

Merit System Protection Board Annual Report FY 2002

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Harold D. Kessler, *Vice Chairman*
James B. McDaniel, *Associate Member*

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2002
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 2002 were:

Robert C. Hamilton	-	Chairman (Appointed 1/97)
Harold D. Kessler	-	Vice Chairman (Appointed 2/97)
James B. McDaniel	-	Associate Member (Appointed 1/02)

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 35.3 Appeal Period of the Personnel Regulations (October, 2001). 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

Case No. 01-11

Appellant filed an appeal from the decision of the Labor/Employee Relations Manager, that Appellant's grievance and the relief requested is not a grievable issue under Administrative Procedure 4-4.

The Appellant is a Captain employed with the Montgomery County Department of Fire and Rescue Services (DFRS). On March 15, 2001, Appellant filed a grievance requesting additional compensation for assignment pay as an Emergency Medical Technician – Paramedic with an excess of 8 years service. In Appellant's grievance, Appellant notes a violation of Article 17 of the collective bargaining agreement between Montgomery County and the Montgomery County Career Firefighters Association, IAFF, Local 1664, and additionally indicates that DFRS Directive 99-03 is arbitrary and capricious in nature, and discriminatory in application. Appellant further noted that DFRS Directive 99-03 required documentation of service delivery that was not required of any other class of special service providers, which is inherently discriminatory in nature.

By memorandum dated April 9, 2001, the Division Chief (Chief), denied the Appellant's grievance. The Appellant noted an appeal from that determination. In a memorandum dated April 19, 2001, the LERM determined that Appellant's reference to the Agreement with the IAFF was not relevant, and further determined that Appellant's complaint was not a grievable issue under Administrative Procedure 4-4.

In a letter dated May 2, 2001, Appellant requested reconsideration of the LERM's determination, expressing Appellant's view that the issues were indeed grievable, and requesting that the grievance be processed on the merits. In a memorandum dated May 16, 2001, the LERM again denied Appellant's grievance, as not a grievable issue. Appellant filed an appeal with the Board on May 29, 2001.

ISSUE

Does Appellant's complaint raise issues that are grievable under the County's Administrative Procedures 4-4, (AP 4-4)?

ANALYSIS AND CONCLUSION

Appellant contends that Appellant has not been paid appropriate compensation as an Emergency Medical Technician – Paramedic in violation of Article 17 of the Collective Bargaining Agreement, and further contends that DFRS Directive 99-03 is arbitrary and capricious, and that its application is discriminatory. Appellant cites a number of Board decisions (Cases Nos. 82-118, 83-125, 84-11, 84-60, 84-67, 85-25, 85-29, 85-411, 86-10, 86-32, 86-395, 89-16, 89-20, 91-03, 92-04, 92-06, 99-03, and 99-17), where employees have alleged that their compensation was not in accordance with the Merit System.

The County contends that Article 17 of the Collective Bargaining Agreement is not relevant in the instant case, because as a Fire/Rescue Captain and a representative of management, the terms of the Agreement are not applicable to the Appellant. The County further contends that since Appellant's complaint doesn't allege a misapplication or violation of policy or procedure, as required under AP 4-4, it is not a grievable issue. The County relies on the Board's decision in Case No. 95-10, where the Board stated, in pertinent part:

“The grievance procedure specifically does not provide for review of County Procedures, law, or practice that is not claimed to be in violation of law or regulation or a wrongful act.”

In the Board's view, Appellant's contention that there has been a violation of Article 17 is irrelevant. Although the provisions of Article 17 with respect to compensation have been passed through to Lieutenants and Captains, as representatives of management, the terms of the IAFF Collective Bargaining Agreement are not applicable to them.

AP 4-4 defines a grievance as a formal written complaint by an employee arising out of a disagreement between an employee and supervisor concerning a term or condition of employment in which the employee alleges that he/she has been adversely affected by an action or failure to act by a supervisor which is:

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

Appellant has not claimed a misinterpretation, misapplication or violation of policy, procedure, law, regulation or practice, or that a supervisors' actions against Appellant have been arbitrary and capricious. Appellant's contends that DFRS Directive 99-03 is itself arbitrary and capricious. The Grievance procedure does not provide for review of County procedure, law or practice that is not violative of law or regulation, and therefore is not the proper forum for Appellant's complaint. The fact that the Appellant doesn't agree with an existing directive, in this case DFRS Directive 99-03, is not a valid consideration for the complaint to be considered a grievable issue under AP 4-4.

Section 29-2 (d) of the Personnel Regulations, also cited by Appellant, states in pertinent part, that a grievance may be filed if an employee is adversely affected by an alleged:

“Improper, inequitable or unfair application of the compensation policy and employee benefits, which may include salary, pay differentials, overtime pay, leave, insurance, retirement and holidays.”

As previously noted, Appellant has not claimed a misapplication of policy. Appellant's disagreement with the policy itself, does not make it a grievable issue under Section 29-2.

The Board has reviewed the cases cited by Appellant, and is of the view that they do not substantiate the contentions made. In the Board's view, they deal with whether a policy is violative of law or regulation or the application or interpretation of policy, rather than the content of the policy itself.

Having concluded that the issues raised by the Appellant are not grievable under AP 4-4, the appeal is denied. As there are no issues of fact in dispute, the Board finds no compelling reasons to hold a hearing on this matter, and as the Appellant has not prevailed in his appeal to the Board, the request for an award of attorney fees is similarly denied.

ORDER

In consideration of the reasons stated above, the appeal is denied.

DISCIPLINE

Case No. 02-13

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on appeals filed by Appellants from the decision of the Montgomery County Fire and Rescue Commission (Commission), affirming the authority of the Fire Administrator to impose disciplinary measures on Appellant in addition to those already imposed on the Appellant.

Preliminary Procedural Issues

At a pre-hearing conference conducted by the Board, the Appellants took the position that a hearing was not necessary, nor sought, because the sole issue of their appeals was the legal question of the authority of the Fire Administrator to impose disciplinary measures in addition to those imposed by KVFD. The County has not opposed what, in effect, is a request by the Appellants to waive the right to a hearing. Upon a review of the written record presented in this matter, the Board has determined that the issues before it can be resolved without the holding of an evidentiary hearing. Accordingly, the request of the Appellants to proceed without a hearing is granted.

Appellants have also filed a Motion in Limine, requesting that the Board not consider some 48 of the County's 65 proposed exhibits. In this regard, the Appellants contend that as their appeals go only to the legal authority of the Fire Administrator to order an independent investigation and impose a discipline different than that imposed by the KVFD, the alleged conduct leading to the discipline imposed by KVFD, and the specifics of the discipline imposed, are not at issue. The exhibits which the Appellants request not be considered all essentially go to the alleged conduct and imposed discipline. Inasmuch as the Appellants' appeals do in fact go only to the legal issue of the Fire Administrator's authority, the Board grants the Motion in Limine, except to the extent that it may be necessary to review the documents at issue to properly address the issue of legal authority.

FINDINGS OF FACT

Imposition of Discipline

Appellant is a KVFD volunteer firefighter serving at KVFD Station 18 in the rank of Lieutenant with the Montgomery County Fire and Rescue Service (MCFRS). As a result of certain conduct toward subordinate Firefighters in 2000 and 2001, the Appellant was twice

disciplined by the KVFD. Following an investigation of an alleged third incident, the KVFD found no wrongdoing and did not discipline Appellant further. Following the second investigation, the Fire Administrator directed that an internal investigation be conducted by an investigator he appointed. After a review of the results of the investigations and the sanctions imposed by KVFD, the Fire Administrator directed KVFD to require Appellant to attend certain training and to execute a Memorandum of Understanding that provided that if Appellant engaged in conduct requiring discipline, the Fire Administrator would remove Appellant as a volunteer, disciplinary measures that exceeded those imposed by the KVFD.

Appeal to the Commission

The Appellants appealed the Fire Administrator's imposition of disciplinary measures that exceeded those of the KVFD to the Commission, arguing that the Administrator exceeded the scope of his authority under applicable County law and violated the fundamental rights of the Appellants. The Commission found, without any supporting rationale or legal analysis, as follows:

The Fire Administrator has the right and responsibility to commence an investigation before the local fire and rescue department has completed its findings in response to complaints of violence or threatening violence in the workplace in accordance with Section 21-3(e) and (g) of the Montgomery County Code and the Montgomery County Workplace Violence Prevention Policy.

The Fire Administrator has a duty to provide a safe workplace environment in accordance with the Montgomery County Workplace Violence Prevention Policy.

Based upon the record, the actions taken by the Fire Administrator in the case before the Commission were consistent with the duties and responsibilities of the Fire Administrator under applicable County law and policy.

There is nothing in the Commission decision concerning application of Code provisions raised by the Appellants in the instant case.

Applicable Law and Regulation

Montgomery County Code Section 21-1, Statement of policy; definitions, describes in subsection (a) as legislative intent a fire and rescue program operated by the MCFRS and local fire and rescue departments. To achieve stated objectives, the system is to include:

- (1) Delivery of . . . services through the Division of Fire and Rescue Services and the local fire and rescue departments under the authority of the (Fire and Rescue) Commission as implemented by the Fire Administrator or as otherwise provided by law; and
- (2) Provision of the policy and regulatory framework for the Montgomery County Fire and Rescue Service, including the local fire and rescue departments by a Fire and Rescue Commission, authorized by and acting for the County Government.

Subsection (a) further contains language acknowledging the contribution of volunteers, and the County's vigorous support for the continuation and expansion of volunteers participation.

Subsection (b) describes as the purpose of the Chapter the promotion of goals regarding the provision of fire, rescue and emergency medical services.

Montgomery County Code Section 21-3, Fire Administrator; Division Chiefs, provides, in pertinent part,

(b) The Fire Administrator is the non-uniformed department head of the (MCFRS), and has all powers of a department director. The Administrator must implement the policies of the Commissions and effectively administer all fire and rescue services provided in the County. The Administrator supervises the Chief of the Division of Fire and Rescue Services, Chief of the Division of Volunteer Fire and Rescue Services, and Internal Affairs Officer.

(e) The Internal Affairs Offices is appointed by the Fire Administrator, after receiving the recommendation of the Commission, and must assist the Commission and the Administrator in monitoring compliance with law and County and Commission policies, regulations, and procedures and investigating matters assigned by the Administrator or the Commission.

(g) In addition to any other authority under this Chapter, the Fire Administrator may take disciplinary action against any employee or volunteer in the County Fire and Rescue Service or a local fire and rescue department for violations of law, County policy, Commission policy, or any other order of the Administrator. Disciplinary action under this subsection may include suspension or discharge of an employee and restriction of a volunteer from participating in fire and rescue activities. Each local department must initially administer the discipline of its employees and volunteers, and the Administrator must not take any action involving an employee or volunteer of a local department unless the Administrator finds (under Commission enforcement policies adopted by regulation) that the local department has not satisfactorily resolved a problem in a timely manner. . . . (Emphasis supplied)

Montgomery County Code Section 21-7, Appeals to and from Commission, provides, in subsection (b) for the filing of appeals an order of the Fire Administrator to the Commission, and in subsection (g) for the filing of an appeal of Commission decision to the Board.

Montgomery County Executive Regulations 30-89AMII, Code of Ethics and Personal Conduct, establishes a code of ethics and personal conduct for all fire, rescue, and emergency medical service personnel.

Fire and Rescue Commission Resolution No. 01-06, Interim Policy for FRC Appeals,” adopted July 13, 2000, establishes procedures for hearing and deciding appeals filed by the LFRDs, a Fire and Rescue Service employee, a volunteer firefighter/rescuer, or other aggrieved person. The document, which states that the Fire Administrator recommends its approval, makes no reference to the powers or procedures of the Fire Administrator. *Fire and Rescue Commission Resolution, Approval of Extension of FRC No. 01-06*, adopted July 12, 2001, provides for the extension of the Policy adopted July 13, 2000. By its specific terms, the Interim Policy is for a period not to exceed 180 days.

Council Bill 37-97, Section 4, Transition; Department Organization, provides, in pertinent part,

After this Act takes effect, all references in Chapter 22 and any other law, regulation, policy, contract, or other document to (DFRS) must be treated as referring to the (MCFRS), and all references in Chapter 22 and any other law, regulation, policy, contract, or other document to the Director and (FRS) must be treated as referring to the Fire Administrator. All personnel or other regulations applicable to employees of the (DFRS) or any local fire and rescue department on July 1, 1998, remain in force until otherwise amended or repealed to employees of the (MCFRS) or the local fire and rescue departments respectively.

POSITION OF THE PARTIES

Appellants

The Appellants contend that the Fire Administrator could only impose discipline “under commission enforcement policies adopted by regulation,” and no such regulations existed at the time the Administrator took the actions challenged. Appellants additionally contend that the Fire Administrator took his action prior to the time the KVFD had taken disciplinary action, in violation of the Code’s requirement that the Administrator has no power to take action until the involved Department has imposed discipline. Finally, the Appellants contend that the Administrator acted on his own in initiating an internal affairs investigation, while the Code required that the Commission action is required to initiate such an investigation.

County

The County contends that the proposed additional discipline of Appellant was lawful and reasonable. In this regard, the County contends, in summary, that: (1) The Administrator's action was consistent with Code Section 21-3(g), which permits him to discipline a volunteer firefighter in a case where the local department has not satisfactorily resolved the problem prompting the discipline; (2) To avoid liability under Title VII of the Civil Rights Act of 1964, the Administrator was warranted in taking action against Appellant for engaging in sexual harassment at a County work site; and (3) Appellants mistakenly contend that the Administrator failed to comply with 30-89 AMII in investigating and disciplining Appellant.

As to the Code Section 21-3(g) requirement that the Administrator review cases for consistency with enforcement policies adopted by the Commission, the County notes that "During the period relevant to this case, FRC had not adopted a disciplinary enforcement policy," but argues that when in March 1998, the County enacted 21-1 *et seq.* by the adoption of County Bill 37-97 it inserted a transitional provision, not printed in the Code,

. . . which provides that the County laws, regulations, and policies referenced in (DFRS) and the Director of (FRS) must be treated as referring to the MCFRS and the Fire Administrator, respectively. In other words, Section 21-1 *et seq.* provides the Fire Administrator the same authority to review MCFRS disciplinary decisions that the Director enjoyed with respect to DFRS.

The County argues that the legislative history of 21-1 confirms the intended authority of the Fire Administrator to impose discipline of volunteers, and, apparently, contends that by adoption of County Bill 37-97, vested the Fire Administrator with the authority to take the action in the instant case, without the need for the Commission regulations provided for by 21-3(g).

As to Appellants' contention that the Fire Administrator failed to comply with Regulation 30-89AMII by causing an investigation to be made and disciplining Appellant, the County contends that the document is not a comprehensive disciplinary policy, that it is preempted by 21-1 of the Code, that the Appellants declined an offer by the Fire Administrator to appoint an *ad hoc* committee, and that the Council adoption of Bill 37-97 vested the Administrator with the authority to do what he did.

ISSUE

Whether the Fire Administrator's imposition of disciplinary measures for Appellant in addition to those imposed by the KVFD was violative of law and/or regulation?

ANALYSIS AND CONCLUSIONS

The Appellants have based their appeal solely on the issue of the legal authority of the Fire Administrator to take the action he did, which would be the threshold issue for the Board even if the Appellants had also contested the facts providing the basis for discipline, or whether the discipline imposed was appropriate. Therefore, the Board's decision responds to the issue before it and is not concerned with whether the discipline imposed was reasonable, or whether a failure to impose additional disciplinary measures would have put the County at risk for a complaint under civil rights legislation.

In the Board's view, the law is clear. Code Section 21-3(g) requires that the exercise of disciplinary authority by the Fire Administrator is conditioned on the existence of Commission enforcement policies adopted by regulation, and, as acknowledged by the County, no such policies existed at the time of the Fire Administrator's actions at issue in the instant case. Accordingly, the Fire Administrator's imposition of disciplinary measures for Appellant in addition to those imposed by the KVFD is violative of Code Section 21-3(g).

As for the County's contention of a legislative intent to arm the Administrator with disciplinary authority, the Board does not question such intent. However, the legislative history reflects an intent to balance the interests of the Fire Administrator and the independent fire departments, primarily through the membership of the Commission. Hence, the Code language required that the Commission first adopt policies by regulation before the Fire Administrator exercised the authority that was being granted. Similarly, the Board sees no basis for interpreting the very general non-Code transitional language found in Council Bill 37-97 as affecting the very specific language of 21-2(g), which requires Commission regulations as a pre-condition of the Fire Administrator taking disciplinary action.

The Board makes no ruling on whether the Fire Administrator's initiation of an investigation was also violative of Code Section 21-3. Section 21-3(e) provides for the Fire Administrator to appoint an "Internal Affairs Office" after receiving recommendations from the Commission. Whether the Administrator's appointment of an investigator constitutes an "Internal Affairs Office" is questionable, but the resolution of this issue is unnecessary given the Board's conclusion that the resulting imposition of additional disciplinary measures was unlawful.

With respect to remedy, it appears from the record that the Fire Administrator's imposition of additional disciplinary measures may have been held in abeyance pending the resolution of the Appellants' appeal. If that is so, the appropriate remedy is an order that the Fire Administrator cease and desist from imposing additional disciplinary measures on Appellant, and to purge from Appellant file any reference to the additional disciplinary measures. If the additional measures have been

effectuated, the appropriate remedy is an order that the Fire Administrator purge from Appellant's file any reference to the additional disciplinary measures. Additionally, the Fire Administrator should be ordered to notify in writing Appellant KVFD that he will not impose disciplinary measures unless and until the Commission issues by regulation, policies required by Code Section 21-3(g).

ORDER

The Fire Administrator is hereby ordered to cease and desist from imposing additional disciplinary measures on Appellant, and to purge from Appellant's file any reference to the additional disciplinary measures. If the additional disciplinary measures have been implemented, the Fire Administrator is ordered to purge from Appellant's file any reference to the imposition of additional disciplinary measures. Further, the Fire Administrator is ordered to notify in writing the KVFD that he will not impose disciplinary measures unless and until the Commission issues by regulation, policies required by Code Section 21-3(g).

DISMISSAL

Case No. 01-08

DECISION AND ORDER

This is a decision on an appeal of Appellant's dismissal from the Montgomery County (County) Department of Correction and Rehabilitation (Corrections) for alleged conduct in carrying out Appellant's duties as an Alternative Community Services (ACS) Work Crew Supervisor. A hearing was held before the Board on May 21, June 12, 14, and 27, 2001, during which the County and Appellant, respectively, presented testimony, documentary evidence, and closing statements.

FINDINGS OF FACT

Relevant Employment Background and Conditions

The Appellant has been employed by Corrections since 1985, and, working in guard positions in the County jail, had reached the rank of Master Corrections Officer (MCO). In 1996, Appellant was reassigned from the jail to the ACS program, and in March 1998, became a "Work Crew Supervisor" (Supervisor). The function of the ACS program is to provide supervised community service opportunities. The Appellant worked out of the ACS office located on Ardennes Avenue, Rockville, Maryland, undisputedly an area isolated from general population traffic.

