of Human Resources, the designee would be unable to render a neutral decision.

Administrative Procedure 5.2 D states that Labor and Employee Relations staff will conduct investigations for decision of the Chief Administrative Officer. Administrative Procedure 5.3 states that the CAO will render a decision on grievances after consideration of reports of investigation conducted by the Labor and Employee Relations staff or the Personnel Office.

Step 3 of the Grievance Procedure provides for a fact finding investigation of the grievance, which is then relied upon by the CAO in order to render a decision. The Appellant is provided an opportunity to review the product of the fact finder and provide comments, which the CAO considers in rendering his decision. There is no showing that this process is inconsistent with the Personnel Regulations or lacking in the ability to issue an unbiased investigative report.

CONCLUSION

In the Board's view, the 1998 promotional process for Police Sergeant was administered fairly and consistently for all candidates. Although possibly uncomfortable, Appellant's casual relationship to the "role player" does not render that procedure or exercise flawed. The Board does not feel that there was any violation of law or regulation in the County's discretionary refusal to provide testing documents or materials to the Appellant. Nor, in the Board's view, does the selection of the CAO designee from the Labor Relations staff lend itself to an inherent bias or present any due process problems. For all of the above reasons, the appeal is therefore denied.

Case No. 99-18

DECISION AND OPINION OF THE BOARD

This is a decision of the Merit System Protection Board (Board) on the appeals of three Appellants (Appellants). The "Final Complaint Designation" of the Labor/Employee Relation's Manager to their grievances over the failure to put them on eligibility lists for current and future promotions, be considered for unfilled vacancies, and, in the case of one Appellant, receive a retroactive promotion. The Board has determined that because the appeals concern the same basic facts, issues, and contentions, and because the Appellants are represented by the same counsel whose submissions cross-reference each other, that they should be consolidated for decision.

FINDINGS OF FACT

Background

In November 1994, the Department of Fire and Rescue Services (Department) issued a vacancy announcement for a number of positions at the rank of Master Firefighter/Rescuer and Fire/Rescue Sergeant. A number of the vacant positions were filled from among employees who had been rated "Well Qualified," the highest rating category, on a previously published promotion eligibility list. The Department determined to fill vacancies only from employees rated "Well Qualified". Nine Firefighters rated "Qualified" who were not selected for the subject vacancies grieved the failure to select them for the vacant positions. (Victoria Castle Fowler, et al., MSPB Case No. 97-12, May 5, 1997)

The Circuit Court for Montgomery County, Maryland (Civil Action No. 170173, August 28, 1998), (herein referred to as Leigh) reversed a Board decision and found that once the County decides to advertise the vacancies, they are obliged to fill them so long as there are qualified persons available to fill those vacancies. With respect to remedy, the Court stated:

In light of the court's findings, the court will remand this matter to the Merit System Protection Board with direction that the (Chief Administrative Officer) be instructed that the vacancies which are the subject of the appeal must and shall be filled from those on the list of "qualified" applicants as it existed in October of 1994.

On November 17, 1998, the Board remanded the matter to the County with direction that the Chief Administrative Officer be instructed that the vacancies which were the subject of the appeal must and shall be filled from those on the list of "qualified" applicants as it existed in October of 1994, as ordered in the Court decision.

A Personnel Action dated November 18, 1998 promoted eight of the nine Appellants in Leigh from Firefighter III to Master Firefighter, and promoted the ninth from Master Firefighter to Lieutenant, all with a "revised date" of December 25, 1994. Beside the nine Appellants from Leigh, one other Firefighter III, who had been rated "Qualified" on the 1996 promotion exam process, was promoted to Master Firefighter. The parties submissions do not include the eligibility list used for these selections, nor indicate whether there were some Master Firefighter vacancies not filled. On January 15, 1999, a vacancy announcement was posted for one Master Firefighter position, the selection to be made from candidates on the October 25, 1998 Master Firefighter eligibility list.

Appellants' Circumstances

Appellant one was rated "Qualified" in the 1994 promotional process. Appellant contends that Appellant did not apply for either the 1996 or 1998 promotional exam because the 1994 and 1996 policy of the Department refusing to select from among "Qualified" applicants.

Appellant two was not on any eligibility list in the 1994 promotional process, but was rated as "Qualified" in 1996. Appellant contends that Appellant did not apply for the 1998 promotional process because of the 1994 and 1996 policy of the Department refusing to select from among "Qualified" applicants.

Appellant three was rated "Qualified" in the 1994 promotional process. Appellant was rated "Well Qualified" in a concurrent promotional process for Fire/Rescue Sargent positions and was selected for one of those positions (now titled Lieutenant) effective November 24, 1994. Appellant was not involved in either the 1996 or 1998 promotional process to Master Firefighter.

ISSUES

1. Were the grievances timely filed?
2. Can the Appellants obtain an affirmative remedy from the Court decision?
3. Are the Appellants entitled to any remedy?

ANALYSIS AND DISCUSSION

1. The County contends that the grievances were not timely filed in that they were not filed within 20 days of the "triggering event," which was the 1994 failure to be selected for a Master Firefighter position. While grievances are required to be filed within 20 days of when the employee knew or should have known that the problem existed, in our view the grievances are not to what transpired in 1994, but the County's failure to include the Appellants in the remedy ordered by the Court. As to that "triggering event," the grievances had to be filed within 20 days of the November 18, 1998 personnel action promoting only the Appellants in

Leigh. The grievances of the three Appellants were filed on December 1 and 2, 1998. Accordingly, the Board rejects this contention of the County.

2. The County contends that the Appellants cannot obtain affirmative relief as a result of the Court's decision in Leigh in that, they were not parties to that case, nor did the grievances that culminated in Leigh request class relief. Further, the Court's order in Leigh should be construed as intending to grant relief only to the grievants in that case. In the latter regard, the County cites varying principles to support the contention that it is unlikely that the Court intended to grant "class-wide" relief.

In the Board's view, it is clear that the Court's decision addresses the entire promotional process and that the order is not limited to the Appellants in Leigh. The entire text of the Opinion and Order describes the process generally, including the key section "The Obligation To Fill Vacancies Once Advertised." Most importantly, the Court's Order instructs the Board to direct the CAO "...that the vacancies which are the subject of the appeal must and shall be filled from those on the list of 'qualified' applicants as it existed in 1994." There is in our view no ambiguity that the Court intended that the 1994 promotion process be remedied consistent with the order, and not just that the grievants in Leigh be afforded relief. Actually, nothing in the Court's decision implies such limited application. Accordingly, we conclude the Court's Order in Leigh provides a basis for providing an affirmative remedy to the Appellants in the instant case. While the file is limited in its description of what took place leading to the November 1998 promotions to Master Firefighter, it is clear that retroactive promotions went to only the Appellants in Leigh, and did not include other persons who were rated "Qualified" in the 1994 promotion process.

3. The Court was reviewing the 1994 promotion process and the Order very specifically requires the filling of the vacancies from the list of qualified applicants as it existed in October 1994. In the Board's view, in conforming to the Court Order, the County incorrectly limited promotions to the Leigh Appellants. The Board concludes that, pursuant to the Court's Order, Appellants in the instant case who were on the "Qualified" list in 1994 should have gotten the same remedy. This would make the failure to retroactively promote Appellant One and Appellant Three inconsistent with the Court's Order. The fact that Appellant One did not apply in 1996 or 1998 does not impact on Appellant's right to a remedy for the 1994 flawed promotion process. Appellant Two was not on the "Qualified" list in 1994 and, therefore, is not entitled to any remedy as a result of the Court's decision.

CONCLUSION AND ORDER

Having concluded that the Court Order in Leigh is not limited to the Appellants in that case, and that the County is obligated to accord Appellants One and Three the same remedy accorded to the Leigh Appellants, their appeals are sustained. The County is ordered to promote them to Master Firefighter, with the revised date of December 25, 1994. The application of this order to Appellant Three, who was otherwise promoted to Sergeant, now

Lieutenant, in 1994 shall be resolved in the compliance procedure. For the reasons described above, the appeal of Appellant Two is denied.