The Appellant's supervision came from ACS Program Manager and from a Workforce Manager. Appellant's daily duty consisted of taking a group of court assigned "clients" from the ACS office in a County van to specified work sites, where Appellant was to "supervise" their work efforts, and then return them to the ACS office. The Appellant's work hours were 7:30 a.m. to 4:00 p.m. The instruction provides for leaving the ACS office with a work crew (Crew) at 8:00 a.m., and returning to the ACS office at 3:30 p.m. It is undisputed that on occasion, a Crew departure on a given morning is delayed while the Supervisor waits for an adequate number of clients to arrive.

Reasons for Termination

In the January 4, 2001, "Notice of Disciplinary Action," the following are alleged as the basis for the action taken, which was effective on January 12, 2001:

- On September 3, the Appellant failed to properly supervise the Crew, particularly with respect to a juvenile who was assigned to the work crew on that day;
- On September 3 and 17, Appellant terminated the work day in violation of required procedures, and without proper authorization;
- On September 3 and 17, Appellant falsified work crew logs;
- During Correction's officials internal investigation of the events of September 3 and 17, the Appellant made false statements.

Set forth below are the County's allegations as to the facts supporting the charges, and the Appellant's version of the allegations relied upon by the County:

Failure to provide proper supervision of a work crew, particularly as to a juvenile

County allegation

On September 3, 2000, a Sunday, the Appellant took the Crew from the ACS office to the Wheaton Triangle/Georgia Avenue area where they were to perform clean up duties in and around specified parking lots, and along both sides and the median strip of a specified length of Georgia Avenue. The Crew consisted of four males, all over 18 years of age, and a 14 year old female (Juvenile).

According to documents provided by the County, on September 4, the Juvenile's father called the ACS office, to inquire as to whether his daughter would get credit for her September 3 community service, as no staff member had signed her time card on that day. In the course of this telephone conversation, the Juvenile's father expressed concern over the fact that she had been dropped off along Georgia Avenue and left alone with four adult males, with the Appellant only periodically driving by. He further contended that the Crew had returned to the ACS office early and that his daughter had been left alone outside the building for him to pick her up. The Juvenile's father's allegations were reported through ACS management, who caused an investigation to be conducted by Correction's Central Processing Unit.

In support of the contention that the Appellant did not properly supervise the Crew, the County cites:

- The January 21, 2000 supervisory memorandum to the Appellant, which describes the "general duties of a work crew supervisor," and states, in pertinent part:
- To actively supervise the ACS clients on job sites at all times.

- To pay full attention to ACS client workers to ensure they are performing work assignments as required.
- The March 28, 2000 “Guidelines for Community Work Crew Supervision,” which provide, in pertinent part:
 - Correctional staff shall remain in close proximity to work crews at all times.
 - Correctional staff shall not leave work crews unsupervised.
- The June 19 supervisory “Interim Work Evaluation” of the Appellant, which identifies “Deficiencies and Areas of Improvement,” one of which is described as,

Ensure you monitor and control work crews to operate in a safe and secure manner. Maintain supervision and control of work crew offenders at all times, including breaks and lunch periods. Practice sound supervision and offender control techniques in accordance with DOCR Policies and Procedures.

Appellant response

The Appellant contends that pursuant to supervisory instructions for carrying out the particular work that the Crew performed on this date, Appellant was permitted to “split up the crew,” so that, for example, some of the Crew might be at one parking lot, while the others were at an adjacent one. Appellant states that Appellant would then be in a position so that Appellant could view both work sites. When the Crew proceeded from the parking lot areas to clean the Georgia Avenue area, consistent with the permitted practice of splitting up the crew, Appellant put two Crew members on each side of the street, with one in the grass median. The Juvenile was on the sidewalk on the east side of Georgia Ave. As the Crew proceeded north, Appellant would drive the van along the curb lane of the east side of Georgia Avenue. Appellant contends that except for occasions when the traffic would force Appellant out of the curb lane, the members of the Crew were always in Appellant’s sight. Appellant testified that on occasion, because of traffic, Appellant would have to proceed ahead, but would then go around the block and be back adjacent to the Crew.

Appellant contends that Appellant’s manner of supervising the Crew, including the Juvenile, was consistent with written guidance and general practice, noting in this regard that no special instructions exist with respect to the supervision of juveniles.

The Appellant does not dispute that Appellant left the Juvenile alone outside of the ACS office, testifying that Appellant let the Juvenile into the office to telephone her father, and offered to let her wait for her father in the office, or to give her a ride home, but that the girl stated that she had telephoned her father to pick her up, that they lived

only a short distance away, and that he would be there in just a few minutes. The Appellant testified that there is no policy regarding responsibility for clients after their work day. In fact, clients are free to get to a work site without reporting to the ACS office, and then leave a work site without going back to the ACS office.

Failure to work the required work day and falsification of work crew logs and reports

Hours of work requirements

The Guidelines for Work Crew Supervisors provide, in pertinent part:

- All clients are required to work the full shift to earn credits for work hours.
- All work crews participants will work a minimum of 6 ½ hours and a maximum of eight hours.
- Crews may be released early at the discretion of the Program Manager or supervisor.
- Crew supervisors must contact the Workforce Manager or Program Manager if ever they are uncertain of their assignments for the day.

September 3

County allegation

On the basis of the Juvenile's father saying that the Work Crew had returned early, the scope of the investigation included that issue. The Juvenile's father informed the investigator that his daughter called him between 2:00 and 2:15 p.m. to tell him to pick her up. Access to the ACS office, and to areas within the building, require the use of a security card, and, when used, the system produces an "events log" showing the date and time of entry, which door was entered, and the name of the person's whose card was used. The system also logs any exit from the building, but not the identity of the person exiting. The events log for September 3 shows that the Appellant entered the ACS office at 1:58 p.m., and again at 3:32 p.m. An employee of the Pre-release center, from where the Appellant had gotten the van used on September 3, testified that they saw the Appellant at the Center at 2:40 p.m.

Appellant response

At the hearing, the Appellant did not dispute the accuracy of the events log showing Appellant entering the ACS Office at 1:58, and testified that Appellant had released the Crew

prior to entering the building. Appellant does not dispute that Appellant took this action without the approval of one of Appellant's supervisors. Similarly, Appellant does not dispute that what was written on Appellant's log was an inaccurate account of Appellant's activities on September 3. Further, Appellant does not contest that Appellant's actual work day was inconsistent with instructions for the work day. Appellant offers up the following as explanations/defenses for Appellant's actions:

- Terminating the Crew shift early is not uncommon when circumstances dictate such actions, and on the day in question, the Crew had finished its duties, and it was raining hard and everyone was getting wet. In this regard, logs from Appellant's work days and other Crew Supervisor show many examples of the early termination of a work day.
- As a Crew Supervisor, it was within Appellant's authority to terminate the work day early and it was not required that Appellant get the approval of one of Appellant's supervisors.
- Appellant has always had trouble with numbers/time.
- Logs are frequently filled out at the end of the work day, rather than while events are taking place, and the misinformation was inadvertent.

September 17

County allegation

On this date, a Sunday, Appellant was scheduled to work Appellant's regular 7:30 a.m. to 4:00 p.m. shift. That morning, the Appellant found that the keys to the van Appellant was supposed to use were in a locked office. Appellant telephoned the Program Manager at home to report the situation, and Program Manager made arrangements to have another staff member come in and get the keys to the Appellant. According to the Program Manager, shortly after completing the last conversation with the Appellant, apparently as a result of Appellant having inadvertently hit the "redial" button on Appellant's cell phone, the Program Manager got another call from Appellant and overheard a client ask, "How long are we working today?" The Program Manager then heard the Appellant say, "It will be a short day, my foot hurts." The Program Manager testified that they tried to talk to the Appellant through this telephone connection, but Appellant did not respond.

The Program Manager testified that because of the overheard remark by the Appellant that morning about ending early, at approximately 3:25 p.m. on that day, the Program Manager stopped by the ACS office and was unable to locate the Appellant either in or outside the ACS office, or find Appellant's personal car in the parking lot. The building access event log from

that date show that the Appellant's access card was used to gain entry into the office at 3:02 p.m. Appellant's Work Crew Log for September 17, states, in pertinent part, "3:15 back at ACS."

Appellant's Response

The Appellant does not dispute the accuracy of the events log showing Appellant entering the ACS Office at 3:02 p.m., and Appellant acknowledges that Appellant released the Crew prior to entering the building. The Appellant testified that while the Crew was performing their duties, Appellant began to experience an unanticipated menstrual situation affecting Appellant's clothing and requiring the immediate obtaining of feminine hygiene products. Appellant states that Appellant returned to the ACS office, released the Crew, and went to a nearby convenience store to purchase the products Appellant needed. Appellant acknowledges that when the Workforce Manager called at 3:07 to check on the status of the Crew, Appellant was actually back in the ACS office and did not tell the Workforce Manger the truth.

Lying during the investigation

County allegation

On September 18, the Appellant was interviewed by two supervisors in the presence of Appellant's union representative. In that meeting, Appellant contended that on September 3 and 17, Appellant left the ACS Office between 3:50 and 4:00 p.m. Following the interview, the union representative told the supervisors that the Appellant had told the representative that on September 17, Appellant had actually gone to the grocery to purchase cigarettes after releasing the Crew and had then returned to the ACS Office at 3:45.

On September 21, the Appellant was interviewed by the investigator, as part of the investigation. During the interview, Appellant contended that the times written on Appellant's logs were accurate, to within 15-20 minutes. When confronted with the Events Logs, Appellant responded that Appellant could not explain the discrepancies. The Appellant informed the investigator that upon returning to the ACS Office on September 17, Appellant had gone to the grocery to purchase other products, sometime around 3:20 p.m. As to why the supervisor could not find Appellant when supervisor went to the ACS office at about 3:25, the Appellant informed the investigator that around that time Appellant was sitting in the car smoking a cigarette. The supervisor testified that if Appellant would have been parked on the street in the vicinity of the ACS office, the supervisor would have seen Appellant.

Appellant's response

In Appellant's testimony at the hearing, the Appellant denied any intention to be unresponsive and attributed any comments during the investigation that may have been at variance with the truth to:

- Lack of certainty about times;
- Mistakes;
- A reluctance to discuss a personal problem.

Prior Discipline

The record contains the following evidence of disciplinary actions/communications taken toward the Appellant:

March 2, 2000, Memorandum of Concern addressing allegations of taking a crew to unapproved work projects, three occasions of returning from work sites early, not following instructions, failure to attend a schedule meeting, and failing to demonstrate problem solving skills.

March 29, 2000, Second Memorandum of Concern and Work Expectation, which references concerns stated in the March 2 Memorandum and addresses allegations of failing to perform an assigned work project. This Memorandum also sets forth “current expectations,” and future “methods of evaluation.”

June 5, 2000, Counseling Memorandum, addressing allegations of failures in maintaining proper safety, staff appearance, preparation for a project, and organization of a work area.

June 19, 2000, Interim Work Evaluation - Statement of Expectations, which alleges deficiencies in the areas of security, safety, communications, work assignments, maintenance and equipment, appearance and uniforms, and staff supervision. The Memorandum concludes with the warning, “Your current substandard level of work performance must be totally resolved within the forthcoming ninety (90) days, or you will be removed from this post assignment.”

APPLICABLE REGULATION

Relied upon by County

County Personnel Regulation Section 12-3, which provides:

- (b) It is the responsibility of each employee to be at work during scheduled hours unless an absence is approved by the supervisor of the employee or other authorized individual in accordance with established procedure.

(c) An employee who fails to report for duty as scheduled or who leaves the work site prior to the end of the scheduled work day without the approval of a supervisor, will be:

- (1) considered absent without leave;
- (2) placed in a non-pay status for the period in question; and
- (3) subject to appropriate disciplinary action or termination.

County Personnel Regulation Section 28-2, Causes for disciplinary action provides, in pertinent part:

- (g) Insubordinate behavior by failure to obey lawful directions given by a supervisor;
- (h) Violations of an established policy or procedure;
- (i) Negligence or carelessness in the performance of duties;
- (p) Knowingly making false statements or reports in the course of employment;

Montgomery County Department of Correction and Rehabilitation Departmental Policy and Procedure Manual:

VI. Department Rules for Employees, D, "Specific Department Rules":

2. Compliance with Orders:

a. Employees shall obey a superior's lawful order. If a superior issues an order which conflicts with a previously issued order or directive, the employee shall respectfully call attention to the conflicting order and if not rescinded by the superior, the order shall stand. Responsibility for the order shall rest with the issuing superior and the employee shall not be answerable for disobedience of any previously issued order.

4. Integrity of the Reporting System:

Employees shall submit all necessary reports in accordance with established department procedures. These reports shall be accurate, complete, and timely and shall be submitted before the end of the employee's tour of duty wherever possible.

5. Punctuality:

a. Employees shall be punctual in reporting for duty at the time and place specified by their supervisors.

- b. No employee shall be absent from duty without leave or without authorization from his/her supervisor.

9. Conduct Unbecoming:

- a. No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, dishonest or improper conduct.
- b. Examples of conduct unbecoming include falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, misuse of a police radio, and the failure to cooperate with an internal investigation.

10. Neglect of duty/unsatisfactory performance:

Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee's rank, grade, or position.

14. Untruthful Statements:

Employees shall not make untruthful statements, either verbal or written, pertaining to official duties.

Other relevant regulations

Montgomery County Personnel Regulation Section 28-1. Policy, 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. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record and other relevant factors.

ISSUES

1. Does the manner in which the Appellant supervised the work crew, specifically the Juvenile, on September 3 provide a basis for discipline?
2. Does the Appellant's conduct as to the hours worked on September 3 and 17 provide a basis for discipline?
3. Does the manner in which the Appellant filled out work crew logs on September 3 and 17 provide a basis for discipline?
4. Does the manner in which the Appellant responded to an official internal investigation provide a basis for discipline?
5. What is the appropriate discipline for any conduct by the Appellant found to provide a basis for discipline?

POSITIONS OF THE PARTIES

County

The County contends that the record sustains that the Appellant violated applicable regulations, supervisory instructions, and proper procedure: in the manner in which Appellant supervised the Crew, particularly the Juvenile, on September 3, 2000; in Appellant's failure to work required hours on September 3 and 17, 2000; in falsification of work logs; and in making false statements in an internal investigation. The County further contends that the Appellant's conduct with respect to the supervision of the Crew on September 3, 2000, created a safety risk warranting termination even in the absence of progressive discipline.

Appellant

The Appellant essentially contends that the County has not sustained the burden of proof as to the matters relied upon for Appellant's termination. In support of this, the Appellant seeks to demonstrate that the manner in which Appellant supervised the Crew on September 3, terminated the work day on September 3 and 17, and filled out the work logs, were consistent with past practice, and not inconsistent with applicable regulations and instructions. Further, Appellant contends that any errors in filling out logs and responding to questions were inadvertent mistakes, and that while Appellant should not have lied about the circumstances surrounding the early return of the work crew on September 17, there were reasons for not being candid. The Appellant also contends that the weakness of the County's case demonstrates that the County sought to terminate Appellant for reasons other than those relied upon in the termination notice. Finally, the Appellant contends that any misconduct engaged in did not

present a safety risk and was insufficient to sustain the non-progressive termination of an employee with 16 years service.

ANALYSIS AND CONCLUSIONS

1. Applicable regulations and supervisory instruction require that in carrying out Appellant's supervision of the Crew that the Appellant "actively supervise . . . at all times," "pay full attention," "remain in close proximity," "not leave . . . unsupervised," ". . . monitor and control work crews in a safe and secure manner," and "Maintain supervision and control . . . at all times, including breaks and lunch periods." While the message of these instructions is clearly one of diligence and attentiveness, usually requiring constant visual contact, in the Board's view, the factual setting permitted the Supervisor to exercise judgment in how the supervision was carried out, and some deviation from constant visual contact. Management acknowledges that when a Crew is cleaning the multi-level garage in the assignment area, the Crew can be split among floors. Similarly, when they clean adjacent parking lots, the Crew can be split. When they are cleaning Georgia Avenue, accepted practice was to split the Crew on different sides of a divided six lane road.

There are differences in the County and Appellant's version of how Crew supervision was accomplished as the Crew did their work on Georgia Avenue on September 3. The County, which has the burden of proving violative conduct, relies on hearsay evidence and has Appellant "driving by" periodically, while otherwise being at some unknown location. The Appellant describes self as basically following the Crew on one side of the street, although periodically being required by traffic to circle the block. It seems from management testimony, that if Appellant did what Appellant describes doing, Appellant's manner of supervising the Crew was acceptable procedure. No one contradicted the Appellant's testimony that the person who trained Appellant told the Appellant could remain in the van, and no one ever told the Appellant that the manner in which Appellant supervised the Crew's cleaning of the Georgia Avenue area was incorrect. As for the fact that one member of the Crew was a juvenile, there were no separate instructions for juveniles and treating the Crew as a totality when doing the cleaning duties was standard procedure. Based on the totality of these considerations, the Board concludes that the County has not sustained that the manner in which the Appellant supervised the work Crew in its September 3 cleaning duties on Georgia Avenue provides a basis for discipline.

The second aspect of whether the Appellant's supervision of the Crew provides a basis for discipline is the leaving of the Juvenile unattended outside of the ACS office. Leaving the Juvenile unattended is, of course, contrary to all of the above described requirements of how the Crew is to be supervised. Once Appellant left the premises, there was no active supervision, no paying of full attention, no remaining in close proximity, etc. The Appellant excuses this conduct by arguing that responsibility for the Crew ended when they have concluded their work day, and that the Juvenile informed the Appellant that it was alright to

leave because her father would be there shortly. As for the first of these proffered excuses, it was not in fact close to the end of the work day. The Appellant had returned to the ACS office by 2:00 p.m., a matter dealt with later in this decision, but, the Board concludes, Appellant actually had some responsibility for the Crew until the 3:30 p.m. time when the Crew was authorized to be released, which is when the Juvenile's father was to pick them up. As for the fact that the Juvenile told the Appellant that Appellant could leave because the father would be there soon, this, in the Board's view, did not excuse the Appellant from Appellant's responsibility. While we have noted that the Appellant can exercise some judgment in the manner in which Appellant supervised the Crew, and that there are not separate instructions for supervising juveniles, such judgments must be consistent with the intent of the instructions and must meet a test of reasonableness. Leaving the Juvenile alone in an isolated area, such as that where the ACS office is located, does not meet that test. Accordingly, the Board concludes that the circumstances of leaving the Juvenile Crew member alone at the ACS office does provide a basis for discipline.

2. Appellant's assigned hours are to have the work crew back to the ACS office at 3:30 p.m., and to be able to leave at 4:00 p.m. While the Appellant initially disputed allegations that Appellant had not worked the appropriate hours on September 3 and 17, at the hearing Appellant acknowledged that on the 3rd, Appellant returned the Crew to the ACS office by 2:00 p.m., and left the area shortly thereafter. While Appellant's activities between 3:00 and 4:00 p.m. on the 17th are in dispute, it is undisputed that Appellant was back at the ACS office at 3:02 p.m. Accordingly, without supervisory permission, on both dates the Appellant failed to work the Crew the appropriate number of hours, and to work Appellant's own required number of hours. The question then is whether there were circumstances that keep this conduct from being a basis for discipline.

The Board rejects each of the defenses offered up by the Appellant for Appellant's conduct. It may well be that the Appellant, or others performing similar work, periodically end the work day earlier than the appropriate time, but there is no support for the contention that such action is an acceptable practice, without obtaining approval from higher supervision. This requirement had been clearly communicated to the Appellant not only by the guidance for Appellant's position, but in memoranda of concern and work evaluations. Similarly, it may be that the rain on the 3rd and the personal problem on the 17th, provide a justification for ending the day early, but the Appellant acted without supervisory approval. Appellant not only didn't seek approval, but apparently recognized that it was improper, as evidenced by keeping the fact that Appellant had done it from Appellant's supervisor's, i.e., putting incorrect information on the log and responding falsely to the telephone inquiry as to where Appellant was. It is true that the instructions provide for coming in early with supervisory approval, and the Appellant's title contained the word "Supervisor," but the Board is not of the view that Appellant's title granted discretion to leave the work site early without approval from one of Appellant's supervisors. Again, Appellant apparently recognized this, as evidenced by Appellant's attempts to keep secret that Appellant had left the work site early.

Accordingly, based on the above, the Board concludes that Appellant's ending of the work day early on September 3 and 17 provides a basis for discipline.

3. The Appellant was required to maintain daily logs for the purpose of documenting Crew activities. The record contains considerable discussion on such aspects of the maintenance of the logs as whether they are to be filled out as the daily events unfold, or can be filled out at the end of the day; whether the use of different colored pens on the September 3 log is evidence of some improper procedure; and whether people filling out logs routinely round off the time of entries. However, the unassailable facts are that on both September 3 and 17, the logs filled out by the Appellant did not accurately document the crews activities. The September 3 log has the Appellant returning to the ACS office at 2:50, when the building events log and the testimony of witnesses prove that Appellant was back prior to 2:00 p.m. The Appellant's September 17 log shows "3:15 back at ACS," while the building events log and testimony of witnesses prove that Appellant was back prior to 3:02 p.m.

The Board finds unacceptable such proffered explanations that the misinformation on the logs were the result of "trouble with numbers/time," or an inadvertence resulting from filling out the logs after the fact. The log errors at issue were events at the end of the work day, which were immediately before the logs were completed. It can only be concluded that the misinformation was a deliberate act to mask terminating the work day early. In the Board's view, the Appellant's falsification of the work logs provides a basis for discipline.

4. As described above, applicable regulations required that the Appellant should not:

- knowingly make false statements or reports in the course of employment;
- falsify a written or verbal report; or
- make untruthful statements . . . pertaining to official duties.

The undisputed facts disclose that the Appellant did not truthfully respond to questioning from supervisors Blank and Blank as to when on September 3 and 17 Appellant terminated the Crew activities, first insisting that Appellant had in fact not left work until shortly before 4:00 p.m., and then, through Appellant's union representative, changing the September 17 story to having gone to the grocery to buy cigarettes. When interviewed by the investigator, the Appellant at first insisted that the logs were correct, and then, when confronted with the events log, changed the story, at least as to the 17th, to going to the grocery store to buy personal products and, thereafter, that Appellant was sitting in the vehicle smoking a cigarette.

The Appellant seeks to explain away these inaccuracies by either denying that they were done "knowingly," or seeking to attribute it to a reluctance to discuss Appellant's personal problem. In the Board's view, the totality of the evidence supports that the incorrect responses were deliberate falsifications. As noted above, the Board has concluded that the Appellant's

falsification of the work logs was clearly deliberate, done to hide from Appellant's supervisors that Appellant had ended the work day early. When confronted with allegations and evidence that Appellant's logs were incorrect, Appellant's pattern was to provide answers that were untruthful. It was not as if Appellant were having to reconstruct long past events. Blank and Blank interviewed Appellant on September 18 and the investigator interviewed Appellant on September 21. While the Board has no reason to disbelieve the story about having to buy personal products, or even the contention about a reluctance to tell Blank about this personal problem, when Appellant subsequently used Appellant's union representative as a source of information, the reason was cigarettes.

In considering whether the manner in which the Appellant responded to an official internal investigation provides a basis for discipline, the Board gives considerable weight to a factor that will be discussed further in determining the appropriate discipline, that is, that Appellant was a corrections officer, involved in the carrying out of public safety functions. While all public employees must be held to a high standard of trust, in the Board's view, public safety employees have an even higher standard to participate fully and truthfully in an internal investigation. Therefore, the Board concludes that the manner in which the Appellant responded to an official internal investigation provides a basis for discipline.

5. The Board has concluded above that there are bases for discipline provided by the leaving of the Juvenile alone at the ACS office on September 3, the ending of the work day early on September 3 and 17, the falsification of work logs on September 3 and 17, and the manner in which Appellant responded to an official internal investigation. Of the conduct alleged in the Notice of Discharge, only that portion related to how the Crew was supervised as it cleaned the Georgia Avenue area was not sustained.

In the Notice of Disciplinary Action, in summarizing why the alleged conduct supports dismissal, the County concluded, in pertinent part,

Your actions as noted above have made it evident that you cannot be entrusted with the supervision and well being of the offenders who are assigned to the (ACS Crew).

. . . Your actions in . . . make you unsuitable for continuation in the position of Correctional Officer, a position that requires honesty and trustworthiness. Correctional Officers are responsible for the safety and well being of persons entrusted by the Courts to their care and supervision.

The Board concurs that the fact that the Appellant is a correctional officer must be considered in determining the appropriate discipline for the proven conduct. The Board also realizes that while some of the items relied upon for discipline may seem less than serious, e.g., bringing the Crew in some 90 minutes early on a rainy day, the discipline must be judged on the basis of the totality of the proven conduct that provides a basis for discipline. The Board

concludes that the totality of the proven conduct is not acceptable for a corrections officer, a category of employee who operates without on-sight supervision, is accountable for persons who are the responsibility of the County, and who has an important public safety mission. The Appellant failed to supervise a Crew member, who was a juvenile, in a manner consistent with guidelines and instructions; ignored clearly proscribed rules for both the Crew's and Appellant's own work day; falsified required recordation documents to cover up Appellant's improper conduct; and, failed to tell the truth during an internal investigation, a very serious breach of very specific applicable regulations. The Board concludes that this conduct by the Appellant, a corrections officer, makes termination the appropriate discipline.

As quoted above, Montgomery County Personnel Regulation Section 28-1 provides, in pertinent part, that except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary action must be progressive in severity. The County seeks to meet this test by arguing that the manner in which the Appellant supervised, or didn't supervise, the Juvenile, created a safety risk that is the exception to the progressive discipline requirement. The County also argues that retaining a corrections officer who has engaged in the type of conduct attributed to the Appellant creates such a safety risk. While the Board does not minimize the potential risk to the Juvenile in the circumstances presented, we are not convinced that this incident alone is sufficient to meet the exception provided in Section 28-1. As to the contention going to possible future conduct by the Appellant, while the Board has agreed that the Appellant's conduct is not appropriate for a corrections officer, we are not basing approval of Appellant's termination on a prediction of how Appellant might comport oneself in the future. Rather, the Board concludes that discharge is appropriate even in the absence of a finding of the creation of the type of safety risk described in Section 28-1.

The Board has stated with respect to the regulatory requirement of progressivity in discipline,

Notwithstanding its imperative wording, in the Board's view, the language . . . does not provide an absolute ban on a penalty without there having been a prior less severe penalty. The language on progressive discipline must be read in conjunction with the sentence which follows that conveys discretion in the selection of penalty after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors. To interpret the language at issue as always requiring evidence of a prior less severe discipline would lead to the unreasonable interpretation that management could not select any of the disciplines listed in Section 28-3 without first imposing a lesser discipline.

While concluding that Section 28-2 does not provide an absolute ban on a discipline without there having been a prior less severe penalty, the Board views the imperative as placing on the County a rather significant burden of proof that the selection of penalty, and the rejection of less penalty, is justified by all of the circumstances of the situation.

This is particularly true when the discipline at issue is dismissal. (Danny L. Johnson and Montgomery County Government, Case No. 00-22, December 4, 2000)

It should be stressed at the outset of this discussion, that the Appellant was not without prior discipline with respect to Appellant's conduct as a Work Crew Supervisor. Appellant received Memoranda of Concern on March 2 and 29, June 5, and a June 19 evaluation that concludes with the warning of possible removal. These documents, which speak to the type of conduct that led to Appellant's dismissal, were, in effect, "written reprimands," which are the second listed type of disciplinary action in Personnel Regulations Section 28-3.

While there has been no level of discipline between written reprimand and discharge, the imperative for progressive discipline does not provide an absolute ban on a penalty without there having been a prior lesser penalty. Rather, the penalty must be selected after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors. The conduct found by the Board to have been committed by the Appellant was grave, a corrections officer failing to follow procedures with respect to the task of supervising the Crew, falsifying records, and failing to tell the truth in an internal investigation. Most importantly, Appellant's offenses went to the core of Appellant's duties and responsibilities as a corrections officer. Although, while the Appellant had a good work record prior to becoming an ACS Supervisor, Appellant's performance in Appellant's current position had led to written reprimands and a poor evaluation. On the basis of the above, the Board concludes that notwithstanding the absence of a discipline more serious than written reprimand, dismissal is appropriate in the circumstances presented.

ORDER

On the basis of the above, Appellant's appeal of dismissal from County employment is denied. As the Appellant has not prevailed on the merits, the request for attorney fees and costs is denied.

Case No. 01-08

SUPPLEMENTAL DECISION AND ORDER

This is a supplemental final decision and order of the Montgomery County Merit System Protection Board (Board) on the appeal of Appellant from Appellant's dismissal from the Montgomery County (County) Department of Corrections and Rehabilitation (Corrections) for conduct in carrying out Appellant's duties as an Alternative Community Services (ACS) Work Crew Supervisor. This matter is currently before the Board following a remand Order by the

Circuit Court for Montgomery County (Court). (Circuit Court for Montgomery County, Civil No. 224779-V, June 10, 2002)

Board and Court Decisions

In its original decision, the Board concluded, in pertinent part, that there were bases for discipline provided by Appellant's conduct, specifically,

Leaving a Juvenile Crew member alone at the Alternative Community Service office;

On two occasions, without supervisory permission, failing to work the Crew, and themselves, the required number of hours;

On two occasions, deliberately falsifying work logs to mask terminating the work day early;

Failing to respond truthfully to an internal investigation of Appellant's conduct. The Board noted that the fact that the Appellant was a corrections officer must be considered in determining the appropriate discipline for the proven conduct, and concluded, ". . . that the totality of the conduct is not acceptable for a corrections officer, a category of employee who operates without on-sight supervision, is accountable for persons who are the responsibility of the County, and who has an important public safety mission." On that basis, the Board found that termination was the appropriate discipline.

At issue with respect to the appropriateness of termination was what at the time was Montgomery County Personnel Regulation Section 28-1, which provided that except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary action must be progressive in severity. While the Board concluded that they were not convinced that the conduct found was sufficient to meet the exception provided in Section 28-1, it was concluded that discharge was still appropriate, quoting its precedent that Section 28 does not provide an absolute ban on a discipline without there having been a prior less severe penalty. It was then noted that the Appellant ". . . was not without prior discipline with respect to Appellant's conduct as a Work Crew Supervisor," listing three Memoranda of Concern and an evaluation which concluded with a warning of possible removal. The Board concluded, "These documents, which speak to the type of conduct that led to Appellant's dismissal, were, in effect, 'written reprimands,' which are the second listed type of disciplinary action in the Personnel Regulations Section 28-3." As to the absence of discipline between written reprimand and termination, the Board concluded that, ". . . notwithstanding the absence of a discipline more serious than written reprimand, dismissal is appropriate in the circumstances presented."

On appeal, in its review of the Board's decision, the Court concluded,

As a matter of law, the Court holds that the memoranda of concern and the interim evaluation given (the Appellant) do not constitute written reprimands or other discipline. Therefore, the (Board) erred in considering the memoranda and interim evaluation to be discipline in determining the appropriate disciplinary sanction to be imposed on (the Appellant).

Because of the (Board's) legal error in considering the memoranda of concern and interim evaluation as evidence of prior discipline, the decision of the (Board) affirming the dismissal of (the Appellant) is therefore REVERSED. This matter is REMANDED to the (Board) which is directed to determine - in light of the Court's ruling that the officer had no prior reprimands - whether dismissal is still appropriate, or what other sanction, if any, is appropriate under the circumstances and consistent with the Court's ruling.

The Court did not reverse any of the Board's findings with respect to the Appellant's conduct that provided a basis for discipline.

Positions of the Parties

Following receipt of the remand, the Board ordered the Parties to file briefs on the “. . . issue of what is the appropriate discipline for the conduct of the Appellant found to provide a basis for discipline, without consideration of any prior communication as discipline.” The positions reflected in those briefs are:

County

The County contends that there is more than sufficient evidence in the record to support the Appellant's dismissal even without prior discipline. The County notes that during the appeal hearing, the Court stated that there can be instances of such a nature where the discipline need not be progressive, and that the Court did not find that the Board could not consider at all the Memoranda of Counseling and evaluation. The County argues that these communications put the Appellant on notice about conduct ultimately leading to Appellant's discharge. Finally, the County argues that as the Court did not dispute the offenses found by the Board, the Board should affirm its prior determination that the Appellant, under the totality of the circumstances, was appropriately dismissed.

Appellant

The Appellant contends that in light of Appellant's discipline-free record, and compared with the discipline given by the Department in similar cases, dismissal is an extreme and arbitrary sanction. In support of this position, the Appellant provides data obtained from the County Office of Human Rights (OHR) setting forth arguably analogous “Offenses,” “Prior Discipline,” and “Final Discipline,” of disciplined employees in the Department. Appellant argues that the Department has not disciplined “more egregious” behavior with the sanction of

dismissal. Appellant concludes that the appropriate penalty should be determined at a minimum in the context of all of the possible penalties available under the progressive discipline system. Noting one incident from the OHR data where the employee received a 15-day suspension for conduct arguably analogous to that attributed to the Appellant, it is contended, “The circumstances of this case warrant at most the same punishment - a 15-day suspension.”

Appellant has requested an oral argument before the Board on the issue of the appropriate discipline.

ISSUE

What is the appropriate discipline for conduct by the Appellant found to provide a basis for discipline?

ANALYSIS AND CONCLUSIONS

In the initial decision in this case, the Board concluded that the conduct found to be improper was sufficient to justify the penalty of discharge. However, the Board recognized the application of the Section 28 requirement for progressive discipline, except in specified circumstances, which the Board found were not present in the Appellant’s conduct at issue. The Court has stated that “as a matter of law,” that the memoranda of concern and interim evaluation, which the Board found were “in effect, ‘written reprimands’,” “do not constitute written reprimands or other discipline,” and directed the Board to determine whether dismissal is appropriate “in light of the Court’s ruling that (the Appellant) had no prior reprimands.” In carrying out the Court’s Order in the instant case, the Board does not interpret the Court’s decision as requiring in all circumstances that a written conveyance of negative comment about an employee must be titled a “reprimand” to constitute a written reprimand within the meaning and application of the County’s Personnel Regulations. Rather, such a determination must be made in the context of the specific fact situation, particularly upon review of the content of the communication.

While the Board has stated that the imperative for progressive discipline does not provide an absolute ban on a penalty without there having been a prior lesser penalty, the Board does not view the Appellant’s conduct in the instant case as sufficiently egregious to support a termination without there having been any relevant progressive discipline, noting the totality of the circumstances, including the severity of the sanctions imposed by the Department in similar cases, the fact that the Appellant has been employed in Corrections since 1985, and that termination is of course the most severe discipline available. Accordingly, the Board concludes that Appellant’s dismissal was not an appropriate penalty.

As to what, if any, discipline is appropriate, as was stated in the original decision, the Board views as a compelling consideration the Appellant's position as a corrections officer, and the duties associated with that position. Strict conformance with rules and procedures and trustworthiness are absolute requirements, and the misconduct found by the Board are each serious breaches of rules and procedures, and reflect significantly on the trustworthiness of the Appellant. Juveniles under Appellant's care must be carefully attended to, and one wasn't. Recordation requirements are justifiable, and getting paid for hours not worked is dishonest. Being truthful in an internal investigation is essential. Moreover, while not constituting discipline, the Memoranda of Concern and the interim evaluation had put the Appellant on notice as to what conduct was appropriate. On the basis of these conclusions, the Board concludes that a severe discipline is appropriate.

As for what the discipline should be, the Board finds the submission of the Appellant concerning other disciplines imposed by the Department to be of interest, but not controlling. While some consistency in the imposition of discipline is an appropriate consideration, each circumstance must be judged on its specifics, and, as discussed above, the Board believes that the instant circumstances compel a severe discipline. In the Board's view, the conduct of the Appellant, which was fully litigated, warrants a suspension of 90 calendar days, and a 10 percent reduction in pay for a six month period from the end of the suspension period, a discipline which is consistent with the magnitude of the improper conduct found by the Board. While this penalty is significantly greater than the examples provided by the Appellant, it is based on conduct that the Board has had an opportunity to consider and to weigh its impact.

Noting that all of the facts concerning the circumstances leading to Appellant's dismissal were fully litigated at an extensive hearing held before the Board, and that the parties had an opportunity to fully brief the issues presented by the remand, the Board finds no need for further oral argument. Accordingly, the Appellant's request for such is denied.

ORDER

On the basis of the above, the Board's Order of August 8, 2001 is modified to grant Appellant's appeal of Appellant's dismissal, and to provide that the Appellant be reinstated to Appellant's previous position, and be assessed a penalty of 90 calendar days from the date of Appellant's original termination, and a 10 percent reduction in pay for a six month period from the end of the suspension period. Further, the County is ordered to reimburse the Appellant back pay consistent with this Order.

Section 33-14, Hearing authority of the Board, of the Montgomery County Code, in providing remedial authority, empowers in section (c), that the Board may "Order the County to reimburse or pay all or part of the employee's reasonable attorney fees." As the Appellant has

partially prevailed, Appellant is authorized to request such payment. The Appellant must submit a detailed request 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 33-1(c)(9).

Case No. 02-14

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from Appellant's dismissal from the Montgomery County (County) Department of Correction and Rehabilitation (Corrections) for conduct in violation of Montgomery County Personnel Regulations and Departmental Policy and Procedures. A hearing was held before the Board on June 4, 2002, during which the County and Appellant, respectively, presented testimony, documentary evidence, and closing statements.

FINDINGS OF FACT

The Appellant has been employed by Corrections since 1986, working in guard positions in the County jail, and had attained the rank of Corporal. Appellant's duties consisted of providing for the custody and security of inmates at the County's Seven Locks Detention Center. Appellant, in the performance of Appellant's duties, has direct contact with the inmates, both male and female, which may include juveniles.