Case No. 99-23

DECISION & OPINION OF THE BOARD

FINDINGS OF FACT

Non-Selection of Appellant

In June, 1994, Appellant, a Master Police Officer, was one of 23 “Well Qualified” rated candidates for a Police Sergeant position. All candidates were ranked exclusively on the basis of their examination score and the selectee, promoted June 26, 1994, was ranked immediately ahead of the Appellant. The selection process did not include a review of any materials in the Appellant’s personnel file, materials Appellant contends would demonstrate that Appellant had better qualifications than the selectee.

Selection Procedures

The selection procedure followed in the instant case is termed “rank order with exception,” and provides for promotion on the basis of test score, unless negative information regarding a particular candidate would cause that candidate to be skipped. The identification of such negative information derives from a review of candidates files by a committee of high-ranking officers. Such negative information is all that would constitute an “exception” to selecting solely on the basis of “rank order,” i.e. test score. Positive information contained in the personnel file of a candidate, e.g., evaluations, interview results, recommendations, length of service, time in rank, commendations, etc., which the Appellant contends would have demonstrated that Appellant was the “better candidate,” was not conveyed to the selecting official.

Applicable Regulations

Personnel Bulletin #389, dated January 6, 1992, provided in pertinent part:

In accordance with Personnel Regulations Section 6.3, “When a position is to be filled, the appointing authority must be provided an eligible list that has been certified by the Personnel Office. Subject to affirmative action objectives, the appointing authority is free to choose any individual from the highest rating category.”

In making promotion decisions the Chief of Police may consider examination results, length of service, time in rank, and other information pertinent to the

candidates suitability and potential for successful performance in the higher rank. The Chief may also consider for up to a maximum of five years: personnel evaluations, commendations, reprimands, and disciplinary actions. Information may be obtained by a review of personnel files, examination results, personal interviews or recommendations from the supervisors of those on the eligible list. The selection process must be consistently conducted at each stage of consideration.

The Chief of Police may formally delegate authority to review and consider the above listed information and, based on that information, to recommend officers for promotion. Recommending officers must be at least equal in rank to the promotional position. Several individuals may serve as a recommending panel. Panel should include minorities and women when possible.

Anastasi II

In the matter of Joseph Anastasi v. Montgomery County, Maryland, 123 Md. App. 472 (1998) (Anastasi II) the Court of Special Appeals of Maryland (Court), in pertinent part, reviewed the validity of the Montgomery County Police Department's "rank order with exception" promotional procedure, in a fact situation where the Appellant in that case had been denied a promotion because of negative information in Appellant's personnel file. The court stated as to the issue of whether the procedure used by the Department violated that Appellant's rights under the County Charter and Code:

We believe that the "rank order with exception" procedure used by the Department complied with the dictates of the Montgomery County Charter and the Montgomery County Code. The fact that promotions were made primarily by rank order, and the fact that problems with each candidate were discussed and analyzed by a committee of high-ranking officers...were sufficient to assure that each candidate was considered equally and according to relevant, rational criteria.

Comparing the procedure followed with one that the Court had reviewed in an earlier case, the Court went on to say:

...because the Department developed and adhered to a separate procedure where candidates were promoted, with limited exceptions, according to rank order on the eligibility list, the dictates of the Montgomery County Charter and the Montgomery County Code were adhered to...

ISSUE

Was the procedure used in filling the Police Sergeant position, and/or the non-selection of the Appellant, in violation of applicable law or regulation, or in any other manner inappropriate?

ANALYSIS AND CONCLUSIONS

The Appellant's contentions all suggest a failure of the promotion process to include consideration of materials found in the personnel file which, allegedly, would demonstrate that Appellant was a better candidate than the selectee, and that the failure to select Appellant violates the County Charter, Merit Law, Personnel Regulations, and Administrative Procedures. Reliance for this position rests on the Court's Anastasi II decision, which the Appellant argues stands for the proposition that a procedure which meets the court's test must include a review of materials in the personnel file.

The County contends that the Personnel Bulletin makes discretionary, "may," the consideration of anything other than test scores, and Anastasi II constitutes judicial approval of this procedure. In this regard, the County contends that Anastasi II addresses exception from rank order for negative factors, but does not address exception for positive factors.

It is quite clear that the literal language of Personnel Bulletin #389 grants discretion for what factors will be considered in the selection process. "May consider examination results..." as the introduction to a list of other considerations means what it says. There is nothing in the Bulletin to indicate a "shall" for the consideration of other factors. The question however is whether the Court in reviewing and approving the procedure in Anastasi II engrafted into the procedure a mandate that consideration include materials in the personnel file.

In the Board's view, the Court decision in Anastasi II does not stand for the proposition that Charter and Code compliance required that the promotion policy include consideration of other than examination score. The Court specifically endorsed a procedure that granted promotion on the basis of "rank order on the eligibility list," and was only addressing the fact that excepting to that list by allowing the consideration of negative information did not violate the Charter or Code, or in any other manner violate the rights of the employee. The Board sees nothing in Anastasi II which would have required the selecting official in the instant case to consider the positive information in Appellant's personnel file and to thereafter promote Appellant over an employee with a higher examination score.

Accordingly, the Board concludes that the procedure used in filling the Police Sergeant position, and/or the non-selection of the Appellant, was not in violation of law or regulation, or in any other manner inappropriate.

CONCLUSION AND ORDER

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal.

Case No. 99-23 - REMAND

SUPPLEMENTAL DECISION AND ORDER

This is a supplemental final decision of the Montgomery County Merit System Protection Board (Board) on remand from the Circuit Court for Montgomery County, Maryland (Court).

In its original Decision, the Board denied the appeal of Appellant from the decision of the Chief Administrative Officer (CAO) denying Appellant's grievance over not being selected for promotion to the rank of Police Sergeant. Rejected by the Board was the Appellant's contention that the selection process violated the County Charter, Merit Law, Personnel Regulations, and Administrative Procedures because there was a failure to consider materials in Appellant's personnel file which would have demonstrated that Appellant was a better candidate than the selectee, who was selected solely on the basis of a higher examination score than the Appellant.

In the Board's Findings of Fact, in describing the selection procedures utilized, the Board stated, in pertinent part:

The selection procedure followed . . . is termed "rank order with exception," and provides for promotion on the basis of test score, unless negative information regarding a particular candidate would cause that candidate to be skipped. The identification of such negative information derives from a review of candidates files by a committee of high-ranking officers.

The Appellant appealed the Board's decision to the Court, which remanded the case to the Board with the explanation:

The Board erroneously concluded that the promotion procedure used in this matter allowed for the "skipping" of a candidate with a higher score due to "negative information . . . derived from a review of candidates files by a committee of high ranking officers."

The Board's factual finding was based on materials in the case papers describing the "rank order with exception" procedure, much of which was discussed in the context of the procedure judicially approved in Joseph Anastasi v. Montgomery County, Maryland, 123 Md. App.472 (1998) (Anastasi II), wherein negative information was derived from a review of candidates files by a committee of high ranking officers. In the judicial proceeding leading to the instant remand, the parties have stipulated that there was no review of personnel files either by a committee of high ranking officers, or by anyone else related to the disputed selection process. Rather, knowledge of negative information that might constitute the basis for an "exception" is only that which might be known by the

selecting official. But in this case the selecting officials were unaware of any negative information and, accordingly, they made their selections exclusively on the basis of examination score.

In compliance with the Court remand for further fact-finding and determination of the merits of the case, the Board has reviewed the record in light of the above-described information on the selection procedure used. In the Board's view, the process followed in this case did not violate the merit system law.