Appellant was arrested in Frederick County, Maryland, on December 13, 2000, and charged with the following:

- One count of Child Abuse, Custodian
- One count of Third Degree Sex Offense
- One count of Attempted Third Degree Sex Offense
- One count of Fourth Degree Sex Offense
- One count of Second Degree Assault

On July 2, 2001, Appellant pled guilty to the Second Degree Assault charge, and all other charges were Nolle Prossed (not to be prosecuted). Appellant was sentenced to three (3) years of incarceration in the Maryland Division of Correction, all of which were suspended. Appellant was placed on two (2) years of supervised probation, with the following conditions:

Urine testing at your own expense
Must remain drug and alcohol free
Must attend all programs recommended including alcohol and drug counseling
To have no contact with victim or her mother

Pursuant to the guilty plea, a “Notice of Disciplinary Action” was issued to Appellant, on March 6, 2002, effective March 18, 2002, stating that Appellant was in violation of the Montgomery County Personnel Regulations (MCPR), Causes For Disciplinary Action, Section 28-2 (h) and (o) which state in pertinent part:

- h) Violation of an established policy or procedure; and
- o) Violation of any provision of the County Charter, County laws, ordinances, regulations, State or Federal laws, or conviction for a criminal offense, if such offense is related to County employment.

The “Notice of Disciplinary Action” additionally stated that Appellant was in violation of the following Departmental Policy and Procedures:

3000-7, Standards of Conduct, VI. Department Rules For Employees, D, Specific Department Rules (1) and (9)(a), which state in pertinent part:

- 1) Conformance to Law – Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative

Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public.

9a) Conduct Unbecoming- No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, dishonest, or improper conduct, and 3000-36, Criminal and Civil Actions Involving a Departmental Employee, I, General Information (a) and (b), which state in pertinent part:

- a) Each employee shall conduct him/herself at all times, both on and off duty, in such manner as to reflect favorably on the department and County service.
- b) Those who are supervising inmates/residents/participants must maintain credibility in order to preserve their authority, their ability to lead/supervise, and their capability to serve as a role model. Committing a legal violation undermines one’s credibility and ability to manage, supervise, and counsel offenders.

The “Notice of Disciplinary Action” further states in pertinent part:

Your recent conviction on the Second Degree Assault charge is a serious violation of Montgomery County Personnel Regulations, 1994, Department of Correction and Rehabilitation Policy and Procedures, and Laws. Your presence as an employee in a Detention Center environment is inappropriate and it is a significant conflict of interest with your criminal history to supervise offenders in an incarcerated population.

As a Correctional Officer, you are in a position of trust to provide services to an inmate population. Your criminal acts are clearly an abuse of power and show a lack of moral turpitude.

As a Correctional Officer, most of your work is performed independently and without supervision and requires direct contact with a variety of offenders. To work effectively in this capacity, you must be a good role model and maintain an exemplary standard of conduct. Your conviction in this case is irrefutable evidence that you lack the good character and moral fiber necessary to work as a Correctional Officer for the Montgomery County Government. You have proven by your behavior in the community that you cannot be trusted. Trust is the bond between the Department and its employees that allows the Department to carry out its mission. Based on your actions and subsequent conviction in this case, it is clear that you do not meet the standard of conduct that the Department requires of its employees.

POSITION OF THE PARTIES

County

The County contends that Appellant’s duties require Appellant to work independently and without supervision, and requires direct contact with a variety of offenders. Appellant must be a good role model and maintain an exemplary standard of conduct in order to work effectively in that capacity. The County further maintains that Appellant’s conviction for Second Degree Assault is in violation of applicable regulations, and policy and procedure, and evidences that Appellant lacks the good character and moral fiber necessary to work as a Correctional Officer for the Montgomery County Government.

Appellant

The Appellant essentially contends that the criminal charge that the County relies on, was not related to Appellant’s County employment, and that Appellant’s termination was unfair.

Appellant further contends that Appellant is not guilty of the offense, although Appellant entered into a plea agreement saying that Appellant was guilty. Appellant maintains that Appellant's guilty plea was not of Appellant's own will. Following discussions with Appellant's family and attorney, and in consideration of the jurisdiction that Appellant lived in, it was the best avenue to take.

ISSUE

Was the Appellant's termination on the basis of a criminal conviction outside the scope of Appellant's employment consistent with law and regulation, and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

As noted in the "Notice of Disciplinary Action", applicable regulations and Departmental Policy and Procedure provide specific guidelines regarding the conduct of County Correctional Officers. There are no exclusions in the regulations that isolate an officer's conduct to the workplace or while in the performance of one's official duties. To the contrary, Section 3000-6 (a) of the Departmental Policy and Procedures states that "each employee shall conduct him/herself at all times, both on and off duty, in such a manner as to reflect favorably on the Department and County service. Appellant voluntarily and without coercion entered into a plea of Second Degree Assault growing out of an incident involving a female juvenile, the seriousness of which is demonstrated by the conditions of the of the probation. In the Board's view, there is a demonstrated relationship between Appellant's job duties, specifically Appellant's supervision of female offenders, and the offense for which Appellant pleaded guilty.

Finally, the Board rejects the Appellant's contention that Appellant should not be held accountable because of the circumstances of Appellant's guilty plea, i.e., while not guilty was made to avoid the complications of trial. The circumstances before the County was knowledge that the Appellant had been charged with serious charges involving a minor, and that the Appellant pled guilty to one of the counts of the charge. In the Board's view, there is no obligation on the County to attempt to judge the circumstances of that guilty plea.

ORDER

Accordingly, on the basis of the above, the Board concludes that the Appellant's termination was consistent with law and regulation, and not otherwise improper. The Appellant's appeal of Appellant's termination from County employment is denied.

EMPLOYMENT

Case No. 02-18

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on an appeal of an Applicant from the decision of Montgomery County to not offer Applicant a position of Housing Code Inspector.

FINDINGS OF FACT

Posting, Interview, and Alleged Offer

The Department of Housing and Community Affairs (Department) advertised a position of Housing Codes Inspector II, Grade 21, with the intention of filling as many as three positions from the recruitment. The announcement also contained a statement that the position may be filled at the Housing Code Inspector, Grade 19 level. Relevant to the instant case is that the recruitment advertisement for the position provided as to the “SELECTION PROCESS,”

The cover letter, resume, and resume attachment forms of those individuals meeting the minimum qualifications will be reviewed further to determine the extent and relevancy of training and experience

Further, the first bullet under the nine listed items of “General Information” in the advertisement stated,

All offers of employment or promotion will be extended only by the Office of Human Resources unless delegated.

A total of 36 applications were received and rated, with 17, including the Applicant, determined to have met the minimum qualifications, and 19 not meeting that standard. The 17 qualified candidates were then rated by subject matter experts in the field of housing code inspection, resulting in nine candidates being rated “Well Qualified,” and eight being rated “Qualified.” The Applicant was rated Qualified, receiving 35 points out of a possible 90, with Well Qualified candidates receiving a score of 68 and above.

Due to the imposition of a hiring freeze, selection interviews were delayed. Because of the intention to fill two positions (one having been filled prior to the freeze), and the significant length of time that had passed since the eligibility lists were certified, the Department decided to interview both the Well Qualified and Qualified rated candidates, resulting in the Applicant being interviewed.

Applicant was first interviewed on January 24, 2002, the interview being conducted by Code Enforcement Manager, along with two Inspection and Enforcement Field Supervisors. Shortly after the first interview, Applicant was contacted by a Department representative and told that Applicant had made the "short list," and was to come in for a second interview. The second interview was held on February 1, and was conducted by the Director of Housing and Community Affairs, and the Division Chief Manager of the Housing and Code Enforcement Division. According to the Applicant, and uncontroverted by the County, at the conclusion of this interview, the Director stated that the Applicant would be contacted in the next couple days for the purpose of making Applicant an official offer for the position, and that they intended to expedite the process to fill the position as soon as possible.

According to the Applicant, and without contradiction from the County, on February 4, the Applicant was contacted by the Manager and told that the Department had decided to hire Applicant, and that Applicant accepted the offer and agreed to a starting salary. Applicant was told that a physical examination was required and Applicant would be contacted to arrange a date for it. Applicant acknowledges that during this conversation, "I was also advised not to notify my current employer of my intent to leave until I had established the start date with the Human Resources representative and set up the time for the physical." On February 5, Applicant was contacted by the Manager's assistant, who reiterated that Applicant had been chosen to fill the position, confirmed the starting salary, and notified Applicant that a Human Resources representative would contact Applicant to set the time for Applicant's physical. Applicant contacted the Manger on February 7 to inquire as to why Applicant had not yet heard from Human Resources, and was told that some additional paperwork needed to be submitted, and that the process would take three to four weeks at most to be resolved, a delay which the Manager attributed to the hiring freeze. The Manager assured the Applicant of their intention to hire Applicant, and to wait to be contacted. Approximately three weeks later, the Applicant again called the Manager to check on the status of the Applicant's hiring, with the Manger reiterating the previous conversation, telling Applicant that the process would take one more week.

Processing of Hiring Authority

Sometime in early February, apparently shortly after Applicant's February 1 second interview, the Department forwarded a Personnel Action Form to hire the Applicant to Human Resources Specialist. The County contends that in the Specialist's review of the forms, the Specialist noted that the Applicant was not in the highest rating category, Well Qualified, and that there were still non-selected Well Qualified candidates. County Personnel Regulations Section 7-29(c) provides:

If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.

Because of this provision, the Specialist contacted the Manager and the Executive Administrative Aide, and advised them that if they would like to hire the Applicant, the Department would have to request a bypass of the highest rating category. It is contended that the Specialist cautioned the Manager that such requests are not always approved.

By memorandum dated February 26, the Director submitted to the County Director of Office of Human Resources (OHR) a "Justification for Selection from a Lower Rating Category." The Memorandum describes the events leading to the decision that the Applicant was the most suitable candidate for the vacancy, and the view that the original rating process was in error, and that the Applicant should have rated Well Qualified for the available Grade 19 position. Attached to the memorandum were explanations as to why the Director believed that each of the remaining Well Qualified Applicants were not suitable and why the position should be offered to the Applicant. On March 10, during the pendency of the Department's request, an internal transfer filled one of the two remaining vacant positions at issue.

Applicant contends that on approximately March 14, Applicant called OHR to check on the status of Applicant's situation and Applicant was directed to the Specialist, who explained that the Department was "applying for some kind of exception," and that it would be resolved in the next four weeks. When the Applicant asked the Specialist if Applicant should notify Applicant's current employer, the Specialist responded that Applicant should not do that until after the physical examination was passed.

On March 18, Acting OHR Director, transmitted the bypass request to an Assistant CAO. In the Acting OHR Director's transmittal memorandum, the Acting OHR Director contended that he believed that the raters had correctly assessed the Applicant's application, contending that the Applicant had not articulated in Applicant's application relevant knowledge and experience, and that the rating process was a consensus rating, and that both raters had formed a consensus opinion on each application. The Acting OHR Director's memorandum concludes,

(OHR) faces a dilemma with this bypass request. On one hand the Director has interviewed an applicant that is in the "Qualified" rating category that the Director believes is the right person for the job and would like to hire the Applicant. On the other hand, (OHR) believes that the examination process was not flawed. I understand, per the department's justification, that when interviewed, some of the remaining eleven applicants did not demonstrate their knowledge of the requirements of the position and

(the Applicant's) knowledge surpassed what was presented in Applicant's application. Since the department's justification to bypass the remaining eleven candidates in the highest rating category . . . is based primarily on the interview process and not the recruitment process, I am relying on the judgment of the department.

Based upon the reasons that have been stated in the department memo, I request your approval.

On March 19, the day after the Acting OHR Director's memorandum, OHR was verbally advised that the bypass request would not be approved. The County does not provide the basis for the CAO's denial of the request.

The Applicant contends that on April 8, Applicant telephoned the Specialist to check on Applicant's status, at which time Applicant was told that the decision had been made to decline Applicant's application for the position. According to the Applicant, the Specialist told Applicant that Applicant did not receive the highest rating because of the format of Applicant's application, and that applicants should submit a cover letter stating their qualifications, as listed in the advertisement. Applicant contends that during this conversation, Applicant and the Specialist agreed that the advertisement did not request a cover letter or specify any format at all. Rather, it only said to include information on how an applicant meets the specified qualifications, which Applicant did on Applicant's resume. On April 12, the Director sent the Applicant a letter stating that the County was "unable to offer you the position of Housing Code Inspector for which you applied." "Please accept our sincere appreciation of your patience and cooperation throughout this process and your interest in this position."

POSITIONS OF THE PARTIES

Applicant

Applicant contends that Applicant was led to believe through a verbal agreement that Applicant already had the position at issue. While Applicant was told not to tell Applicant's existing employer of Applicant's intention to leave, as Applicant was told that it was only a matter of completing paperwork and passing a physical, Applicant declined three other appealing job prospects, and made other arrangements based on the belief that Applicant would have the position offered and agreed to. Applicant also contends:

The interview process should be used in considering Applicant's qualifications for the position;

Either an individual in OHR is attempting to force the Department to hire a candidate that they know or favor for some personal reason, or Applicant's application has been declined due to some form of discrimination; and

the advertisement should have stated clearly that qualifications were to be listed in a letter format, if that in fact was a requirement for a proper rating.

Applicant concludes, “I further believe that Montgomery County is obligated to hold true to the verbal agreement that was made with me, especially when such an agreement comes from someone in a position of authority.”

County

The County contends that “No official offer of employment was extended” by (OHR) to (Applicant), as “any ambiguous statements that may have been made . . . did not constitute a formal appointment.” “Under the County’s hiring procedures, only an authorized staff member of the (OHR) has the authority to notify a job applicant that the applicant has received an ‘appointment’ to a position.” In support of this contention, the County cites provisions of the County Charter, the County Code, and the County Personnel Regulations for the proposition that “County employment occurs through ‘appointment’ rather than by contract.”

As to the correctness of Applicant’s initial rating, the County reiterates the rating process, and the Applicant’s score, and contends that the process was conducted fairly, accurately, and without discrimination. Further, the County contends that no one in OHR was advocating the selection of any particular applicant for the position.

ISSUES

1. Was the rating process violative of law or regulations, or otherwise improper?
2. Was the Applicant’s non-selection for the position at issue violative of law or regulations, or otherwise improper?
3. Do the total circumstances of the Applicant’s consideration for the position at issue provide a justification for remedial action?

ANALYSIS AND CONCLUSIONS

1. Applicant’s allegations directed at the legality and propriety of the rating process are essentially that Applicant was misrated because of where in Applicant’s application Applicant described Applicant’s knowledge and experience, and the speculation that such misrating must have resulted from some improper motive. As to the former, Applicant relies exclusively on the fact that the Specialist told Applicant that Applicants should submit a cover letter stating their qualifications. Applicant contends that the advertisement does not require a cover letter.

While the Applicant is correct that there was no stated requirement for a cover letter, as quoted above, the advertisement quite specifically states as the first item that will be reviewed, "cover letter." The Applicant chose not to submit such a document where Applicant could have sought to highlight Applicant's knowledge and experience, instead leaving it to reviewers to find the information in the resume. The Manager's suggestion that a more compelling application would include a cover letter highlighting knowledge and experience does not provide a basis for concluding that the rating process was violative of law or regulation, or otherwise improper. Similarly, Applicant's speculation alone provides no evidence of any improper motive on the part of raters or OHR staff. Accordingly, the Board finds that the rating process was not violative of law or regulation, or otherwise improper.

2. Applicant's allegation as to the legality and propriety of Applicant's non-selection is based on a compelling common sense view, i.e., the fact that persons of authority told Applicant that Applicant was selected for the position binds the County to give it to Applicant. Quite clearly the Department representatives who notified the Applicant of Applicant's selection should have known about and provided Applicant with information on procedural requirements that would have to be accomplished, although it is noteworthy that Applicant was at least cautioned not to give notice to Applicant's existing employer. However, the County correctly argues that under the hiring procedures used by the County, such overtures do not create a right to a position. As the advertisement states in no uncertain terms, "All offers of employment or promotion will be extended only by the Office of Human Resources unless delegated." (Emphasis supplied) The Department representatives that told the Applicant of Applicant's selection had no authority to bind the County, and their lack of specificity, or, for that matter, errors of omission, cannot legally create an obligation on the County to place the Applicant in the position. Additionally, the Board finds the requirement that offers of employment or promotion will be extended only by OHR to be reasonable and appropriate. In a workforce as large as that of the County, such a rule is important in an attempt to ensure that hiring is done in a manner consistent with applicable laws and regulations. Accordingly, the Board finds that the non-selection of the Applicant was not violative of law or regulation, or otherwise improper.
3. While the Board has concluded above that there is no illegality or impropriety in the rating process at issue or in the Applicant's non-selection, the uncontroverted facts reveal a process that does not reflect favorably on County managers, and constitutes an injustice to a potential County employee. The managers who interviewed the Applicant should have been aware of procedural requirements that had to be met if they chose a candidate with a Qualified rating, and, based on such knowledge, they should not have so clearly led the Applicant to believe that Applicant had the position, a physical examination being the only barrier. Moreover, when the managers in question were advised of the existence of a problem only a few days after advising the Applicant of Applicant's selection, Applicant should have been told immediately. Applicant was formally advised of Applicant's selection on February 4, and it wasn't until March 14 that Applicant was told

anything about the need for “an exception,” in the interim only being told that the process would take a little longer. The Department submitted a rather compelling request on February 26, which OHR did not forward until March 18. The official notice of non-selection sent to the Applicant on April 12, provides no explanation as to why all of this has happened. In the Board’s view, these circumstances require a remedy to the Applicant.

In the absence of a finding that the rating or non-selection was illegal or improper, the Board cannot order the placement of the Applicant into the position. However, the Board concludes that a proper remedy of the above-discussed conduct would be that for a one year period from the date of this decision, the County be ordered to give prior notification to the Applicant of future vacancies for Housing Code Inspectors. Thereafter, should the Applicant apply, Applicant should be given priority consideration for such positions.

ORDER

Based on the above, Applicant’s appeal of Applicant’s non-selection for the position of Housing Inspector is denied. For a one year period from the date of this decision, the County is ordered to give the Applicant prior notification of vacancies for Housing Code Inspector positions. Thereafter, should the Applicant apply, the County is to give Applicant priority consideration for such positions.

GRIEVABILITY

Case No. 85-323

DECISION AND OPINION

This is a final decision of the Montgomery County Merit System Protection Board (Board) on appeals from decisions on grievances filed by Montgomery County (County) firefighters seeking payment of overtime compensation.

Three hundred and sixty-eight paid employees of the Independent Fire and Rescue Corporation of the County filed grievances in October 1984, concerning overtime compensation. They appealed the Personnel Director's decision to the Board in March 1985. The Board issued its decision on May 24, 1985, which was appealed by the County to the Circuit Court. The Circuit Court's order dated April 16, 1986, found that the Board had erred and remanded the case to the Board for further processing consistent with the Court's opinion. A search of Board records and County archives located no files which reveal that there had been any processing of the case by the Board, or communication from Appellants, from the Circuit Court Order to October 13, 1994, when the Board received a letter from Appellants' Council, requesting that the Board comply with the Circuit Court Order.

Because of the complexity of this matter, the Board referred it to the Hearing Examiner to conduct an evidentiary hearing and issue a Report and Recommendation. Following a lengthy hearing process, the Hearing Examiner issued a 39-page preliminary ruling on liability and a subsequent 50-page Report and Recommendation on June 12, 2001. Thereafter, the parties were permitted to file written comments, and make oral presentations to the Board.

Upon consideration of the Hearing Examiner's Report and Recommendation, the parties written submissions and oral presentations, and the entire record, the Board adopts in full the Hearing Examiner's findings, conclusions, and recommendations, as stated below.

For the reasons set out by the Hearing Examiner, the Board concludes that the doctrine of laches does not bar its consideration of the appeals.