Appellant contended that it violated applicable law and rule for the County to rely exclusively on test scores, rather than taking into account positive information in Appellant's personnel file which would have led to Appellant's selection over a candidate with a higher test score. As described in our original decision, Appellant's support for this proposition is Anastasi II, which the Board concluded "...does not stand for the proposition that Charter and Code compliance required that the promotion policy include consideration of other than examination score." In Anastasi II, the situation before the court was the passing over of a promotional candidate because of negative information in his file. The Court of Special Appeals stated:

We believe that the "rank order with exception" procedure used by the Department complied with the dictates of the Montgomery County Charter and the Montgomery County Code. The fact that promotions were made primarily by rank order, and the fact that problems with each candidate were discussed and analyzed by a committee of high-ranking officers . . . were sufficient to assure that each candidate was considered equally and according to relevant, rational criteria.

The Court of Special Appeals specifically approved in that decision a promotion process "where candidates were promoted, with limited exceptions, according to rank order on the eligible list," which is exactly the procedure utilized by the County in the instant case.

Appellant is correct in one regard - deriving negative information about candidates solely from the personal knowledge of the selecting official rather than a review of each candidates personnel files is very much like the casual and unrecorded procedure the court found to violate the merit law in Anastasi I. But, as in Anastasi II, the actual procedure followed in this case did not violate the merit law because the selecting official did not consider any negative information about any of the candidates, resulting in promotions based solely on rank score.

On the basis of the above, the Board affirms its decision that the procedure used in filling the Police Sergeant position, and/or the non-selection of the Appellant, was not in violation of law or regulation, or in any other manner inappropriate.

Subsequent to the Court decision and remand, Appellant requested that the Board direct the reimbursement of attorney fees and costs. The Board ordinarily grants requests for the reimbursement of attorney fees and costs where an Appellant has prevailed, at least in part, on the merits of their appeal. That is, as a part of a directed remedy. In the instant case, while the

Appellant's appeal to court did lead to a remand for further Board processing, Appellant has not prevailed on the merits and there is no showing of any other basis for the directing of the reimbursement of attorney fees and costs.

ORDER

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal.

Case No. 00-11

DECISION & OPINION OF THE BOARD

FINDINGS OF FACT

On May 26, 1999, the Appellant filed a formal written grievance alleging:

- In a promotion procedure for the rank of Captain, Appellant had an examination score of 100, ranking Appellant first among those rated "Well Qualified," but on August 2, 1998, "a lower ranked less qualified candidate was promoted." Further alleged is that there were a number of apparent violations of merit system principles and other rules, regulations and policies in the selection process, specifically contending that on May 11, 1999, Appellant became aware that in violation of rules, performance appraisals were used in the competitive process.
- A September 20, 1998 performance appraisal and an April 16, 1999 "interim review" constituted harassment, retaliation and discrimination.

In support of Appellant's allegation about the use of performance appraisals, Appellant relied on a 1986 Supervisor's Handbook, entitled "Performance Planning and Appraisal," which Appellant contended precluded the use of appraisals in competitive processes, as compared to the Personnel Bulletin leading to the Captain selection that provided for their consideration. Subsequent to the filing of the grievance, the County provided the Appellant with a copy of a March 3, 1997 memorandum from County Chief Administrative Officer to the Police Chief providing for the use of performance appraisals when selecting applicants for promotion from an eligibility list. By memo dated June 30, 1999, from the Appellant, Appellant references the March 3, 1997 memo superceding the 1986 document and states, "...I would withdraw the portion of my grievance dealing with performance evaluations being used competitively."

In Appellant's grievance, Appellant describes receiving a performance appraisal on September 20, 1998 from a Lt., which was a "vast departure from the outstanding appraisals I have consistently received in the past." Appellant states that Appellant advised the Colonel of this, which resulted in Appellant's prior supervisor being tasked to prepare Appellant's evaluation, "which mirrored prior evaluations as far as (Appellant's) level of performance." On

April 16, 1999, Appellant received from the Colonel an "interim review," which Appellant described as "extremely negative, inaccurate and unfair."

POSITIONS OF THE PARTIES

The Appellant contends that Appellant's grievance was timely filed from the May 11, 1999 date when Appellant became aware of what Appellant believed was the improper use of Appellant's performance appraisal in the August 2, 1998 selection process for the rank of Captain. In response to the County's claim that the portion of the grievance alleging discrimination must be filed with the County Human Relations Commission, rather than through the grievance procedure, the Appellant contends "...this grievance is not to address discrimination based on sex, but is to address discrimination and reprisal/retaliation based on my filing of an earlier grievance." In response to the County's contention as to the impact of Appellant's withdrawal of that portion of the grievance going to the use of Appellant's performance appraisal, the Appellant responded, that it is incorrect that Appellant had withdrawn "...all of Appellant's allegations that the performance evaluation was incorrectly used," alleging that diversity considerations were not considered in the promotional process.

In its initial response to the grievance, the County contended that the portion of the grievance concerning the Captain selection process was untimely filed and that the portion alleging discrimination must be filed with the County Human Relations Commission, rather than through the grievance procedure. After the Appellant withdrew that portion of the grievance concerning the use of performance appraisals in the selection process, the County took the position that performance ratings are not appealable to the Board, and that the grievance directed at the appraisal and interim review was untimely filed. Additionally, the County references a separate July 9, 1999 complaint filed by the Appellant alleging improper treatment by the Colonel because Appellant filed a grievance, which the County says is currently under investigation.

ISSUE

Was the grievance timely filed?

ANALYSIS AND CONCLUSIONS

Administrative Procedure 4-4, Section 6.0, provides as to the timeliness of a grievance that it must be filed within 20 calendar days from the date the employee knew, or should have known, that the problem existed. At issue is the application of this standard to the facts of the case.

While this case is complicated by imprecise and shifting contentions and theories, the salient and dispositive facts are clear. The Appellant filed a grievance on May 26, 1999. The "problem" alleged by the first contention in that grievance was Appellant's non-selection for the August 2, 1998 promotion to the rank of Captain, an event more than nine months prior to the

filing of the grievance. The Board sees no merit to Appellant's contention that the date that should be used to determine timeliness is May 11, 1999, the date Appellant allegedly found out about what Appellant thought was a misuse of Appellant's performance appraisal. As the Appellant withdrew the portion of the grievance having to do with the use of Appellant's appraisal, the date Appellant found out about the possible misuse of the appraisal is irrelevant. As to the contention that Appellant did not withdraw allegations that diversity considerations were not considered, this concerns the August 2, 1998 selection itself, rendering the May 26, 1999 grievance clearly untimely. It should also be noted in this regard that the grievance contains no reference to diversity considerations not being considered.

The "problem" alleged by the second portion of the grievance is a September 20, 1998 performance appraisal and an April 16, 1999 "interim review." The May 26, 1999 grievance is clearly untimely with respect to both of these "problems". Again, there is no relevance, as the Appellant tries to argue, to the May 11, 1999 date when Appellant reviewed the Supervisor's Performance Planning and Appraisal Handbook. The grievance talks about the handbook leading to the grievance over use of performance appraisals, but the handbook had no relevance to Appellant's dissatisfaction with the appraisal and interim review given by the Colonel.

CONCLUSION

Having concluded that the grievance was untimely filed, the Appellant's appeal is denied.

Case No. 00-12

DECISION & OPINION OF THE BOARD

FINDINGS OF FACT

Appellant's Employment Background

The Findings of Fact (Findings) provides some information on the Appellant's career as a Department officer, including occasions when Appellant served as an acting Major. Relevant to the instant matter is a description of events in 1995 when the Chief assigned the Appellant to a permanent mid-night duty shift, and subsequent protesting activity, which Appellant contends Appellant was not involved in, but was ordered to stop. The Findings describe as evidence of subsequent animus toward Appellant being required to take annual leave to attend a memorial service for an officer under Appellant who had been killed, while other officials attended during on-duty time; and being required to assure a Lieutenant Colonel of Appellant's loyalty to the Chief.

Non-Selections and Grievances Background

In 1997, the Appellant was one of six Department Captains rated “Well Qualified” for promotion to the rank of Major, but was not one of the two promoted. On December 12, 1997, the Appellant grieved Appellant’s non-selection, alleging violations of the County Charter, County Code, Personnel Regulations, Department Directives, and Department operating procedures. In 1998, the Appellant was one of four Department Captains rated “Well Qualified”, and one rated “Qualified” under consideration for promotion to the rank of Major, and was not selected. On July 30, 1998, Appellant grieved Appellant’s non-selection, making the same allegations as those contained in Appellant’s 1997 grievance. The two grievances were consolidated for consideration and decision by the CAO, whose decision addresses both grieved non-selections.

Personnel Bulletin for Police Major

The Personnel Bulletin for both the 1997 and 1998 selections provided, in pertinent part:

... In accordance with the Personnel Regulations, Section 6.3, “When a position is to be filled, the appointing authority shall be provided an eligibility list that has been certified by the Personnel Office. Subject to Affirmative Action objectives, the appointing authority shall be free to choose any individual from the highest rating category.”

In making promotional decisions, the Chief of Police may consider the following: examination results, past performance evaluations, length of service, time in current rank, commendations, reprimands, disciplinary actions, and other information pertinent to the candidate’s suitability and potential for successful performance in the higher rank. Information may be obtained by a review of personnel files, examination results, personal interviews or the recommendations of supervisors. The selection process must be conducted in a consistent manner at each stage of consideration.

The Chief of Police may formally delegate to others authority to review and consider the above listed information and, based on that information, to recommend officers for promotion. Recommending officers may serve as a recommending panel. Panels should include minorities and women when possible.

Promotion Panels

The Findings provide as to the 1997 selection that a selection committee meeting was called by the Chief of Police, to be attended by two Majors, and a Lieutenant Colonel. Pursuant to the Police Chief’s instructions, committee members individually reviewed personnel files, Office of Internal Review (OIR) summaries, and the test score report listing for each candidate.

The committee members had the Personnel Bulletin, which provided information regarding promotional selection, and prior to the selection meeting, committee members met with Department Personnel representatives who provided training consisting of "specification of documents that raters would see and subsequent sign off acknowledging review of documents." "Other than what was contained in the promotional bulletin, there were no instructions as to how to evaluate candidates." The Chief and all members of the committee took part in the selection review. There were no lists of topics to be discussed, but a "free flowing" discussion of candidates took place. Notes were taken by one of the committee members. As a result of the meeting, a consensus recommendation in favor of a candidate was made to the Chief, who subsequently made the decision to promote the candidate.

Prior to the selection, there was a meeting to provide instructions as to how the selection process was to be conducted, but the only guidelines were those set forth in the Promotional Bulletin. Differing from the 1997 promotional process, in addition to the personnel files and the OIR summaries, the committee members had resumes of candidates under consideration. The Findings also describe varying factors focused on by the different committee members, and that two of the members recommended the Appellant, with the third seeing the Appellant and the eventual selectee as the top two candidates, but ultimately recommending the selectee. The Chief listened to the recommendations of the committee, and then selected another. No notes were taken during the selection review.

Grievance Meeting

Pursuant to the County grievance procedure, a Step 3 grievance meeting was held. Appellant's attorney sought to interview the Chief but the request was denied by the County Attorney.

CONTENTIONS

The Appellant's contentions and County response to each are as follows:

I. The Promotional Processes Lacked Guidelines or Standards To Assure Fairness and Consistency

The Appellant notes the absence of training and guidelines regarding what to look for during the selection process, the committee members relying solely on the general guidelines provided in the Bulletin; the "unsystematic, ad hoc, casual, and unrecorded" nature of the committee meetings; the absence of criteria or definition for topics to be discussed; the failure in 1997 to review resumes which had been required by the Bulletin; the use of inconsistent procedures in the two 1997 selections, the first not utilizing a selection committee and interviewing two candidates, but not a third, and the second utilizing a selection committee and no interviews; and in 1998 the testimony of selection committee members as to their varying viewpoints on what to consider important. Appellant cites for support the decision of the Maryland Court of Special Appeals in the matter of Montgomery County v. Joseph R. Anastasi,

which provided, in pertinent part:

Promotion selection procedures followed by County police departments, whereby Police Chief discussed promotional selections with ranking subordinates in casual, unmethodical, and unrecorded manner, and in which subordinates submitted recommendations only for candidates whom they personally observed, violated County Code and County Personnel Regulations which required the Chief, in considering qualifications of candidates, to proceed by some system which ensured fairness, informed decision making, and compliance with other mandates of both charter and code....

The County contends that during the selection process all committee members had reviewed the same materials; committee members utilized their own criteria in evaluating Applicants, but there is no evidence that they were differential or expressed favoritism in their evaluation; that while there might have been aspects of inconsistency in selection procedures, there is not a requirement that selections be identical; and that while there might be examples in the selection process identified by the Appellant as information which was incorrect or drawn from sources other than personnel files, such circumstances do not rise to a level so as to create a flaw deemed sufficient to have unduly prejudiced the selection recommendation.

The Department's Temporary Promotion Practices Disadvantaged the Appellant

The Appellant describes occasions when the selectees and others served as acting Majors pursuant to a Department practice of temporarily promoting a person to a position prior to a permanent promotion to that position. While the Appellant also had opportunities to serve as an acting Major, it is alleged that Appellant's were far more limited.

The County contends that turnover at the rank of Major in recent years has necessitated the use of acting status, opportunities accorded current incumbents and the Appellant, but that acting status is not a minimum qualification for the rank of Major and selections were not made on the basis of a candidates acting status.

The Chief's Failure to Appear at the Step 3 Grievance Meeting Deprived the Appellant of Due Process

Appellant cites Administrative Procedure 4-4, Section 6.4 provision that at the Step 3 meeting "the employee and the department will have an opportunity to present and respond to the grievance and provide all supporting documentation, and may call witnesses as appropriate," and contends that because the Chief was not present, essential due process was denied. In this regard, Appellant requests that the Board conduct a hearing to obtain the Chief's testimony.

The County submission to the Board does not respond specifically to this allegation.

Selection Committee Members Had a Conflict of Interest

Appellant contends that the selection committee included Majors who were competing with Appellant for promotion to Deputy Chief, and that as no Captain had ever been promoted to Deputy Chief, it was in their interest for the Appellant not to be promoted to Major. “Although two members recommended (Appellant) for the 1998 Major position, it is uncertain how vigorously they supported Appellant because the selection committee meeting was unrecorded.”

The County submission to the Board does not respond specifically to this allegation.

The Department Violated Administrative Procedure 4-8.

Appellant contends that after each of the selection committee meetings, all notes were given to the Department Personnel Office, and Appellant’s inability to respond to the written comments, some of which are inaccurate, violated Appellant’s rights under AP 4-8. In this regard, it is contended that Section 3.5 of AP 4-8 provides that no information shall be placed in an employee’s personnel record unless the employee receives a copy and is provided an opportunity to submit a rebuttal, which can be included in the file. In the Appellant’s view, the notes from the selection committee are part of Appellant’s personnel record, which Appellant should have an opportunity to review and rebut.

The County submission to the Board does not respond specifically to this allegation.

Summary

Appellant contends that County Charter Section 401 requires that personnel decisions be made on “demonstrated merit and fitness,” and that County Code Section 33-5 requires that the advancement of merit system employees be based on “their relative abilities, knowledge and skills, including the full and open consideration of qualified Applicants for initial appointment. “As long as the position of Major remains a merit position, the County must comply with these requirements when selecting a candidate for promotion.” “There is nothing in the County Charter, Code of Personnel Regulations which gives the Chief of Police greater latitude in choosing a Major than a Sergeant, Lieutenant or Captain.”

The County contends that a Major is a senior command staff and a key position in the Department, and the Chief must have considerable latitude and discretion in selecting an individual for promotion at that level. “In addition to the possession of the highest professional credentials ... a compatible management style and a shared vision directly affect the Chief’s ability to effectively manage and implement new initiatives in the Department.” In the County’s view, the Appellant received fair and appropriate consideration for promotion, and the evidence indicates that selecting officials were informed decision-makers and that the selection process was methodical and documented.