For the reasons set out by the Hearing Examiner, the Board dismisses the appeal of those firefighters who already received overtime compensation under other cases, or are ineligible to participate in this case because they failed to file timely grievances or appeals, or are no longer viable Appellants for other reasons noted by the Hearing Examiner. That leaves 34 firefighter-Appellants who filed timely grievances and appeals and did not obtain relief from other litigation.

For the reasons set out by the Hearing Examiner, the Board agrees that the remaining Appellants' relief is limited to the overtime rate they actually challenged in their grievances under Section 3(i) of the personnel regulations. Like the Hearing Examiner, the Board rejects Appellants' belated attempt to raise Section 3(g) of the personnel regulations. At oral argument, Appellants suggested that their failure to raise Section 3(g) in their grievances is not fatal to their attempt to apply it now, because personnel regulations like constitutional rights, are self-executing and need not be specifically pled. The Board agrees with the proposition that the County must comply with its own personnel regulations, regardless of whether an employee has asked for that compliance. But that does not relieve a grieving employee of the obligation to specify which of those regulations the employer has violated, as a basic requirement of notice pleading.

For the reasons set out by the Hearing Examiner, the Board agrees that the remaining Appellants are not entitled to any damages because they have already been adequately compensated for their overtime.

Lastly, we decline to award any attorney's fees. Under Section 33-14(c) County Code, the Board is authorized to order appropriate relief to accomplish the remedial objectives of Section 33 of the County Code, including an award of reasonable attorney's fees. That Section goes on to list the factors the Board must consider in determining the reasonableness of the requested fees. The Board's practice is to award such fees only in conjunction with the order of remedial relief to an appellant. Because counsel for Appellants did not obtain any relief in the instant case, the Board concludes that an award of attorney's fees would not further the remedial objectives of Section 33, and is therefore not appropriate.

ORDER

In consideration of the reasons stated above, the appeals and the request for attorney fees are denied.

Case No. 98-01

SUPPLEMENTAL DECISION AND ORDER

This matter is before the Board on remand, following a decision by the Court of Special Appeals of Maryland that the Board had erred in deciding that the Appellants lacked standing to bring their complaint under the County's administrative grievance procedure. Upon the Court remand, the Board remanded the grievances to the County for further processing under Administrative Procedure 4-4. The appeal from the resulting decision by the CAO is now before the Board.

FINDINGS OF FACT

Assignment and Grievances

The Appellants, both career Firefighters with the County Department of Fire and Rescue Services (Department), filed identical grievances over being ordered to “engage in grass-cutting and other lawn maintenance activities” by management at the Bethesda, Maryland Fire Station where they were assigned. In their grievances, the Appellants contended that such duties were outside the scope of their Class Specification, and that as Firefighter III’s, they should not be required to perform yard work or any other type of manual labor in connection with the maintenance of the facility. The grievances concluded, “I am a paid professional firefighter and do not believe it is appropriate or the best use of my skills and abilities to perform activities which do not fall within my job classification.”

It is undisputed that for many years prior to the order that generated the instant grievances, Firefighters at the Bethesda Fire Station where the Appellants were assigned had been doing the type of grass-cutting and lawn maintenance activities which gave rise to the grievances. It is also undisputed that at some other County Fire Stations, Firefighters are not assigned such duties, lawn maintenance duties were performed by other sources.

RELEVANT LAW AND REGULATION

Class Specification, Firefighter III

The statement of the Definition of Class provides, in pertinent part,

This is full-performance level work in fire suppression, fire prevention, communications, training, rescue, and emergency medical care. Personal contacts are with other fire/rescue and emergency medical personnel to coordinate firefighting and rescue efforts; with supervisors to receive assignments and resolve problems; and with the public to provide information, fire safety education and emergency assistance as required.

The Specification lists as “Examples of Duties (Illustrative Only),” the following that are relevant to resolution of the instant grievances:

Participates in cleaning and preventive maintenance activities concerning fire and rescue apparatus, equipment, facilities and grounds.

Performs related duties as assigned consistent with this class specification.

County Code and Firefighter Collective Bargaining Agreement

County Code Section 33-152, “Collective Bargaining” provides, in pertinent part,

(B) Employer rights. This Article and any collective bargaining agreement made under it must not impair the right and responsibility of the employer to:

- (3) determine the services to be rendered and the operations to be performed;
- (4) determine the overall organizational structure, methods, processes, means, job classifications, and personnel by which operations are conducted, and the location of facilities;
- (5) direct and supervise employees;
- (9) transfer, assign, and schedule employees;

Article 5 “Management Rights,” of the Firefighter collective bargaining agreement contains this same language.

Personnel Regulations and Administrative Procedures

Cited by the County as directing it “to assign duties and responsibilities to each County position”:

Personnel Regulation Section 7 “Classifications,” subsection 1, which provides, in pertinent part,

It is the policy of the Montgomery County Government to classify positions on the basis of assigned duties and responsibilities and minimum qualifications required to assure that positions are allocated to classes which are at comparable grade level assignments for work of substantially equal value performed under essentially similar conditions.

Administrative Procedure 4-2, “Policy,” Section 3.1 “Policy,”

Individual positions are assigned, by reference to class specifications, to occupational classes solely on the basis of assigned duties and responsibilities and minimum qualifications required. Employees should be assigned duties and responsibilities which are appropriate to their authorized position classifications and should not be intentionally assigned to higher level duties or responsibilities for the purpose of circumventing the competitive promotional process.

Department Directive

A January 8, 1995, Departmental Directive from the Director to “All Personnel” on “Station Commander Responsibility” provides, in pertinent part,

The following items will vary, depending upon which corporation the Station Manager is assigned to:

- Coordinate a station maintenance program above and beyond the routine maintenance and cleaning program. The program may include contact with County and/or private contractors.

- Assure that routine maintenance of tools, equipment, and apparatus is performed in a timely fashion.

Departmental Report

A November 1, 1998, Final Report entitled “Station Management Task Force,” concluded,

Grounds Maintenance. We recommend that lawn maintenance should not be the responsibility of members. Some stations have no lawns to cut while others have four or five hours worth of cutting. Managing a station should be uniform throughout the county. Stations with lawns to cut must use activity periods to accomplish this. The Task Force believes there are more important tasks to be completed. Therefore, Montgomery County Facilities or a private contractor should be hired to maintain the grounds.

Recommendation: The MCFRS should contract with Montgomery Facilities or a private landscaping company to maintain the grounds at all sites.

POSITIONS OF THE PARTIES

County

The County, relying on the referenced management rights provisions of the Code and the Firefighter collective bargaining agreement, and the responsibility to assign portions of classification guidance in the Personnel Regulations and Administrative Procedures, contends a right to make the assignments at issue. Additionally, the County contends that the disputed work is specifically provided for in the Class Specification example “Participates in cleaning . . . facilities and grounds.”

The County also raises for the first time, two procedural issues not addressed in the CAO’s determination on the grievances. First, it is contended that the appropriate forum to contest assignments of work is to request a classification study under Administrative Procedure 4-2, Section 4.2. Second, it is contended that since the Appellants had been performing the disputed work for some 14 or 15 years, the grievances in the instant case were not filed within 20 days of when they “knew or should have known” a problem existed.

Appellants

Appellants contend that they should not be required to perform lawn maintenance duties because they do not fall within the position classification of Firefighter/Rescuer III. In this

regard, they note that the definition of the Class Specification goes to being “fully proficient in all aspects of fire suppression,” someone who “conducts emergency rescues and provides emergency medical assistance,” and that the work performed “affects the rescue and safety of individuals and the preservation of structures and physical property.” As to the language in the Specification about participating in the cleaning of facilities and grounds, Appellants note that this language, found near the end of a list of illustrative duties, references mechanical maintenance on fire and rescue apparatus, which is maintenance Firefighters don’t perform. Appellants reject the relevance of the Department Directive because it does not expressly reference cutting of grass. The Appellants also cite the Task Force recommendation to support their belief that Firefighters should not have to cut grass. Noting that Firefighters at other stations do not do grass cutting, Appellants contend that their treatment is disparate, and,

Requiring them to do so under these circumstances is an arbitrary, capricious, unreasonable, and unlawful assignment and violates their rights under the County’s Merit System and their rights to due process and equal protection of laws as guaranteed by the Federal, and State Constitutions, the County Charters and its laws.

As to the County’s procedural contentions, the Appellants contend as to proper forum that the County is barred from raising this issue that was not raised in the original review, that the grievance is within the scope of the grievance procedure, and that the availability of another forum does not preclude use of the grievance procedure. As to the timeliness issue, the Appellants contend that the County is barred from raising this issue that was not raised in the original review, that the Court of Special Appeals decision leading to consideration of the merits is the law of the case, and that they were not time barred from grieving over the assignment, notwithstanding that they had performed such work for some time.

ISSUES

1. Are the grievances procedurally defective in that the proper forum for their resolution was to request a classification review, or that they were untimely filed from the date when the Appellants knew or should have known that a problem exists?
2. Is the assignment of lawn maintenance duties to the Appellants inconsistent with law, regulation, or otherwise improper?

ANALYSIS AND CONCLUSIONS

1. The Board rejects both of the County’s contentions with respect to procedural impediments to the consideration of the merits of the Appellants’ grievances. As to both the issues of proper forum and timeliness, we note that these matters were not raised or addressed when the grievances were considered on their merits by the CAO, nor during the judicial review process, raising an issue as to permitting them to be raised before the Board.

However, without passing on whether the County is now foreclosed from raising these procedural issues, the Board concludes that there is no merit to either contention.

As to the contention that the proper forum for the Appellants was to seek a classification review, the Board essentially spoke to that issue in its original December 31, 1997 decision in this case. The Board held that the grievances over the assignment of assorted lawn maintenance duties was grievable under the administrative grievance procedure, a finding that is inherently supported by the Court of Special Appeals' decision that the fact that the Appellants are covered by a negotiated grievance procedure does not foreclose the raising of the issue in the administrative grievance procedure. The possibility that the Appellants might have alternatively requested a classification review does not render the grievances non-grievable under the administrative grievance procedure.

As to the application of the regulatory requirement that a grievance be filed within 20 days from when an employee knew or should have known that a problem exists, the record does not provide a basis for sustaining the County's contention. While it is undisputed that the Appellants had been assigned grass cutting work for a number of years, there is no basis for disputing that existing knowledge of the assignment was juxtaposed with other information, so as to trigger a timely grievance. The mere fact that a practice has existed for some time is not sufficient to preclude a grievance over an aspect of that practice.

On the basis of the above, the Board concludes that the grievances were not procedurally defective either on the basis of proper forum or timeliness.

2. With respect to the merits question of the legality and propriety of the assignment at issue, the Board disagrees with a considerable portion of what the parties rely upon to support their positions. The County primarily relies on law and regulations that are not applicable. The Code section 33-152 (B) statement of "Employer rights," is specifically a restriction on the scope of collective bargaining, as is the restatement of such rights in the collective bargaining agreement. These statements of collective bargaining management rights do not control the Board's review of management's actions in the context of the administrative grievance procedure. Similarly, the County's reliance on regulations related to the classification system are not applicable. The cited sections go to the classification process, and do not stand for the argued right to assign. Finally, the Board sees no significance in the Department Directive that assigns as a duty to Station Managers "coordinate a station maintenance program," noting that there is no mention of the disputed duties, and that the referenced section provides for the alternative of having maintenance done by the County or private contractors.

The Board also gives no weight to the Appellants' reference to the Station Management Task Force Report. Whether it is a good practice to assign lawn maintenance duties to Firefighters does not resolve the question of whether such an assignment is legally permissible, which is the question before the Board.

While not agreeing with the County's contentions as to its source, the Board acknowledges the existence of certain inherent management rights, and the right to assign work is among any compilation of such rights. In fact, the Appellants do not dispute the existence of a right to assign work, instead contending that the right does not include the disputed lawn cutting assignments because they view it as outside the scope of the work of a Firefighter. While it can be speculated that a particular assignment is so unrelated to the content of a particular position that it is inconsistent with merit principles, that is not so in the instant case. The County has included "cleaning" duties in the Class Specification because they are a recognized part of the residential nature of work life in a fire station. More specifically, included in the cleaning duty is "facilities and grounds." Taking care of the "grounds," which certainly includes cutting the grass, is no different. In the Board's view, such work is sufficiently related to the function of a Firefighter. In this regard, it is undisputed that Firefighters perform many tasks that are other than fire suppression, fire prevention, etc., including cleaning of facilities. Accordingly, the Board concludes that the assignment of grass cutting duties is not violative of law or regulations, or otherwise improper.

ORDER

On the basis of the above, the Board dismisses Appellants' appeal of the CAO's denial of their grievance and requested relief over the assignment of grass cutting work.

Case No. 98-01

DECISION AND ORDER ON REQUEST FOR RECONSIDERATION

On May 29, 2002, the Montgomery County Merit System Protection Board (Board) issued a Supplemental Decision and Order in the above-entitled case dismissing the Appellants' appeal of the Chief Administrative Officer's (CAO) denial of their grievance and requested relief over the assignment of grass cutting work. The Appellants have filed a timely request for reconsideration.

Contention 1

The Appellants disagree with the Board's analysis and conclusions regarding the assignment of lawn maintenance duties, and requests that the parties be allowed to make submittals with respect to the existence of the inherent management rights, and the basis upon which the Board has issued its decision. Similarly, the Appellants reiterate their request for a hearing in connection with the finding made by the Board that the lawn maintenance work was sufficiently related to the functions of a firefighter so as to be appropriate.

In the Board's view, no basis is shown for the granting of the request for reconsideration as to contention 1, noting particularly the absence of any proffered support for the allegation that the Board's analysis and conclusions were in error. As to the request for a hearing, it is neither alleged, nor does it appear, that there are genuine disputes of material facts present. Accordingly, the Appellants' request for reconsideration as to this contention is denied.

Contention 2

The Appellants contend that they should have been awarded attorney fees and costs for specified proceedings leading to the Maryland Court of Special Appeals' remand of the instant case to the Board. In this regard, the Board had previously determined, in pertinent part, that a negotiated grievance procedure was the exclusive procedure for the grievances at issue, a decision sustained by the Circuit Court. Upon appeal by the Appellants, the Court of Special Appeals determined that the Board had erred in deciding that the Appellants lacked standing to bring their complaint under the County's administrative grievance procedure, and remanded the matter to the Board to make a determination on the merits. Therefore, the Appellants did prevail with respect to the issue of jurisdiction, thereby providing a basis for the awarding of appropriate fees and costs. Accordingly, the Board will grant the request for reconsideration with respect to contention 2, and amend its decision to provide for the awarding of attorney fees and costs. However, the Board reserves judgment on which proceedings present an entitlement to attorney fees and costs, pending review of Appellants' specific claims.

ORDER

The Board's decision in the above entitled case is amended to provide for the awarding of appropriate attorney fees and costs related to the Appellants' prevailing on the issue of standing to bring their complaint under the County's administrative grievance procedure. The Appellants must submit a detailed request 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 the County Code, section 33-149(c)(9).

Case No. 01-10

DECISION AND ORDER

This is a final decision on an appeal, a decision of the Chief Administrative Officer denying Appellant's grievance over not receiving full paramedic certification pay for 1999.

FINDINGS OF FACT

Background

The Appellant is a Captain in the Montgomery County Department of Fire and Rescue Services (Department), and is a “certified” paramedic. At least for the period of time relevant to the instant case, the collective bargaining agreement covering bargaining unit Department employees has provided for “certification pay” for certified paramedics, a pay practice which has been “passed through” to non-unit employees. The certification pay is apparently paid in a lump sum early in a calendar year for service during the preceding calendar year.

While it appears from the record that receipt of certification pay was conditioned, or at least linked, to the paramedic spending some amount of time “riding” on a medic unit, there is an acknowledgment that prior to 1998, some paramedics received full certification pay without actually being used in that capacity. A January 13, 1998 memorandum to all Department paramedics who would be eligible to receive certification pay provided that in order to receive such pay for 1997, recipients must: 1) Maintain their certification; 2) pass a field evaluation; and 3) “ride as a (paramedic) an average of 24 hours per month, calculated on a quarterly basis.” An April 23, 1998 Memorandum to Department paramedics repeated the same conditions as the January 13 memorandum, but also transmitted a new form to be used to verify time on a medic unit. The Appellant is assigned to a fire station that does not have a medic unit. Accordingly, to work on a unit the requisite hours for Appellant to qualify to receive certification pay requires that Appellant work on a unit assigned to a different fire station.

1999 Requirements

On May 4, 1999, Directive 99-03, entitled “Employees Who Receive Compensation for Maintaining Montgomery County Paramedic Certification Status” was issued to all Department personnel. The Directive described historic problems and changed circumstances related to the assignment of paramedics, and states, in pertinent part, that effective June 1, 1999, the following assignment of work requirements would prevail:

1. Employees in the Operations Bureau, Field Staffing in Fire Stations, who possess Montgomery County paramedic certifications, will be assigned by Scheduling to work as a paramedic as follows:

48 hour schedule = 1 x 24 hours per month
40 hour schedule = 3 x 10 hours per month

Such employees will be assigned by Scheduling not less than three calendar days prior to the day served as a paramedic. This assignment must occur during regular hours of work; overtime activity does not count toward fulfilling this obligation. Certification Lieutenants and Captains in Field Staffing positions are encouraged to plan and coordinate their

assignment to ALS units with the Scheduling Office to maximize efficiency and limit interruptions to other necessary work.

2. Employees assigned to any work assignment other than above must maintain their Montgomery County Paramedic certification to be eligible for compensation. Unrepresented employees (Lieutenant - Chief) are prohibited from using any of the Waivers of Service Time, as provided for in the Paramedic Program Standards for the purpose of compensation.

4. In accordance with . . . the Paramedic Program Standards, all certification paramedics must submit documentation of ALS service time to the EMS District Chief, Bureau of Operations. The documentation must be provided within 30 days of the date that the ALS Service time occurred. Failure to submit the documentation will result in a loss of compensation for that month.

All career ALS providers who possessed certification status on January 1, 1999, and continuously maintained that status until May 31, 1999 will be considered eligible for certification pay for that period. As of June 1, 1999, all previous requirements, exceptions, waivers, or other allowances provided under any former process are terminated.

Appellant's Loss of Pay

The record reflects that at the end of January, 2000, Appellant received certification pay for 18 pay periods. It appears undisputed that the 18 pay periods for which Appellant received certification pay consisted of 14 for which Appellant actually met the hours of work requirements, and an additional four by operation of the above-quoted last paragraph of the May 4 Directive that makes paramedics who continuously maintained that status until May 31 eligible for certification pay. It is also undisputed that the Appellant worked as a paramedic each time the Scheduling Office contacted Appellant with an assignment, but was not detailed to a medic unit during the months of January, February, April, August, September, and November. The Appellant never contacted the Scheduling Office to request additional details to a medic unit. The record does not indicate the total number of pay periods for which certification could have been paid, but it was presumably 26. There was a five week period during which Appellant was on vacation and, therefore, not available for paramedic assignment.

Upon learning that Appellant had not received certification pay for all of the pay periods, the Appellant contacted the Scheduling Office to find out if Appellant could make up any additional hours needed to obtain full certification pay for 1999, and was advised that Appellant could not do this once the year at issue was over. Some number of similarly situated paramedics were able to make up hours, but these made their request during 1999, and worked the hours prior to the conclusion of that year.