ANALYSIS AND CONCLUSIONS

I. There is no dispute between the Appellant and the County over the need to apply the Court decision in Anastasi to the instant facts, the dispute being whether the record circumstances of the 1997 and 1998 selection process when the Appellant was not selected for a Major position meets the standard enunciated in that decision. In Anastasi, the Court found unacceptable a procedure where the Chief discussed promotional selections with ranking subordinates in a casual, unmethodical, and unrecorded manner, and in which subordinates submitted recommendations only for candidates who they personally observed. The Court mandated a system which ensured fairness, informed decision making, and compliance with other mandates of both Charter and Code. In the Board's view, the selection processes at issue in this case met that test. "Well Qualified" lists were developed independently by the Office of Human Resources. Once the list was established, a procedure was enunciated in the Personnel Bulletin, a selection committee convened, with some training provided to that committee on what they were to review. Thereafter, committee members were provided with the same materials to be reviewed and given an opportunity to review those materials. At the selection committee meetings, each member was permitted to fully participate in the discussion, including the opportunity to make recommendations on the basis of whatever each felt were appropriate considerations. It is demonstrated that each candidate received equal consideration by each committee member, based on the method they chose to evaluate the candidates. After receiving the input of the committee members, the Chief made a selection. (See the Board's decision in Case No. 00-07, Dec. 1, 1999)

As to the allegation that there were slight differences between procedures followed in the two 1997 selections, or between the 1997 and 1998 selections, in the Board's view, consistency between differing selection committees does not render any one of them defective, as long as each independently meets appropriate standards. In the Board's view, as described above, each met such standards.

Accordingly, the Board rejects the contention that the promotional processes lacked guidelines or standards to assure fairness and consistency.

II. The allegation that favoritism improperly influenced the selection process is not supported by the evidence, but only that the Chief and the selectee had prior, official contact and the Appellant did not. In an organization like the County Police Department it is inevitable that given the small number of personnel in the rank of Captain and above, some will have more contact with the Chief than others. In the Board's view, such does not render defective the selection for promotion, of someone with greater contact with the Chief. Accordingly, the Board rejects the contention that favoritism improperly influenced the selection process.

III. The contention that the Chief had animosity toward the Appellant is similar to the contention that favoritism influenced the selection. The Record seems to indicate that the Chief bore some animosity toward the Appellant, or, at a minimum, viewed Appellant less favorably than the selectees. The requirements enunciated in Anastasi are that a procedure be in place that

assures fairness in the consideration process. The fact that the selecting official picks someone who is previously known and viewed favorably, or doesn't select someone who is previously known and viewed unfavorably, does not, in the Board's view, render the procedure defective.

Accordingly, the Board rejects the contention that animosity toward the Appellant improperly affected the selections.

IV. As acknowledged by the County, there is a practice of using temporary promotions to deal with organizational exigencies and there is no contention by the Appellant, who has served some such promotions, that the practice is violative of anything. The fact that a selectee may have had more opportunities to serve as an acting Major, than non-selectees, does not, in the view of the Board, render a selection improper.

Accordingly, the Board rejects the contention that the Department's temporary promotion practice improperly disadvantaged the Appellant.

The Board rejects the contention that the Chief's failure to appear at the Step 3 grievance hearing deprived the Appellant of due process, provides a basis for finding the selections defective, or necessitates the need for a hearing.

V. This contention reflects considerable conjecture, and amounts to what the Board views as lacking in rationality. The Appellant seems to be contending that the Majors on the selection committee would not want Appellant to be promoted because Appellant would be another Major who would compete with them for promotion to Deputy Chief, which Appellant would be unlikely to do as a Captain. There is first the fact that two of those Majors recommended that Appellant be selected. Beyond that, the procedures were going to lead to someone being selected to be a Major, who could compete for Deputy Chief positions, whether it was the Appellant or someone else.

Accordingly, the Board rejects the contention that the makeup of the selection committee provides a basis for finding the selections defective.

VI. The linkage between the selection processes at issue and the allegation concerning selection committee members' notes is the Appellant's contention that since Appellant was not provided copies, Appellant was denied the opportunity to rebut what might have been contained in the notes. Administrative Procedure 4-8, which is relied upon by the Appellant, has as its purpose, "To establish a procedure for review of employee personnel records, and to identify all organizations of the County Government which maintain personal information concerning employees." Section 2.1 of AP 4-8 defines "Personnel Records" as:

The repository of official information regarding an active, terminated or retired employee of Montgomery County Government. A personnel record can be a personnel, medical or departmental operating file.

Section 3.5 of AP 4-8 provides:

“No information shall be placed in an employee personnel record unless the employee receives a copy of the information and is provided an opportunity to submit a rebuttal, if desired, to be included in the file.” The Appellant contends that “employee personnel records” includes the notes made by selection committee members which were turned over to the Office of Human Resources at the conclusion of the selection procedure.

The Board disagrees with the Appellant’s contention that AP 4-8 is applicable to the notes at issue, which have been made a part of the Board’s record in this case. Each member of the selecting committee made notes concerning all of the persons on the “Well Qualified” list for their deliberation. These notes were apparently collected by the Office of Human Resources as part of their record of the selection process. There is no evidence that they went into the Appellant’s personnel record, which would have made them subject to the provisions of AP 4-8.

Accordingly, the Board rejects the contention that the collection of the selection committee members’ notes by the Office of Human Resources provides a basis for finding the selection defective.

On the basis of the above, the Board concludes that there is no substantiation to support the contentions that either the 1997 or 1998 non-selection of the Appellant was violative of law or regulation, or was in any other manner improper.

ORDER

Having concluded that the process used in the selections at issue were not violative of law, regulation, or in any other manner improper, the appeal is denied.

Case No. 00-18

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

Examination Process and Results

In September 1997, the Appellant, a Police Sergeant, participated in the examination process for promotion to the rank of Lieutenant. The examination consisted of a presentation exercise and a structured oral interview. The presentation exercise consisted of an oral presentation and a written component. The oral interview consisted of a series of structured questions. Based on an overall evaluation of all examination components, each candidate received a consensus score, from which an eligibility list would be established with each promotional candidate being placed in the category of either “Well Qualified,” or “Qualified.”

Participants in the examination were advised that their performance would be monitored by a panel of three raters who would be in the room during the presentation, but would not interact with them. The "General Guidelines for the Promotional Process" stated that "oral communication consists of not only how clearly and concisely a person speaks, but also eye contact, mannerisms, voice control, vocabulary, etc." The Guidelines included the following warning:

Do Not Be Distracted by the Raters: During the oral presentation exercise and the oral examination exercise, the raters will be taking notes on your behavior. They will necessarily have their heads down at times and will not be looking at you the entire time that you are in the room. Do not be disturbed by this. You should conduct the exercise just as you would if the raters were able to maintain eye contact with you the entire time.

The three raters were police captains and lieutenants from neighboring jurisdictions, who were given two full days of training on how to effectively evaluate candidate's performance, trained in the rating process, given multiple opportunities to practice evaluating sample candidates, and were briefed on County regulations and policies.

The Appellant participated in the examination, at the conclusion of which Appellant was advised that Appellant's score resulted in Appellant's name being placed on the promotional eligibility list in the "Qualified" category, along with 26 others, and that eight individuals were in the "Well Qualified" category. An attachment to the notification showed for each managerial dimension the consensus, average, and lowest scores received. Also attached was a three page "feedback sheet" prepared by the raters which included for each dimension notes on "area to improve" and "area handled well." On the dimension of oral communications the average score was 5.16 and the Appellant received a consensus score of 5.0. For this dimension, under "areas to improve" the raters placed an "X" before "keep consistent eye contact." On the dimension of written communication, the raters had included a handwritten note, "Written was pretty good - Had some mistakes of grammar." The average score on grammar was 4.94 and the Appellant received a consensus score of 5.5.

Processing of the Grievance and Request for Information

On October 17, 1997, the Appellant filed a written grievance over the examination procedures, requesting as a remedy immediate promotion to Lieutenant, including being "made whole." Additionally, Appellant requested:

That all candidates, including me, be afforded an opportunity to review examinations and scores.

That I be provided a copy of all documents establishing that this was a professionally accepted test instrument, including any validation studies.

That I be provided a list of all professionals, along with their credentials, who

have certified the instrument and process, or issued any opinion thereof.

On November 5, 1997, the (OHR) Director issued a denial of the grievance. In the response to the grievance, the Director denied the request for examination materials and scoring information. While advising the Appellant of Appellant's right to see Appellant's own written examination, the Director relied on the provision of the Maryland Public Information Act that permits a custodian of records to deny inspection of test questions, scoring keys, and other examination information.

Appellant appealed the denial of Appellant's grievance to the CAO. While processing of the appeal was delayed by mutual agreement pending a final decision by the Board in an unrelated grievance and appeal, activity continued with respect to the Appellant's request for information. By letter dated October 23, 1998, Appellant's attorney addressed the information request, "We again request that (Appellant) be provided with the requested materials including, but not limited to, raters' instructions, review, comments, as well as the actual test documents." By letter dated January 12, 1999, the County Attorney's office advised Appellant's attorney of the decision to release materials from the exam training manual, and the raters' disclosure form, but that being denied were listed information on the oral presentation, written exam, and interview. Also denied were raters' notes and rating forms. The material being provided was an enclosure to this communication.

The step III hearings were held on May 18 and 20, 1999, to determine the facts relevant to the issues in the grievance. In attendance were a Human Resources Specialist, who is an OHR staff member and subordinate to OHR Director, the Appellant's attorney, Police Department and OHR staff, and an Assistant County Attorney. The Police Department and OHR representatives were called as witnesses. Presiding over the meetings was OHR Labor Relations Manager, (LERM), also a subordinate to OHR. A proposed findings of fact was sent to the parties on August 9, 1999. On August 18, and 20, respectively, Appellant's attorney and the Assistant County Attorney submitted written comments in response to the proposed findings, both of which were incorporated into the findings. On January 3, 2000, the LERM transmitted to the parties CAO's December 30, 1999 decision, which included the agreed-upon findings of fact, positions of the parties, responses to the findings of fact, conclusions, and disposition. ¹

¹ When the CAO failed to issue a final decision within the 15 calendar day period of time provided in Administrative Procedure 4-4, the Appellant filed an appeal with the Board, which was administrative rejected because of the absence of the CAO's decision. The CAO did issue his decision ten days after the Appellant's initial appeal. Thereafter, the Appellant filed an appeal of the CAO's written decision with the Board, which was accepted. Upon review, the Board has concluded that the Appellant's right to file should not have been diminished by the failure of the CAO to render a timely decision. However, as there is no showing of prejudice to the Appellant because of the delay, the Board does not believe any remedy is required.

ISSUES

1. Was the use of an OHR staff member to conduct the Step 3 fact-finding portion of the grievance procedure improper?
2. Has the Appellant been denied relevant and necessary information and documents to adequately prepare Appellant's grievance presentation to the Board?
3. Was the promotion examination process violative of applicable law or regulation?

ANALYSIS AND CONCLUSIONS

1. Appellant, relying on the decision of the Circuit Court for Montgomery County in the matter of Petition for Review of Master Officer Nancy A. Hudson, contends that the use of Labor/Employee Relations Manager, a subordinate of the OHR Director, to review the grievance at Step III denied the right of merit system employees to be assured of fair treatment (County Code 33-12) and to have their grievances resolved in an environment of impartiality and mutual respect (County Personnel Regulations Section 29-3; AP 4-4).

This same contention had been raised and rejected by the Board in its decision in Nancy A. Hudson, Case No. 99-14, wherein we stated:

Step 3 of the Grievance Procedure provides for a fact finding investigation of the grievance, which is then relied upon by the CAO in order to render a decision. The Appellant is provided an opportunity to review the product of the fact finder and provide comments, which the CAO considers in rendering his decision. There is no showing that this process is inconsistent with the Personnel Regulations or lacking in the ability to issue an unbiased investigative report.

In its review of the Board's decision in Hudson, the Circuit Court noted that the record included not only factual information but also the impressions and conclusions of the person conducting the fact-finding and of OHR Director, "which are perceptually tainted by the appearance of command influence," which the Judge concluded was not cured by the de novo review that the Board accorded. The County has filed an appeal of the Court's decision with the Maryland Court of Special Appeal, which is now pending.

The Board has reviewed the Court's decision and reasoning and concluded, with all due deference to the Court, that it will not apply that decision in this case, because we view it as based on a misunderstanding of the internal grievance resolution procedure.

The merit system law, personnel regulations and AP 4-4 assure grievants that management will review their grievances objectively and impartially within the context of an internal grievance resolution procedure. But it is ultimately **management's** review of the

grievance during the internal grievance resolution process. The CAO, who issues the step III decision, is, after all, the ultimate supervisor of all merit system employees. Montgomery County Code sections 1A-103(b)(3) & (4); 1A-202(b); 1A-204(a)(1); 33-6. MCPR section 29-3 compels the CAO to establish a procedure “for reviewing and processing grievances to assure prompt, objective and impartial resolution **at the lowest level of supervision possible**. Such procedure must provide for . . . review of the grievance by the **immediate supervisor, department head and Chief Administrative Officer** or designee” (emphasis added). This language reflects a basic truism of any **internal** grievance resolution procedure - management is the ultimate decision maker unless and until the procedure provides for de novo review by an outside independent agency (i.e., the Board). We do not believe this language precludes an OHR employee from conducting the step III hearing after a supervisor, the OHR Director, has issued the step II response, anymore than it precludes the CAO, as the ultimate manager and supervisor, from issuing the final step III response. Simply put, an internal grievance procedure allows management to resolve grievances before they arrive at this Board. It should be noted that County Code section 33-8(a), in stating the administrative responsibilities of the CAO with respect to the merit system authorizes, “the (CAO) may designate a representative to implement any or all of the provisions of law or the personnel regulations.”

Also, the Court’s decision does not appear to take into account the role of the Board’s procedure in assuring fairness and impartiality. The Board’s review of cases such as this one is de novo. Appellants’ are permitted to submit any and all matters which they wish to have considered. The fact-finding report prepared by an OHR staffer is but one piece of the Board’s consideration. Appellants, including the Appellant in this case, submit statements of fact, arguments, and exhibits, all of which are considered by the Board. Should the Board find that there are issues of fact necessitating the holding of a hearing, the Board has the discretion to direct such a hearing. (County Code Section 33-12(b) In the instant case, a comparison of the parties’ submission to the Board reveal no genuine disputes of material fact necessitating an evidentiary hearing. Moreover, the Appellant does not allege that the County’s findings of fact are inaccurate. It is noteworthy that in this case, and somewhat universally in cases that come before the Board, there are not allegations of factual inaccuracies in the fact-finding report, only allegations as to whether the facts constitute a violation of law or regulation. Montgomery County Code section 33-12(b). (While the Appellant in this case has requested, as an alternative to a positive decision on the merits, that the Step III decision be vacated with direction to the CAO to assign another designee to hear the Step III grievance, there is not a request for the Board to hold a hearing.)

On the basis of the above, in the Board’s view, the use of OHR staff to conduct the Step III fact-finding procedure is in no way improper and the Appellant’s contentions to the contrary are denied.

2. In contending that Appellant has been denied information and documents to enable adequate preparation of Appellant’s grievance presentation, Appellant generally describes “extant examination materials and score information, such as raters’ instructions, review, comments, and notes for each candidate, identity and test scores of other candidates, and a list of

questions asked and exercises performed.” In support of this contention, the Appellant relies on section 4.4 of AP 4-4, which provides:

Each person who is responsible for presenting or responding to a grievance, or who holds information pertinent to the resolution of the grievance, must provide full disclosure of evidence relating to the grievance, provided that such disclosure is not precluded by law, policy or regulation.