POSITIONS OF THE PARTIES

Appellant

Appellant contends that Directive 99-03 states clearly that the Scheduling has the obligation to assign paramedics in a manner which would qualify them to receive certification compensation, and that this obligation was not met in Appellant's case. Appellant states that the portion of the Directive about Lieutenants and Captains being encouraged to plan and coordinate their assignments was for the purpose of avoiding assignments to a Station Officer that would interrupt other necessary work, not to remove the obligation on Scheduling to make sufficient numbers of assignments. Appellant also contends that Appellant should have been given the opportunity to make up the hours, as was allowed for others, and that the requirement for documenting paramedic work within 30 days should not foreclose Appellant from having been given the opportunity to make up the missing hours. Finally, the Appellant contends that Appellant should not be penalized because Appellant could not be assigned to paramedic duties during the five weeks Appellant was on vacation.

County

Relying on the portion of the Directive, "Certification Lieutenants and Captains . . . are encouraged to plan and organize assignments . . ." the County contends that the burden was on the Appellant to make sure that Appellant worked as a medic the required number of hours to earn the certification pay. In the County's view, the Appellant received certification pay for each pay period for which Appellant was qualified, and there is no provision in the Directive for making up missed pay periods past the 30 day reporting requirement set forth in the Directive, or for being paid for a period of unavailability while on vacation.

ISSUES

1. Did the failure to assign the Appellant to paramedic duties so as to qualify Appellant for certification pay each pay period violate Directive 99-03?
2. If there was a violation of Directive 99-03, what is the appropriate remedy?

ANALYSIS AND CONCLUSIONS

1. At issue is the interpretation of Directive 99-03, which the Appellant interprets as placing an obligation on the Scheduling Office to make the assignments, while the Department interprets it as placing the obligation on the Appellant. In the Board's view, the actual wording of the Directive supports the Appellant. The first sentence of paragraph 1. states that paramedics "will

be assigned by scheduling to work as a paramedic as follows.” After the statement of the hour requirements, again it is stated, “Such employees will be assigned by scheduling not less than three calendar days” The message conveyed is that Scheduling has the obligation of making assignments, presumably in sufficient quantity to meet the certification pay requirements stated in the Directive. As for the third sentence that is relied upon by the Department, the Board views this as not sufficient to shift the initial obligation from the Department, but a caution to Lieutenants and Captains that when getting such assignments, they must plan and coordinate them to assure that they meet their station duties.

The Board concludes that the wording of the Directive places the obligation on the Department, and the failure of the Scheduling Office to provide assignments to the Appellant constitutes a violation of the Directive. The Board is mindful that it would not be unreasonable to assume that a Captain would have some idea that they were not being scheduled for sufficient hours, and contact the Scheduling Office before the end of the year, as some of Appellant’s counterparts apparently did. However, the hours requirement and the manner of scheduling was in a state of flux, going from one where at least some paramedics received their annual certification pay without meeting hours requirements, to one where they were told that they would have to work required hours, which the Department would schedule. Under all of these circumstances, the Board concludes that the Department did not fully comply with the requirements of Directive 99-03.

2. Having concluded that the Department did not fully comply with the requirements of the Directive by not assigning the Appellant to paramedic duties, which caused Appellant to be deprived of certification pay for some number of pay periods, the Board concludes that the appropriate remedy is for the Appellant to be paid certification pay for every pay period that Appellant was available for such assignments and was not given the requisite amount of such assignments. As the Appellant was not available for paramedic assignments while Appellant was on a five week vacation, there is no obligation for the Department to pay Appellant certification pay for pay periods during that time. The record is not clear as to the number of pay periods during the year, and is silent on how the five week vacation overlaid pay periods. Therefore, the parties shall resolve such matters in complying with the Board’s Order.

ORDER

The Montgomery County Department of Fire and Rescue is ordered to pay to the Appellant certification pay for each pay period that Appellant has not already been paid such pay, and which Appellant was available for an assignment of the required number of hours to earn such certification pay.

Case No. 02-01 & 02-02

DECISION AND OPINION OF THE BOARD

This is a decision on two appeals from the Chief Administrative Officer's (CAO) decision denying Appellant's grievance concerning a request for sick leave. This is a consolidated decision.

FINDINGS OF FACT

Request for Parental Leave

On March 29, 2000, (All facts at issue took place in calendar year 2000) the Appellant submitted a request for "parental leave" for 10 different dates between April 2 and June 19, and for December 25. The Department approved the April through June dates, but denied the request for December 25, without explanation. On October 17, the Appellant resubmitted Appellant's request for parental leave for December 25, which the Department denied on October 20, again without explanation.

On October 29, Appellant filed a grievance in connection with the Department's denial of Appellant's request for parental leave for December 25. In Appellant's grievance, Appellant claims, in essence, an entitlement to the requested parental leave under the provisions of Department Policies and Procedures (DPP) 508.1, Pregnancy/Parental Leave, and 508.7, Family Medical Leave Act, and Administrative Procedure 4-35, Family and Medical Leave. In the grievance, Appellant states that Appellant's request had been denied because "no leave was available," and contends that under the regulations relied upon, ". . . FMLA leave is not subject to available leave slots if I use Annual leave and there are no leave slot restrictions if I use Sick leave."

On November 15, a Deputy Chief responded to the grievance, contending that Department Policies and Procedures, 508.1, and 508.7 do not apply to the current issue, and that AP 4-35, is the controlling document. The Deputy Chief states,

The AP does permit you to take leave and you have not exhausted your FMLA allowance. The AP permits intermittent use for either "serious health condition" or to care for the newborn. You have not indicated any "serious health condition." and you therefore are not required to provide any medical documentation. An employee who takes FMLA leave to care for the employee's newborn or newly adopted child or newly placed foster child may use the leave on an intermittent or reduced workweek basis only if approved by the supervisor.

The Deputy Chief concluded “Workload requirements and minimum staffing mandates are such that you must work that day.”

The Appellant appealed to Step II of the grievance procedure and on November 27, management reiterated that parental leave may be granted on an intermittent basis with the approval of the supervisor, citing Administrative Procedure 4-35 and Personnel Regulations Section 17-2 as a basis for management’s decision.

Request for Family Sick Leave

According to the Findings of Fact, approximately 6-8 employees submitted requests in advance for parental leave for December 25, and all of the requests were denied. The Deputy Chief had instructed the Scheduling Officer that any employee requesting sick leave for December 25 would be required to submit medical certification to substantiate their absence from duty.

On December 24, Appellant called the Scheduling Office to request Family Sick Leave for December 25, “in connection with Appellant’s child’s illness.” As no one was in that office when Appellant called, Appellant left a message on the voice mail. December 25, approximately 13 employees who were scheduled for duty called in and requested sick leave. On December 26, the Appellant took Appellant’s child to a cardiologist. On December 28, Appellant was informed that medical certification was needed to cover Appellant’s absence on December 25. On December 28, the Appellant submitted a note from the physician dated December 26, which states, “Please excuse Appellant’s absence from work.”

On January 1, 2001, the Deputy Chief interviewed the Appellant concerning Appellant’s absence on December 25. According to the Finding of Facts, during the interview, the Appellant offered no new information concerning Appellant’s child’s illness that would warrant requiring Appellant to submit additional medical evidence, and, as Appellant’s child’s medical condition was essentially unchanged during the three-week period immediately before Christmas, there was no compelling reason for the Appellant’s absence. The medical certificate submitted by the Appellant was not accepted and Appellant was charged leave without pay.

Of the 13 employees who requested sick leave, two, including the Appellant, had been required to submit medical certification. The other employee’s medical certification was accepted and Appellant’s request for sick leave was approved.

On January 17, 2001, Appellant grieved being charged leave without pay for Appellant's December 25 absence. In Appellant's grievance, Appellant claims a right to use sick leave for the circumstances of December 25, on the basis of cited provisions of DPP 508.2, Sick Leave. In this regard, relying on a Staffing Office "leave report" for December 25, Appellant contends that Appellant was in fact approved for 24 hours of "family sick leave." Appellant also contends that Sections 5.3 and 6.8 of DPP 508.2 were violated when the Staffing Office failed to notify Appellant in a timely manner of the disapproval of Appellant's sick leave request.

Management denied Appellant's grievance by citing 508.2 and Section 14-7 of the County Personnel Regulations for the fact that use of sick leave is subject to approval of the employee's supervisor. Management then states:

You stated that your 10-month old child's heart rate had slowed to an average of 50 beats per minute. On December 6, 2000, you advised an Assistant Chief that your child's heart rate was approximately 50 beats per minute and the cardiologist was examining the possibility of implanting a pace maker. The issue cited in your grievance does not appear to have changed between December 6th and December 25th.

A review of your time sheets from December 3, 2000, through January 13, 2001, reveal that the only sick leave requested was on December 25, 2000. You were able to work your normal shift on all other days during that time period. In fact it appears that you worked approximately 40 hours of overtime the same time period, including 12 hours on December 28, 2000.

As to Appellant's contention that Appellant's leave request had been approved by the Staffing Office, management contended that the report relied upon was merely a listing of personnel who were not working that day and the reason, and the list must not be construed to be approval of leave.

APPLICABLE REGULATIONS

Administrative Procedure 4-35, Family and Medical Leave

2.5, Family Sick Leave – Sick leave granted to an employee for the care of immediate family members....Family sick leave is limited to the amount of sick leave that the employee earned in a calendar year.

2.6, FMLA Leave – Annual leave, sick leave, disability leave, or leave without pay which an employee may use, and a supervisor may designate, as FMLA leave if it is used for the purposes specified in the Act.

4.0 FMLA Entitlement

- (a) An employee must be allowed to use up to a total of 12 weeks of appropriate paid or unpaid leave in a leave year as FMLA leave....
- (b) An employee may use leave without pay or any type of paid leave, including annual leave, sick leave, disability leave or family sick leave, as FMLA. However, an employee must exhaust all appropriate paid leave as FMLA leave before using leave without pay as FMLA, unless FMLA leave qualifies as parental leave under Section 17 of the Personnel Regulations, in which case the employee may use leave without pay as FMLA leave before exhausting all paid leave.

4.1 Use of FMLA Leave, General

- (a) Designation of leave as FMLA Leave – Either the employee or supervisor may designate leave as FMLA. The Supervisor should designate leave as FMLA if the information available to the supervisor indicates that the leave is being taken for an FMLA purpose; and the employee has not requested or otherwise indicated that the leave is FMLA. The supervisor must advise the employee prior to the completion of the period of leave that the leave is designated as FMLA leave and the reasons for the designation.

Use of FMLA leave to care for Employee's Newborn Child....

- (c) An employee who takes FMLA leave to care for the employee's newborn...may use leave on an intermittent or reduced work week basis only if approved by the supervisor.
- (d) The use of parental leave under Section 17 of the Personnel Regulations will be considered to be FMLA leave and counted towards the FMLA entitlement of 12 weeks of leave in a leave year.

Department Policies and Procedures 508.1 provides, as pertinent:

- 3.1 An employee may be granted up to 12 weeks leave within a 12-month period for the purpose of caring for the birth of a child.... This 12-week period will begin with the first use of leave for family care purposes.

Department Policies and Procedures 508.2 provides, as pertinent:

- 4.2 - It is the policy of this Department to permit the use of sick leave for those employees who experience illness in the immediate family....
- 4.3 - An employee may have unlimited use of personal sick leave that is documented. The employee may use up to the hours earned in a year for documented family sick leave. The documentation must be attached to a completed leave request form for the date(s) sick leave was used. The completed leave request and documentation must be sent to the Senior Career Officer at the time of return to duty. The documentation may be either a Doctor's Certification inscribed with his/her letterhead, or an employer Medical Evaluation of Work Status Form.
- 4.4 - The use of sick leave is subject to approval by the employee's supervisor(s). An employee's absence without such approval subjects the employee to being placed on AWOL status.
- 5.3 - The Staffing Officer...will receive and review requests for sick leave in a timely manner and will approve or deny requests based upon the terms of this policy and approved staffing levels.
- 6.8 - When requesting sick leave, employees must be informed of their status as soon as possible (leave is approved; leave is not approved and any absence will be considered AWOL; leave is approved contingent upon receipt of medical certification).
- 7.8 - Provides for up to three incidents of sick leave w/o medical certification.
- 7.9 - Provides for what "must" be done when an employee takes a fourth incident of sick leave w/o medical documentation, one option being charging the employee with AWOL.

Department Policies and Procedures 508.7 (3.0) adopts AP 4-35, Family and Medical Leave Act. Department Policies and Procedures 508.7 also provides, as pertinent:

- 3.1 Sick leave approved for FMLA purposes shall be considered as excused documented sick leave.
- 3.2 - Annual leave for FMLA purposes that falls above the available leave slots must not be counted against the available leave.
- 3.3 - Annual leave approved for FMLA purposes that falls within the available leave slots will be counted against the available leave slots.

Personnel Regulations Section 14-7 requires supervisory approval for use of sick leave.

Personnel Regulations Section 17 Parental Leave provides, as pertinent:

17-1. Grants of Parental Leave – A merit system employee must be allowed to use up to 720 hours of any combination of sick, annual, or compensatory time and leave without pay during any 24-month period....

An operational firefighter assigned to a 2496-hour work year must be allowed to use up to 864 hours....

17-2. Use of Parental Leave. All leave taken under this section:

(a) Must be used within 12 months of the birth of the child....

(c) With the approval of the supervisor, may be used:

- (1) Under a method involving a reduced work day or workweek;
- (2) On an intermittent basis; or
- (3) Any combination thereof;

(e) Is subject to a 30-day advance notice requirement.

(f) The use of parental leave under this Section for a (FMLA) purpose will be considered to be FMLA leave and counts towards the FMLA entitlement of 12 weeks in a leave year.

Personnel Regulations Section 20-5 Use of FMLA provides, as pertinent:

(a) Leave taken to care for the employee's newborn child or child newly placed for adoption or foster care:

(1) Must be taken within 12 months of the birth, adoption or foster care placement of the child;

(2) May be used on a continuing basis or, with approval of the supervisor, may be used on an intermittent or reduced work week basis.

ISSUES

1. Is the Department's denial of the Appellant's request for parental leave on December 25, violative of laws, regulations, or otherwise improper?
2. Is the Department's denial of the Appellant's request for Family Sick Leave on December 25, violative of laws, regulations, or otherwise improper?

POSITION OF THE PARTIES

Appellant's Position

1. Appellant contends that under applicable, cited regulations, Appellant's request for parental leave for December 25th should have been approved. In support of this contention, the Appellant cites DPP No 508.1, which states that an employee may be granted up to 12 weeks of leave within a 12 month period for the purpose of caring for the birth of a child, and states that Appellant did not use all the hours Appellant is entitled to under the FMLA and that Appellant's leave was denied because "no leave was available."

The Appellant also cites DPP 508.7, Section 3-1, Family Medical Leave Act, which states that sick leave approved for FMLA purposes shall be considered an excused absence. Further the Appellant cites Section 3-2 of the FMLA policy which states that annual leave taken for FMLA purposes that falls above the available slots will not be counted against the available leave. Finally, the Appellant cites Section 3.0 of the FMLA policy which states that the Department adopts interim Administrative Procedures 4-35, Family and Medical Leave Act. The Appellant contends that Appellant's requests for leave for FMLA purposes were treated differently for December 25, than for any other day and that the Department has reduced staffing for holidays. Therefore, Appellant contends that the denial of Appellant's requests for leave for FMLA purposes was treated differently for December 25 and that the denial was unreasonable.

Appellant contends that under applicable, cited regulations, Appellant's request for sick leave for December 25th should have been approved and putting Appellant on leave without pay was inconsistent with those regulations.

2. The Appellant further contends that Appellant's request for Family Sick Leave was in fact, approved by the Staffing Officer and that it was after Appellant returned to work on December 28, that Appellant was advised of Appellant's need for medical certificate from a physician or other Licensed Health Care Provider. Further, the Appellant contends that Appellant did not have to furnish a medical certification because Appellant was not on leave restrictions. Additionally, the Appellant contends that the medical certificate Appellant submitted fulfilled the requirements of DPP 508.2, which does not require Appellant to share private medical details on Appellant's child's condition.

County's Position

1. The County maintains that Section 12-1 of the Personnel Regulations states "The work schedules for all employees must be determined by the (CAO), and that this language is interpreted to mean that department heads and their designees are delegated the responsibility,

under the regulations, to schedule employees' work and determine staffing levels." The Department has the right under AP 4-35 to approve or deny employee's requests for intermittent parental leave. The Department determined that the Appellant's request for parental leave on December 25, did not conform to the Administrative Procedure. Where other employees' requests for parental leave conformed to the Regulations, those requests were granted.

The County further contends that under Personnel Regulations, Section 17-2(c), the Department has the right to approve or deny requests to use parental leave intermittently. "DFRS determined the level of staffing needed for December 25, 2000, and approved leave requests accordingly. The Department's staffing decision regarding December 25, 2000 was reasonable."

2. The County contends that the medical certification, dated December 26, submitted by the Appellant did not justify Appellant's request for family sick leave on December 25. It shows that the Appellant's child was seen at the Cardiology Clinic at Children's Hospital on December 26, and did not outline any compelling reason for the Appellant to have been absent from duty on December 25. Additionally, the County contends that the certificate submitted by the Appellant was not sufficient because Appellant's child's medical appointment was on December 26, not December 25 and did not provide an explanation for Appellant's absence on December 25. Citing sections of Policies and Procedures 508.2, the County contends that the Department may require the Appellant to provide a medical certificate any time sick leave abuse or misuse is suspected.

ANALYSIS AND CONCLUSIONS

1. As contended by the Appellant, DPP 508.1 does provide that an employee "may be" granted up to 12 weeks leave within a 12-month period for the purpose of caring for the birth of a child. Administrative Procedure 4-35, Family and Medical Leave, which is adopted by DPP 508.7 (3.0), provides in Section 4.0(a) that "An employee must be allowed to use up to a total of 12 weeks of appropriate paid or unpaid leave in a leave year as FMLA leave . . ." Applicable Personnel Regulation Section 17-1, Grants of Parental Leave, provides that a merit system employee must be allowed to use up to 720 hours of the various types of leave. It is therefore clear that the Appellant's request was consistent with applicable regulations. However, Section 4.2(c) of Administrative Procedure 4.35 provides, "An employee who takes FMLA leave to care for the employee's newborn . . . may use leave on an intermittent or reduced work week basis only if approved by the supervisor." (Emphasis supplied) This requirement is also set forth in Personnel Regulations Section 17-2(c)(2), which states as to the use of Parental Leave, "With the approval of the supervisor, may be used on an intermittent basis." Appellant's request for December 25, was clearly a request that fell within the definition of "intermittent," i.e., a day not part of a continuous period of time. Accordingly, it is also clear that the Department was within its regulatory right to deny Appellant's request for such "intermittent" FMLA/parental leave.

While the County may have had a regulatory right to deny the Appellant's request for leave for December 25, given the regulatory imperative favoring such leave, in the Board's view, the County cannot deny such a request without providing a reasonable basis for such action. In its submission to the Board in this case, the County acknowledges this view by contending that the Department's staffing decision regarding December 25 "was reasonable." The question then remains as to whether, under all of the circumstances, such denial was proper, that is, reasonable.