As to the County’s reliance on Section 10-618(c) of the Maryland Public Information Act (MPIA) for denying the request, the Appellant contends that the section cited grants discretion to release test-related information, which the County must exercise in Appellant’s favor based upon section 4.4 of AP 4-4.

In OHR Director’s response to the grievance, the above-reference MPIA provision is cited for the principle that it is permissible to deny inspection of test questions, scoring keys, and other examination information, and it is noted that the Appellant was given the opportunity to review Appellant’s own test scores. In a subsequent communication from the County Attorney where additional materials were provided to the Appellant, note was made of the substantial information already provided the Appellant and it was contended that providing the additional material requested would give those with access an unfair advantage in future exams and jeopardize the integrity of future tests. Additionally, raters were given written assurance of confidentiality.

In the Board’s view, it is clear that the MPIA provides a legal basis for the County to deny the Appellant the requested information about the test. Moreover, to the extent that the County has discretion under the MPIA, the reasons for denial are a compelling justification. More importantly, in the Board’s view, the Appellant has not provided a basis for even concluding that the requested information is relevant and necessary for Appellant’s presentation of Appellant’s grievance. The circumstances relied upon by the Appellant to support Appellant’s contention all have to do with Appellant’s personal experience with the raters. It is purely speculative that information on how the raters may have been instructed, how they related to other candidates, etc., may be relevant to Appellant’s contention as to Appellant’s experience.

The circuit court’s ruling in Hudson is inapposite. In dicta, while the Court acknowledged that the issue “may not be related to the legal questions presented in this appeal,” it opined that the County should have provided the information requested in that case because it would have allowed her “to better determine, understand, and explain how and why the presence of a familiar person in the role-playing exercise affected [the Appellant’s] performance.” The issues in this case is not the presence of a familiar person in a role-playing exercise, but whether undisputed facts constitute evidence of lack of qualifications on the part of the raters. Moreover, discovery in cases before the Board is governed by Montgomery County Code section 2A-7(b), not AP 4-4, and Appellant did not make any discovery requests while this matter was pending before the Board.

On the basis of the above, the Board denies Appellant's argument that the CAO wrongfully refused to release the additional requested test materials.

3. The Appellant's contentions with respect to the promotion process are that the raters were not qualified to assess Appellant's qualifications and were not adequately able to assess Appellant's performance. The specific allegations are:

- The feedback sheets which criticized Appellant's grammar contained grammatically incorrect comments. Examples cited are "(c)ould of (sic) done much more," and "written was pretty good - had some mistakes of (sic) grammar."
- The raters were required to evaluate candidates "eye contact" and "gestures," but during the entire period of Appellant's oral examination the raters had their heads down writing and never observed the Appellant.

The County describes the extensive training given the raters and contends with respect to the specifics alleged by the Appellant that:

- Most people would be more likely to make minor grammatical errors in brief notes that were written quickly and which the writer knew would not be evaluated for grammar than in a written examination exercise that the writer knew was being evaluated for grammar.
- It is difficult to conclude that the Appellant was able to keep three raters in Appellant's peripheral vision, evaluate their eye contact, and concentrate on the oral presentation Appellant was presenting. In fact, it would be easier for the raters, as observers taking notes, to observe the Appellant in their peripheral vision while Appellant was making a presentation to them.

The Board concurs with the Appellant's contention that the County Code and Personnel Regulations mandate that promotional programs ensure that qualified employees be given an opportunity to receive fair and appropriate consideration for higher level positions. The Board however rejects the contentions that the proffered theories and supporting evidence constitute a failure of the subject promotional program to be fair and appropriate. The raters were ranking police officers from area jurisdiction, given substantial training in what the County expecting of them in conducting the rating process. The fact that a couple of the raters notations were less than complete sentences, or even grammatically incorrect, does not constitute a basis for concluding that they were not qualified to judge the Appellant's writing ability. Similarly, while no amount of impartial fact-finding would disclose the extent to which the raters observed the Appellant's "eye contact," the allegation that they did not, is not sufficient for concluding that the raters were not qualified to perform their function.

Accordingly, the Board rejects the Appellant's contention that the promotion examination process was violative of law or regulation, or was in any other manner improper.

ORDER

The Board, having concluded that:

- The use of an OHR staff member to conduct the Step 3 fact-finding portion of the grievance procedure was not improper;
- The County did not improperly refuse to release additional requested test materials; and
- The promotion examination was not violative of law or regulation, or in any manner improper, the appeal is denied.

RECLASSIFICATION

Case No. 00-15

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellants are employed with the Montgomery County Fire and Rescue Service, assigned to the County's Emergency Communications Center. On July 15, 1999, they and two other shift supervisors wrote to the Fire Administrator, requesting that their positions be reclassified as Fire/Rescue Captains. In the memorandum of September 22, 1999, a Deputy Chief informed the Appellants and the two other employees that the appropriate method of review of their positions would be to submit a position description in the June or December window period for individual position classification studies, as provided under the County's administrative procedures.

In early October, the Appellants filed grievances contending that they had been working out of class and were entitled to have their positions reclassified to the rank of Captain. In this regard, the Appellants contended that on a regular and routine basis they performed all the duties provided in the class specification for a Captain.

The Labor Employee Relations Manager (LERM) determined that the issue raised in the complaint concerned position classification, which was not grievable under Administrative Procedure 4-4, Section 4-10 and informed the Appellants that their request required the conduction of a position classification study.

REGULATIONS

Administrative Procedure 4-4, Section 4-10, provides with respect to "Matters Which Are Not Grievable."

- A. Position classification decisions (Section 7-6 of the Personnel Regulations states that final decisions may be appealed to the Merit System Protection Board if there is a violation of the procedures contained in Section 7-5)...

POSITION OF THE PARTIES

Appellants' Position

The Appellants contend that the County has mischaracterized their grievances and this has the effect of requiring a position classification study. Furthermore, the fact that they have the ability to pursue a request for reclassification of their position should not deprive them of the ability to grieve that they are not being paid appropriately, given the duties and responsibilities which they are performing. Additionally, the Appellants contend that the County has previously processed grievances which requested retroactive compensation for "working out of class," and that the County "is estopped and has waived any contention that the matters set forth are not grievable." The Appellants cite the Board's decision in the Case A v. Montgomery County Government, Case Number 99-15, for the proposition that the grievances are grievable.

County's Position

The County maintains that the issue raised in the complaints concern position classification and that the County's grievance procedure is not the proper forum for it. Since it is a position classification issue, a position classification study should be conducted to determine if the positions are properly classified as Lieutenants or if the work that they are performing would be more properly classified as Captains.

ISSUE

Did the Appellants grievances set forth matters which are grievable under the County's grievance procedures?

ANALYSIS AND CONCLUSIONS

In Case A cited by the Appellants, the Grievant was serving in a position that had duties undisputedly performed by a Captain. The Grievant was substituting for an absent Captain. In this instant case, the positions in question are currently classified as Lieutenants. The Appellants' claim that their positions should be classified as Captains. There has not been a classification study conducted to determine that the Appellants' positions are Captains. Accordingly, the Board's Case A decision is not applicable.

The Appellants do not dispute that position classification decisions are not grievable, but contend that they are grieving something other than a classification decision, i.e., that they are not being paid appropriately given the duties and responsibilities that they are performing. It should be noted in this regard, that the Appellants' grievances are at variance with their attempted distinction. Each state in their grievance, "...I have been

working out of class for a substantial period of time when my duties and responsibilities are measured by the Class Specification of the class of Fire/Rescue Captain,” seemingly a contention that their position is not properly classified.

Apart from the language used in the grievances, the Board concludes that the facts clearly show that the grievances are over a classification decision. The Appellants are assigned to positions classified as Lieutenant. They believe that the duties and responsibilities of the positions should be classified as Captain. In the Board’s view, this is exactly what a classification decision is. As the County contends, this is not an issue for the grievance procedure, but to be resolved through a request for a classification review, in accordance with MCPR Section 7-4.

Accordingly, in the Board’s view, the issue in this case is a classification issue and is not grievable under the County’s regulations.

CONCLUSION

Based on the facts and conclusions stated above, the appeal is denied.

In the Board’s view there are no issues of fact necessitating a hearing.

TRANSFER

Case No. 00-10

DECISION AND OPINION OF THE BOARD

FINDINGS OF FACT

The Appellant is a Lieutenant with the Montgomery County Police Department (MCPD). On March 5, 1995, Appellant assumed command of the Technology and Records Division, later to be named Records Division and Central Processing Unit. Appellant remained in that position until Appellant's transfer to the Bethesda District station in March 1998.

On August 1, 1997, Appellant wrote a letter to the Maryland State Police. In the letter Appellant indicated that Appellant had information that several employees in Appellant's Division were following Appellant in an effort to discredit Appellant in some manner. Additionally, certain employees had made allegations to the Office of Internal Affairs and Labor Relations about alleged discriminatory practices.

As a result, Appellant requested an off-line search to find out if anyone had attempted to obtain personal information such as home address, vehicle information, etc. in violation of the Criminal Justice Information System (CJIS) laws. The results of the off-line search revealed that Blank A, an employee of the Telephone Reporting Unit in the Records Division had run an MVA check on Blank B, who was Blank A's immediate supervisor. It was also learned that license and registration checks were run on Blank B and Appellant by Blank C, an employee of the Rockville City Police Department.

Appellant noted in Appellant's letter of August 1, 1997:

"We intend to take administrative action against our own employee, however the Rockville employee does not come under our purview. To stop this type of illegal use of computer systems, and to emphasize the seriousness of these unauthorized and unlawful actions, I respectfully request that an investigation be conducted by the State Police Computer Crimes Unit so that criminal charges in violation of Article 27, Sections 45A and 146 can be initiated in both cases."

On October 20, 1997, Appellant and Blank B filed a civil law suit against Blank A and another employee, also an employee of the Records Division, alleging defamation, tortious interference with business relationships, invasion of privacy and intentional infliction of emotional distress.

On November 11, 1997, MCGEO Local 400 Union filed an Unfair Labor Practices Complaint on behalf of the civilian employees of the Records Division. The Appellant was expressly named in that complaint, along with the County Executive, the CAO, the Chief of Police, Management Services Bureau Chief, and the Supervisor of the Telephone Reporting Unit. A hearing was scheduled for February 19, 1998, to hear the allegations and the responses thereto.

On February 19, 1998, Appellant arrived at the hearing, and was told to have a seat while negotiations were in progress. Negotiations between the County and the Union continued through the morning. At about 1:00 PM, Appellant was advised that Appellant was free to leave because the matter would be continued on February 23, 1998.

Upon Appellant's return to Police Headquarters, Appellant was summoned to the office of Appellant's immediate supervisor. On Appellant's arrival, Appellant was informed that Appellant was being transferred to the Bethesda District station, effective February 22, 1998.

On March 5, 1998, Appellant filed a grievance under Administrative Procedure 4-4, requesting immediate rescission of the transfer, a "name-clearing hearing", a copy of the terms of the agreement reached between MCGEO and Montgomery County as a result of the charge of unfair labor practices, reasonable attorney fees, and any and all applicable relief under the circumstances of this case.

On March 20, 1998, the Police Chief responded to Appellant's grievance. In the response, the Chief stated that the Appellant requested a criminal investigation of two subordinate employees for alleged CJIS access violations without first informing Appellant's supervisor, and that Appellant took this action when the Records Division and its management were being subjected to a great deal of negative scrutiny by the Union (MCGEO).

Grievance meetings were held on December 11, 1998, January 5, 1999, and February 2, 1999, by the CAO's designee, a Human Resources Specialist. In attendance were Appellant, Appellant's attorney, Associate County Attorney, and the Labor Relations Officer for the Police Department. Two others were present as witnesses.

On August 6, 1999, the CAO denied the grievance, noting that Appellant did not meet Appellant's burden to demonstrate that the transfer was arbitrary, capricious, discriminatory, or retaliatory. Additionally, the CAO stated that Management advanced a reason for the transfer that does not appear to be arbitrary or capricious, and there was no direct evidence presented concerning retaliation against the Grievant.

ISSUES

1. Was the decision to transfer Appellant arbitrary, capricious, discriminatory, or retaliatory, or violative of regulations?
2. Are there issues of fact necessitating a hearing by the Board?

ANALYSIS AND DISCUSSION

1. Appellant contends that Appellant's transfer was arbitrary, capricious, discriminatory, and retaliatory in violation of Appellant's rights to procedural and substantive due process of law. Appellant also alleges that Appellant's transfer was without cause and for no valid reason or purpose. Appellant additionally contends that Appellant's transfer was in violation of Section 33-109 (a)(4) of the Montgomery County Code prohibiting the County from discharging or discriminating against a public employee because she or he files charges, gives testimony, or otherwise lawfully aids in the administration of this article.

The County maintains that the transfer of Appellant was rightfully made, and was not arbitrary, capricious, discriminatory, or retaliatory. Appellant's tenure as head of the Records Division was marked by labor unrest. Appellant's supervisor, felt that Appellant was becoming too personally involved and that Appellant had exercised poor judgement in making the decision on Appellant's own to pursue criminal charges against two employees for CJIS access violations. Additionally, the action was taken at a time when the Records Division and its management were being subjected to a great deal of scrutiny by the Union. Appellant's supervisor stated that this was the reason that Appellant was being transferred. The County further maintains that no direct evidence was presented that supports Appellant's contention that the transfer was retaliatory or discriminatory in response to Appellant's filing of a civil lawsuit against the two employees.

The authority to initiate the transfer of an employee is clearly granted by Section 22 of the Montgomery County Personnel Regulations (MCPR). Section 22-1 "Transfer" states in pertinent part:

"Transfer of employees is a prerogative of management and is the movement of an employee from one position or task assignment to another position or task assignment at the same grade and salary levels either within a department/office/agency or between departments/offices/agencies."

The Police Chief exercised that prerogative in transferring Appellant from the Records Division to the Bethesda District station, effective March 1, 1998.

Section 22-6 (MCPR) "Appeal of Transfer" states in pertinent part:

"A merit system employee may appeal an involuntary transfer in accordance with Section 29 of these regulations. The employee must show that the action was arbitrary, capricious, or discriminatory."
(Emphasis Added).

In the Board's view, the evidence presented supports the County's contention that the

transfer was made to abate unrest and a morale problem in the Division. While the Appellant's filing of a civil lawsuit against two County employees may have been a facet of the unrest and morale problem, the record does not support Appellant's contention that the transfer was retaliation for the filing of the suit. Instead, the evidence indicates that the Department was responding to the totality of the situation in the Division. Having concluded that the cause for the transfer was in fact the morale problem in the division, the Board rejects the contention that such a reason is arbitrary, capricious, or discriminatory. Rather, the Department had a reasonable, and possibly compelling cause to exercise the right of transfer set forth in Section 22-1 of the Personnel Regulations. Replacing leadership is a totally understandable response to an organization with the kind of problems that existed in the Division. Personnel Regulations, Section 22-6 does not bar the Department from exercising its right to transfer employees, but provides employees a right of appeal, and the burden to show that such transfer was arbitrary, capricious, or discriminatory, a contention that the Board rejects.

2. Appellant's request for a hearing is based on Appellant's inability to cross examine the Chief, Assistant County Attorney, and a Major, and the contention that such evidence was necessary to enable the Board to determine the cause of the transfer. In the Board's view, there are no issues of fact necessitating a hearing with regard to the reasons for the transfer. As stated above, in the Board's view it is clear that the transfer was responsive to the unrest and morale situation in the Division. In this circumstance, we see no need for additional testimony on the issue of cause for the transfer.

CONCLUSION

In consideration of the reasons stated above, and based on the evidence in the record, the Board hereby denies the appeal.