While it is troubling that the disapproval documents did not provide a reason for the denial, there is no procedural requirement that they do so. According to Appellant's grievance document, Appellant was verbally informed that the basis for disapproval was "no leave available," a phrase that is certainly less than precise as to the basis for denial. Ultimately, in the response to Appellant's grievance, the reason given was "workload requirements and minimum staffing," which are certainly legitimate considerations, particularly for a fire department, and there is no reason to doubt that this was the reason. The evidence indicates that the Department anticipated staffing problems for December 25, Christmas Day, when they denied both Appellant's original request and follow up request for leave for that day. The Board notes in this regard that the Department disapproved all of the approximately 6-8 requests for parental leave for December 25. In the Board's view, the Department has provided a reasonable basis for the disapproval of Appellant's request for parental leave for December 25. In this regard, there is nothing in the record that provides a basis for the Board to question the judgment of the Department as to staffing needs for the day in question.

The Appellant argues that DPP 508.7, Section 3.2, which provides, "Annual leave for FMLA purposes that falls above the available leave slots must not be counted against the available leave," precludes the denial of his requests on the basis of "no leave available." The provision relied upon by the Appellant is part of the regulatory imperative on the granting of a leave request that falls within the scope of the FMLA provisions. However, in the Board's view, the regulatory provision requiring supervisory approval of requests for such leave that is intermittent is still controlling. Therefore, notwithstanding DPP 508.7, Section 3.2, the Department did not violate applicable regulation by denying the request for parental leave on December 25.

2. The Appellant argues correctly that DPP 508.2, Section 4.2 permits the use of sick leave for those employees who experience illness in the immediate family, and that Section 4.3 provides that the employee may use up to the hours earned in a year for documented family sick leave. There appears to be no dispute that the Appellant's recently born child had a condition that required medical attention, and that taking sick leave to take the child in for such attention falls within the scope of the relied upon DPP provisions. However, the Appellant did not take the child for medical attention on the date for which Appellant sought sick leave, December 25. Rather, Appellant took the child to the doctor on December 26. Appellant made no showing that there was a sick leave requirement on the date for which Appellant took off on unapproved sick leave.

Appellant contends that DPP 508.2, Section 4.3 requires only a doctor's certificate, and does not require that Appellant provide a compelling reason for the employee to be off. This however misses the point, that the doctor's certificate provided was not for the date which the employee took off, but the day after. Again, there was no doctor's certificate tendered to explain the Appellant being off on December 25.

Appellant contends, correctly, that the DPP does not require that Appellant see a doctor on the day of the requested leave unless that is the reason for the leave, and that it is not required that Appellant see a doctor in order to take sick leave. However, DPP 508.2 provides for the use of sick leave for employees who experience illness in the immediate family. Moreover, Section 4-4 provides that "the use of sick leave is subject to approval by the employee's supervisor." Because of the Department's concern about meeting staffing requirements on December 25, all employees taking previously unapproved sick leave were required to submit a doctor's certificate. The Appellant relied not on his child's medical condition on the 25th, which admittedly was unchanged for some weeks, but on the doctor's certificate for the 26th. In the Board's view, the Appellant's failure to provide a credible basis for Appellant's sick leave on the 25th provided sufficient basis for the disapproval of Appellant's request.

As to Appellant's contention that Appellant's sick leave request was actually approved by the Staffing Office, in the Board's view, this is not supported by the facts. Appellant's contact with the Staffing Office was only leaving a message on a voice mail system that Appellant was taking sick leave on December 25. The Staffing Office document that Appellant relies on as constituting approval is, as argued by the County, a listing of personnel who were not working that day, the reason, and other administrative information. There is nothing to support the Appellant's contention that it constitutes approval for Appellant's sick leave request.

The Board further rejects Appellant's contention that the Department violated the DPP 508.2, Section 5.3 requirement that the Staffing Officer receive and review requests for sick leave in a timely manner, and the Section 6.8 requirement that employees must be informed of their status as soon as possible. Appellant waited until December 24 to telephone in Appellant's request, leaving a message on the voice mail. Presumably Appellant believes that someone should have called Appellant on the 25th to inform Appellant of the disapproval. However, the Department did not disapprove Appellant's request until Appellant was given an opportunity to provide appropriate justification, including submitting a doctor's certificate. It was only after Appellant was given that opportunity that the Department disapproved Appellant's request.

Finally, while the Appellant's grievances went primarily to the denial of requested sick leave, Appellant also references Appellant's resulting placement on leave without pay status. In the Board's view, such placement and result is consistent with applicable regulations. The

Appellant took sick leave without prior approval. DPP 508.2, Section 4.4, provides that “An employee’s absence without such approval subjects the employee to being placed on AWOL status.” Upon Appellant’s return, Appellant was given an opportunity to provide information that would support Appellant’s sick leave request. When Appellant failed to do so, thereby being absent on December 25 without approval, by operation of the regulation Appellant was on AWOL status.

ORDER

Based on the facts and conclusions stated above, the appeals are denied.

INVOLUNTARY TRANSFER

Case No. 02-17

DECISION AND ORDER

This is the final decision of the Montgomery County Maryland, Merit System Protection Board (Board) on Appellant's appeal from the determination of the Chief Administrative Officer (CAO) denying Appellant's grievance regarding an involuntary transfer.

FINDINGS OF FACT

The Appellant is a paramedic employed with the Montgomery County Government (County), Department of Fire/Rescue Services (DFRS). Appellant has been employed with DFRS since 1988, having obtained the rank of Lieutenant in 1994.

Since 1998 Appellant had been assigned as a paramedic at Station 30. This station's responsibilities include coverage of the riverfront on the Potomac River. Appellant's shift consisted of three other members, one of which was a FF/Rescuer III, who was trained in river rescue operations. Although a paramedic, Appellant was not trained in river rescue operations.

In December 2000, the promotion of the FF/Rescuer III left the 'A' shift at Station 30 with no available personnel ready to be part of the River Rescue Team (RRT). The District Chief, who is in charge of the RRT at Stations 10 and 30, felt this was detrimental to the services offered by the RRT. The District Chief expressed that concern in a notice to the Deputy Chief of Bureau Operations, who was responsible for the deployment of personnel within the Bureau.

The Deputy Chief discussed the situation at the next Transfer Meeting, and as was the Deputy Chief's practice, reviewed the requests for voluntary transfers first. A Lieutenant, who was river rescue trained, had submitted paperwork for a voluntary transfer to Station 30 several months prior. Because the Lieutenant had been previously trained in river rescue operations, the Deputy Chief felt that the Lieutenant could be re-qualified in several shifts, as opposed to the several months it would take to train a new member.

On December 28, 2000, Appellant received notice that the Appellant was to be involuntarily transferred from Station 30 to Station 25, effective January 28, 2001. Appellant filed a grievance on January 12, 2001, stating that the transfer was arbitrary and capricious or discriminatory.

In a response dated January 31, 2001, the grievance was denied, citing DFRS Policies and Procedures 515, Transfer Policy, Section 5.1, which states in pertinent part:

The Department will assign personnel through transfer, promotions, or demotions. Such assignments are based on workload needs and maintaining the operational effectiveness of the Department.

The response additionally cited Montgomery County Personnel Regulations (MCPR), Section 22-1, Transfer, which 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 level either within a department/office/agency or between departments/offices/agencies.

The response concluded by stating that “recently several promotions have caused an operational need for a river rescue qualified officer at Station 30 on A shift. Your transfer was to satisfy that need.”

On June 7, 2001, a Grievance Meeting was conducted by a designee of the CAO. During the grievance meeting, Appellant stated that Appellant had never been told of the requirement to have a river rescue trained paramedic on Appellant’s shift at Station 30. Appellant stated that Appellant wanted to be a member of the RRT, but knew that because Appellant was a member of the Urban Search/Rescue Team (USRT), Appellant could not be a member of two specialty teams at the same time. Appellant also stated that Appellant had not taken any river rescue training, because it was only offered on days that Appellant was detailed out to another station. Appellant also noted that there were two other paramedics on Appellant’s shift that were not river rescue trained.

On March 29, 2002, the CAO denied the Appellant’s grievance and the requested relief. By letter dated April 10, 2002, the Appellant noted an appeal to the Board.

POSITION OF THE PARTIES

Appellant

The Appellant contends that the involuntary transfer was arbitrary and capricious or discriminatory because there was no written requirement to have a river rescue paramedic on each shift; that no one ever told Appellant that Appellant needed to be trained in river rescue in

order to remain at Station 30; and that Appellant was never afforded the opportunity to train in river rescue operations. Appellant also contends that Appellant's involuntary transfer could have been avoided by transferring a river rescue trained member from another shift to Appellant's shift.

County

The County contends that transfers are a prerogative of management, and that DFRS had a legitimate reason, the void on A Shift created by the promotion of a paramedic trained in river rescue operations, for transferring the Appellant to Station 25, and the simultaneous transfer of the Lieutenant, who was already trained in river rescue operations, to fill the vacancy at Station 30. The Lieutenant had previously submitted a request for a voluntary transfer to Station 30, and accommodating the Lieutenant's request for transfer at this time would satisfy the requirement for a river rescue trained paramedic on A Shift at Station 30. Additionally, because the Lieutenant and the Appellant were both Lieutenants, the exchange would necessitate only one involuntary transfer, whereas transferring any other personnel would necessitate two involuntary transfers. The County further notes that there was no need to have two Lieutenants staffed on the same shift.

ISSUES

1. Was the involuntary transfer of Appellant from Station 30 to Station 25 arbitrary, capricious or discriminatory, or otherwise improper?
2. Is any basis shown for holding an evidentiary hearing?

ANALYSIS AND CONCLUSION

1. In response to Appellant's contentions that there was no written policy that required a river rescue trained paramedic on each shift and that no one ever told Appellant that Appellant needed to be river rescue trained to remain on the shift, the County maintains that there is no legal requirement that every policy and procedure be in writing, and that DFRS could choose to have river rescue trained paramedics on each shift if they felt it would improve the operational effectiveness of the station. In that regard the County cites Section 22-2, Reason for Transfer, which states that employees may be transferred on the basis of (g) the resolution of other problems affecting the operational efficiency of a unit or organization, or (i) the need for additional personnel at a specific work site. The Board concurs with the County's contentions, noting particularly that there is no requirement that the staffing pattern of having a river rescue trained paramedic on the shift be in writing, or, for that matter, previously conveyed to the Appellant. Further, the Board notes that the relied

upon Personnel Regulations Section 22-2 and DFRS Policies and Procedures 515 specifically provide for the authority to make the type transfer at issue here. Therefore, the Board rejects the contentions that the absence of written requirement for a river trained paramedic on each shift, or the alleged failure to advise Appellant of such a requirement, renders the transfer illegal or improper.

While the Board has concluded that the Department had the authority to make the involuntary transfer at issue, the Personnel Regulations provides a limited basis for challenging such a transfer. Personnel Regulation 22-6, 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 and capricious or discriminatory.

In support of Appellant's contention that Appellant transfer was arbitrary and capricious or discriminatory, the Appellant makes a number of contentions. In this regard, the Appellant contends that Appellant did not have the opportunity to become river rescue trained because Appellant was already a member of the Urban Search/Rescue Team (USRT) and there is a Departmental policy precluding anyone from being a member of more than one special team, and that Appellant's work schedule precluded Appellant from taking the training that was necessary to become river rescue trained.

With respect to this contention, the Board notes that the Appellant was notified in September 1998, in response to Appellant's inquiry about becoming a member of the RRT, that Appellant could not be a member of two specialty teams at the same time. Thereafter, Appellant took no action toward dropping Appellant's membership on the USRT and joining the RRT at any time during Appellant's three years at Station 30. While the Appellant contends that Appellant's work schedule precluded Appellant from participating in river rescue training, there is no evidence, or even assertion, that Appellant took any action toward such a goal until after being told of the transfer.

The Appellant further contends that there were other ways of meeting the requirement to have a river rescue trained paramedic on Appellant's shift, e.g., moving a river rescue paramedic from other shifts on to Appellant's shift; that there were two others on Appellant's shift that were not river rescue trained, presumably arguing that one of them rather than Appellant should have been transferred; and that at the time Appellant was told of Appellant's transfer, Appellant offered to drop their membership in the USRT and become river rescue trained. The Department responded by what the Board concludes are reasoned and justifiable considerations. Specifically, the transfer of already river rescue trained Lieutenant, who had submitted a request for such a transfer some months before, provided an opportunity to meet their requirement rather quickly, as opposed to taking the July and August summer months that would be necessary to train a new person; by

switching the Lieutenant for the Appellant, they were trading a Lieutenant for a Lieutenant; transfers had been going on for the previous two years to have specialty trained personnel at the location of the specialty team; and that while having a river rescue trained paramedic is not a minimum requirement, it increases the efficiency of the station.

In the Board's view, the Appellant has presented no compelling evidence to meet the burden of proof showing that the County's action was arbitrary and capricious or discriminatory. The Department's actions were not without reason or justification. The decision of DFRS to transfer Appellant in order to fill a void on A shift at Station 30 with an already river rescue trained paramedic, is a legitimate reason for Appellant's transfer to Station 25. The facts show, contrary to the contention of the Appellant, that the County has demonstrated there was reason and justification for a river rescue trained paramedic on A Shift at station 30.

2. In the Board's view, there are no disputes of material facts necessitating a hearing before the Board.

ORDER

Accordingly, based on the above, the Board concludes that Appellant's involuntary transfer was consistent with regulation, and not otherwise improper. There is no showing that the County's actions were arbitrary, capricious or discriminatory. Appellant's appeal of Appellant's involuntary transfer is therefore denied.

MEDICAL

Case No. 02-08

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on Applicant's appeal from the decision of the County Office of Human Resources (County) that Applicant did not meet the medical requirements for the position of Police Officer Candidate.

FINDINGS OF FACT

The Applicant sought a position as a County Police Officer. As a result of the required pre-employment medical examinations conducted by the County's Medical Examiner, the Applicant was advised on May 29, 2001, that additional medical information was required from Applicant's personal physician regarding diabetes. The Applicant was provided with a form identifying the specific information required, which related to the diagnosis and prognosis for the Applicant's Insulin Dependent Diabetes Mellitus (IDDM). The Medical Examiner's letter advised the Applicant that County Personnel Regulation Section 5-2, Medical Requirements for Employees/Applicants, states, . . . The refusal of an employee/applicant to take the examination or provide medical records may be grounds for immediate termination of employment or processing of an application."

In response to the Medical Examiner's request, Applicant's personal physician provided an extensive medical response, which included, as points made:

The probability of a conventionally treated person with IDDM experiencing a severe hypoglycemia reaction was 0.2%;

Severe hypoglycemia can be treated by several methods, which can reverse the condition within seconds to minutes;

The Applicant has successfully performed in his INS position, and has had no problem managing his IDDM, never having experienced a severe hypoglycemia reaction;

The Applicant's method of treatment gives Applicant the ability to take action to respond to hypoglycemia;

In his conclusion, the personal physician took note of the fact that the Applicant was functioning successfully as a sworn law enforcement officer with the U.S. Immigration and Naturalization Service in Calexico, California, where Applicant is required “. . . to work rotating shifts, unscheduled and extended hours, and be physically capable of performing arduous physical exertion, use of firearms, exposure to inclement weather, the ability for simultaneous rapid mental and muscular coordination with emotional stability, and arresting suspects where they may need to be physically subdued.” The physician concluded, “I have reviewed job specifications that were included, I place no restrictions on (Applicant’s) ability to successfully perform the essential functions of a Police Officer.”

In a June 7, letter to the Applicant, the Medical Examiner characterized the personal physician’s response as “. . . good information to be used in making a medical determination of your fitness for duty,” but requested, “it would help greatly if you would send me a computer printout (if possible), of your daily sugar readings for the past 2-3 months.” “If this is not possible, explain why and send me what you can.” Responding on June 21, the Applicant did not provide the requested information, but gave reasons why, including that the Applicant’s physician did not require such recordation, and provided information on the results of Applicant’s daily checks of Applicant’s blood sugar levels.

According to the Applicant, when Applicant had heard nothing about Applicant’s application, in October, Applicant made a telephonic status inquiry, at which time the Medical Examiner advised Applicant that additional medical information was required, and that the Medical Examiner would be consulting with an expert in the field of diabetes. According to the Medical Examiner, the consultant had first been contacted in June, but had not responded, nor had the Medical Examiner been able to subsequently get a response from the consultant. He therefore contacted a number of other experts on diabetes, and, based on the information obtained, and the lack of certain information on the specifics of the Applicant’s condition, the Medical Examiner had concerns. Identified information requested but not received were, in summary,

Documentation of good diabetes control over the past two years with hemoglobin Alc data;

Information on daily blood glucose levels for 6 months;
Recent ophthalmology information documenting a normal retinal exam in the year 2001;

A two-week record of the applicant’s daily blood glucose levels;
The result of an isotope stress test to exclude significant coronary artery disease.

Additionally, according to the Medical Examiner, the Medical Examiner contacted the personal physician, who advised the Medical Examiner that the personal physician had not seen the

Applicant since December 12, 2001, which the Medical Examiner contends, “. . . is highly unusual for an insulin-dependent diabetic to go one year without seeing a doctor.” It should be noted however that the appeal record contains a copy of a “While You Were Out” telephone message from the personal physician to the Medical Examiner, with the message, “received protocol and it looks fine.”

According to the Medical Examiner, in addition to the Medical Examiner’s concern about missing information, on the basis of information obtained, the Medical Examiner had a major concern with the Applicant’s risk for hypoglycemia, despite the use of an insulin pump. The Medical Examiner contends that the Medical Examiner could not find a single physician with occupational medicine experience who believed that an insulin-dependent diabetic could safely perform the job of a police officer. Based on the information obtained, and the lack of information on the specifics of the Applicant’s condition, the Medical Examiner concluded that “. . . it would be unwise to place this individual with a major, potentially life-threatening disease into one of the most difficult and dangerous jobs in the county.” On November 16 the Medical Examiner advised OHR that the Applicant was not medically acceptable for the Police Officer position, and OHR provided this information to the Applicant on December 11. In a January 7, 2002, in response to the Medical Examiner’s request for an opinion, the consultant stated, in pertinent part,

. . . diabetes should not impair (Applicant’s) ability to perform the required duties of a Montgomery County Police Officer. Reasonable accommodation, including permission to carry rapid acting carbohydrate and blood glucose monitoring equipment is all that should be required. Continued medical assessment of (Applicant’s) medical condition according to standard practice guideline will insure his continued suitability for performance of the job.

Following its initial consideration of the appeal, the Board issued an Order that noted the Medical Examiner’s statement that one of the reasons for Applicant’s “medically unacceptable” determination was the lack of documentation of Applicant’s good diabetic control, and that information not provided included: 1) hemoglobin A1c data-other than the one A1c report that the Applicant submitted; 2) a two week record of the Applicant’s daily blood Glucose levels; 3) ophthalmology information documenting a normal retinal examination; and 4) a test to exclude significant coronary artery disease. Further noted was the Applicant’s contention that as to the information on blood glucose reading, Applicant had sought clarification from the Medical Examiner; and as to the other information, Applicant had not been able to schedule an appointment. The Board then ordered that the Medical Examiner provide written instructions on the additional information requested, and that the Applicant provide the requested information and any additional information bearing on Applicant’s meeting the medical requirements for the Police Officer position. The Order provided a specified time frame for the exchange of information.

Following the Board's Order, on April 29, the Medical Examiner sent a letter to the Applicant which describes four phases for determining if IDDM's are fit to serve as police officers, including the need for a "coronary artery disease evaluation." The letter concluded with the request that the Applicant discuss this information with Applicant's doctor, and, "If the personal physician or any other physician has any questions, please ask them to call me" The Applicant did not respond to the Medical Examiner's letter. Rather, in a letter to the Board received June 11 (a copy of which the Board provided to the County), the Applicant stated that Applicant was still waiting for the County to comply with the Board's Order. Applicant references the Medical Examiner's April 29 letter, which Applicant describes as "ambiguous and does not make a specific request for additional information. . . ."

There have been no further exchanges between the parties.

POSITIONS OF THE PARTIES

Applicant

The Applicant contends that based on Applicant's five year record as an INS inspector, the opinions of two physicians, and the effectiveness of Applicant's treatment for IDDM, Applicant is medically acceptable for the position of County police officer, and that the Medical Examiner acted arbitrarily and capriciously in reaching a contrary determination. The Applicant also contends that the Examiner continues to add ambiguous requests for additional information that are impossible to comply with.

County

The County contends that the Applicant has failed to provide requested medical information, and that because of Applicant's use of an insulin pump, the Applicant runs the risk of a hypoglycemia reaction. In the County's view, the Medical Examiner's determination of "not medically acceptable" for a police officer position is proper and justified under the circumstances.

ISSUE

Were the procedures followed and the decision made with respect to the determination of the Applicant's medical acceptability for the position of County police officer consistent with regulations and otherwise proper?

ANALYSIS AND CONCLUSIONS

The process of determining the Applicant's medical acceptability for a position of Police Officer Candidate has been long and complicated, which, in the Board's view, is the result of shared responsibility. The Medical Examiner appears to have been moving toward a resolution of the issue of the Applicant's medical acceptability issue when the Medical Examiner made the June 7 request for specified information. The Applicant provided arguably relevant information, but not what was requested. After the Medical Examiner became the new County Medical Examiner, while the Medical Examiner was apparently collecting information on the ability of the Applicant, as a diabetic, to function as a Police Officer, the Medical Examiner was not communicating with the Applicant. After the Applicant made the October status inquiry, the Medical Examiner requested additional information, which the Applicant did not respond to. Then, without further contact with the Applicant, the Medical Examiner advised OHR that the Applicant was not medically acceptable. While the Board's interim Order attempted to bridge the parties lack of communication, the County's responding letter to the Applicant did in fact lack the specificity that the Board contemplated in its Order. Providing the Applicant with the phases of screening is not "written instructions on additional information requested." However, rather than contacting or having the Applicant's physician contact the Medical Examiner, which was suggested in the County's letter to Applicant, the Applicant did nothing, even though the Board's Order had specifically identified missing information. While the above-described communications disconnects are disappointing, the Board is of the view that it is appropriate at this time to address the present appealed determination of the County that the Applicant is not medically acceptable for the position of County police officer.

The establishment of "medical standards" and the requiring of a medical examination of applicants for employment, and the disqualification of applicants based on physical conditions, are all specifically provided for by Section 5-12 of the County Personnel Regulations and Administrative Procedures 4-13, Medical Standards. The Board has long held that County management should be afforded substantial latitude to assess the impact of a particular medical condition on the duties of a specific position. Accordingly, a County determination on qualifications should be given significant deference, absent a showing that it is arbitrary, capricious, or clearly unsupported by facts.

The procedure followed in the instant case was consistent with the regulations. A physical was conducted where the Applicant was considered against the job specifications. Reasonable concerns were raised by the Medical Examiner, who gave the Appellant's personal physician an opportunity to provide requested information. Ultimately, the Medical Examiner had medical concerns, and about the information that he lacked, and the Appellant was given an opportunity to provide that information. Finally, the Medical Examiner made a determination on the basis of the information the Medical Examiner had. While the Board has the above-discussed concerns over lack of communications between the County and the Applicant, the manner in which the medical determination was made is consistent with applicable regulations.

As to the medical determination itself, in the Board's view, the County has demonstrated that, on the basis of the information available to them, that there are reasonably based medical concerns on the Applicant's ability to function as a police officer. While other doctors said that they would place no restrictions on the ability of the Applicant to function as a police officer, both came to their conclusion in the context of the Applicant being able to have the ability to respond to symptoms of Applicant's diabetes, and the Medical Examiner had information that could reasonably lead them to conclude that there could be problems in the ability to respond in a policing circumstance.

With respect to the fact that the Applicant is satisfactorily performing duties which are arguably analogous to those of a County police officer, while this is relevant to a medical acceptability determination, it is not dispositive where there is compelling medical information, which we find to exist in the instant case. In this regard, we note the Medical Examiner's analysis of the risk of hypoglycemia.

Based on the above, the Board concludes that there is not a showing that the County's determination on the Applicant's medical acceptability is arbitrary, capricious, or unsupported by the facts, and, accordingly, the Applicant's appeal is to be denied.

While we are denying the appeal, we note that OHR's notification to the Applicant states that Applicant did not meet the applicable requirements "at this time," and that much of the basis of the Medical Examiners' determination of non-acceptability is because of information that Applicant lacked. Accordingly, the Board concludes that should the Applicant wish to renew their application for employment and, at such time, respond to all requests for medical information, the County will reconsider the Applicant's medical acceptability.

ORDER

Having concluded that the County's procedures were proper and the Applicant's disqualification was neither arbitrary and capricious, and was supported by the facts, the Applicant's appeal is denied. It is further ordered that should the Applicant reapply for a police officer position, and, at such time, respond to all requests for medical information, the County will reconsider the Applicant's medical acceptability.

PAY INEQUITY

Case No. 02-16

REMAND ORDER

This matter involves an appeal from the decision of the Chief Administrative Officer (CAO), partially granting and partially denying the grievances. The Manager, Compensation, the Office of Human Resources, (Factfinder) was designated to conduct the grievance meeting which provided the record upon which the CAO based his decision. The Appellant's are Sergeants within the office of the Sheriff for Montgomery County, who assert that pay increases for recently appointed Sergeants have resulted in pay compression and inequities. Stated differently, they assert that recently appointed Sergeants with less experience are being paid more than Sergeants with more seniority and experience.

The record reflects that in July 2000, the Sheriff requested that the Office of Human Resources (OHR) conduct a compensation study to set entry level salaries at a level necessary to recruit new deputies and to alleviate pay compression caused by increasing the pay level for new deputies and promotions. The Director, OHR, issued a report with recommendations to the CAO July 28, 2000. The report recommended increases for deputy sheriffs to at least the level being paid new hires, but granted no further relief.

Significantly, the CAO's decision on the grievances determined that one aspect of the grievance was subject to the OHR's July 28, 2000 report, and the grievances, which were filed September 10, 2001, were partially denied as having been filed untimely. Also, the Factfinder acknowledges participating in discussions between the Sheriff and OHR regarding the pay increase prior to OHR's July 28, 2000 report.

The Board believes that the Factfinder, as an employee of OHR, may have been subject to command influence such as prohibited by Mayer v. Montgomery County, Maryland, 143 Md. App. 261,194,A2d 704(2002).

Accordingly, the Board vacates the CAO's decision and remands this matter to the CAO for appointment of a Factfinder independent of OHR.

PROMOTIONAL PROCESS

Case No. 00-07

SUPPLEMENTAL DECISION AND ORDER

This is the supplemental final decision of the Montgomery County Merit System Protection Board (Board) on appeal from the denial of a grievance over not being selected for promotion to the rank of Captain. The matter is now before the Board pursuant to the decision of the Circuit Court for Montgomery County, Maryland (Court), remanding the case to the Board for clarification of its Decision on Attorney Fees Request dated August 8, 2001.

FINDINGS OF THE COURT

On November 9, 2001, pursuant to a Joint Motion filed by the County and the Appellant, the Court remanded the matter of Appellant and Montgomery County Government, Case No. 00-07, to the Board with instructions to clarify its Decision on Attorney Fees Request dated August 8, 2001. The Court further instructed that the Board could permit further proceedings, including briefs from the parties.

POSITION OF THE PARTIES

To assist the Board in carrying out the direction of the Court, the Board requested that the parties submit briefs identifying with specificity what they believe to be errors in the original decision, and what they believe to be the correct facts. Additionally, the Board Order provided that the briefs should set forth the parties positions on issues of fact and law raised by the Attorney Fee Request, including the authority of the Board to Order the reimbursement of attorney fees and costs related to the processing of an appeal of a Board Decision to Court.

Appellant

1. The Appellant contends that the Board improperly excluded fees for the County's appeal to the Court of Special Appeals, arguing that the County is compelled to pay such fees when they are the party seeking judicial review. Montgomery County Code, Section 33-15(c) Judicial Review and Enforcement, of the Montgomery County Code states, in pertinent part:

When the Chief Administrative Officer is the party seeking judicial review of a board order or decision in favor of a merit system employee, the County shall be responsible for the employee's legal expenses, including attorneys' fees which

result from the judicial review and are determined by the County to be reasonable under the criteria set forth in subsection (c) (9) of Section 33-14.

2. The Appellant also contends that the Board improperly excluded fees for the Appellant's successful appeal to the Circuit Court, arguing that the Board has, on numerous occasions, awarded fees for appeals to the Circuit Court. In this regard, Appellant notes most recently that the Board awarded fees for the Appellant's successful appeal to the Circuit Court in the matter of Eileen O'Hara and Montgomery County Government, MSPB Case No. 99-23, dated May 16, 2001.

3. The Appellant also contends that the Board's decision is internally inconsistent with regard to the successful appeal to the Circuit Court. Appellant notes in this regard, that a computation of the hours and amounts in the Board's decision would compute to an amount owed to the Appellant of \$XX.XX, but the Board only awarded \$XX.XX in attorney fees. Additionally, the Appellant notes that the itemized dates that the Board allows in its decision, include the period for processing the case before the Circuit Court, which is inconsistent with the Board's position of not awarding attorney fees for appeals to the Circuit Court.

County

1. The County contends that AP 4-4 prohibits an Appellant receiving attorney fees during the grievance's administrative processing. Section 4-9 of AP 4-4 provides, in pertinent part:

As the use of legal counsel is optional in conjunction with this procedure, the costs incurred in using such counsel are the responsibility of the employee.

The County did not address issues related to the authority of the Board to order the payment of attorney fees related to the processing of an appeal of a Board decision to Court.

ISSUES

1. Is an award of attorney fees appropriate for the administrative processing of Appellant's grievance?

2. Is the Appellant entitled to an award of attorney fees for time spent on an appeal to the Circuit Court?

3. Is the Appellant entitled to an award of attorney fees for time spent responding to the County's appeal to the Court of Special Appeals?

4. Is the Board's previous award of attorney fees incorrectly computed, and if so, what is the corrected amount of reimbursement due to the Appellant? Do the itemized dates in the Board's decision include the period for processing the case before the Circuit Court, and make it inconsistent with the Board's position of not awarding fees for appeals to the Circuit Court?

ANALYSIS AND CONCLUSIONS

1. With respect to the County's contention that AP 4-4 prohibits the awarding of attorney fees to employees during the grievance's administrative processing, the Board rejects that contention. In Anastasi, the Board previously addressed the issue of awarding attorney fees during the grievance's administrative processing, holding that Section 4-9 of Administrative Procedure 4-4 had no effect on the Board's remedial authority under Section 33-14(c)(9) to order the County to reimburse or pay all or part of the employee's reasonable attorney fees. We noted therein that the Board's remedial past practice has been to allow attorney fee claims to include time spent processing the original grievance, time which is part of the processes available to employees to assert claims against the County. Accordingly, we reject the County's contention that the AP Grievance Procedure limits the Board's authority to order the reimbursement of attorney fees for time spent in the processing of the grievance.

2. The Board previously addressed the issue of attorney fees incurred during the processing of an appeal before the Circuit Court, in the matter of Anastasi and Montgomery County Government, MSPB Case No. 96-08. Section 33-14(c)(9) of the County Code vests the Board with the authority to order, as part of its decision, the County to reimburse or pay all or part of the employee's reasonable attorney fees. There is no authority in the Code for the Board to order the County to reimburse an employee for such expenses incurred after the Board's decision, including the judicial review of Board decisions.

With respect to the awarding of attorney fees in O'Hara, in that case, the Board was complying with a specific order from the Circuit Court to award the Appellant reasonable attorney's fees and costs associated with the Board's initial decision and subsequent appeal to the Circuit Court. There is no such order in the instant case.

3. In the Board's Decision on Attorney Fee Request, it was concluded that we lacked authority to award requested attorney fees for the processing of appeals before the Circuit Court and Court of Special Appeals. The record before the Board at that time did not indicate that the County was the party filing the appeal to the Court of Special Appeals. Pursuant to Code Section 33-15(c), the Appellant, who prevailed in that proceeding, has an entitlement to attorney fees. However, that Code Section states that "the County shall be responsible for the employees legal expenses, including attorneys' fees which result from the judicial review and are determined by

the County to be reasonable under the criteria set forth in subsection (c)(9) of Section 33-14.” (Emphasis supplied) Accordingly, requests for attorney fees under Section 33-15(c) are to be submitted directly to the County, rather than to the Board.

Accordingly, the Appellant is referred to the County, for reimbursement of attorney fees associated with the County’s appeal to the Court of Special Appeals.

4. The Board has reviewed its Decision On Attorney Fee Request, dated August 8, 2001, with respect to Appellant’s contention that the listed hours and amounts compute to a different total (\$XX.XX) than the Board ordered (\$XX.XX). The Board notes in that regard that the last paragraph preceding the Order does contain text that includes 39.1 hours for the period December 8, 1999 – July 8, 2000. The inclusion of 39.1 hours is an error and at variance with the rest of the decision and the subsequent order of attorney fees in the correct amount of \$XX.XX.

As previously stated in its August 8, 2001 decision, there is no authority for the Board to order the County to reimburse an employee for such expenses incurred after the Board’s decision. Accordingly, having addressed the misstated 39.1 hours, there is no inconsistency with regard to the Board’s position of not awarding attorney fees for appeals to the Circuit Court.

ORDER

Accordingly, having found that the County is responsible for the payment of Appellant’s attorney fees associated with the County’s appeal to the Court of Special Appeals, the Board refers Appellant to the County for reimbursement. Having restated the Board’s position regarding the disposition of cases after a Board decision, the Board denies Appellant’s request for attorney fees associated with the appeal to the Circuit Court. Having addressed the portion of text that was in error in the Board’s August 8, 2001, decision, and thereby determining that the order of \$XX.XX is correct, the County is ordered to reimburse the Appellant that amount. For the reasons stated previously, the County’s request to exclude attorney fees incurred during the grievance’s administrative processing is denied.

Case No. 00-09

SUPPLEMENTAL DECISION AND ORDER

This is a supplemental final decision of the Montgomery County Merit System Protection Board (Board) on an appeal from the denial of a grievance over not being selected for promotion to the rank of Captain in the Police Department.

FINDINGS OF THE COURT

By Memorandum Opinion and Order dated August 21, 2001, (Civil No. 209286) the Court remanded the case to the Board, for further proceedings. In issuing its remand, the Court found that the relevant facts underlying the Board's decision in this case are indistinguishable from those in Walker v. Montgomery County, Case 00-07 (Civil No. 206006). In that case, on review of the Board decision, the Court found that the selection process procedures used by the County denied the Appellant in that case a fair opportunity to be considered for promotion, and violated the County Charter and Code, and concluded:

... that there should be remedial action. However, it would be inappropriate for this Court to decide whether Petitioner should receive redress in the form of backpay, retroactive promotion, future promotions or something else.... The Montgomery County Code grants discretion to the Merit Board to fashion remedies for violations of the Merit System Law.... This Court will not restrict the Merit Board's authority to fashion the appropriate remedial measures, and will remand the instant case to the Merit Board so that it may provide remedial action in accordance with this opinion.

In the instant case, the Court concluded:

... the court can find no merit in any additional exploration into the issues previously adjudicated in Walker. As stated in Walker, it is inappropriate for this Court to decide whether Petitioner should receive redress in the form, of backpay, retroactive promotion, future promotion or something else... Therefore, the Court will not restrict the Merit Board's authority to fashion the appropriate remedial measures, and will remand the instant case to the Merit Board so that it may provide remedial action.

POSITION OF THE PARTIES

To assist the Board in carrying out the direction of the Court, the Board requested that the parties file briefs on the appropriate remedy to be accorded the Appellant for the selection process violations found by the Court, and their reasons therefore.

Appellant

1. The Appellant contends that the appropriate remedial action is a retroactive promotion with backpay to August 2, 1998, the date a different candidate was promoted. Appellant notes in that regard, that because of Appellant's disability retirement, a retroactive promotion would not present any manning or staffing issues. The Appellant further contends that the Court's remand includes all four of Appellant's

grievance cases, and reiterates Appellant's request for a hearing for all of the reasons previously advanced by Appellant to the Board.

2. The Appellant also contends that it is appropriate that the Board award reasonable costs and attorney fees because of the requirement to pursue this matter to the Circuit Court and back.

County

1. The County opposes the grant of a retroactive promotion, contending that there is no evidence that lacking the procedural errors found by the Court, Appellant would have been the candidate selected. The County instead proposes that Appellant be allowed to compete in an upcoming promotional process or alternatively, that the Board direct the County to rescind the promotional selection and conduct a new selection process.

ISSUE

1. What is the appropriate remedy for violations found by the Court?
2. Is the payment of attorney fees appropriate?

ANALYSIS AND CONCLUSION

1. In the Board's view, the Appellant's proposed remedy of a retroactive promotion is not, in the circumstances of the instant case appropriate, because there is no finding by the Circuit Court that but for the procedural errors, the Appellant would have been selected. In fact, there were a total of seven candidates who were considered for the position, and six were not selected, including the Appellant.

In the Board's view, the appropriate remedy in the instant case would be to afford the Appellant priority consideration for future Captain positions, a remedy which would provide the Appellant an opportunity to be considered for selection to fill a Captain position prior to other applicants. However, the record reflects that the Appellant has since taken a service connected disability retirement, and is no longer employed by the County. Accordingly, absent there being a change in the Appellant's employment status, no further compliance is required with respect to the promotion of the Appellant.

In the Board's view, since the Circuit Court found that the Police Department denied the candidates "a fair opportunity to be considered for promotion," by failing to

observe the County's personnel laws and regulations, the Police Department should ensure that its promotional procedures comply with applicable Montgomery County Rules and Regulations.

The Board reaffirms its decisions in the consolidated appeal of Appellant's other three grievances, and rejects Appellant's contention that the Court's remand intended that the Board issue new decisions on all four grievances. In the Board's opinion, the Court's decision clearly references only the issue of the promotion procedures and remands it to the Board to develop a remedy, only on the issue of the defective promotion procedure.

2. Section 33-14 (c) of the Montgomery County Code empowers the Board to order the payment of attorney fees in the circumstance of a decision in favor of Appellant. In view of the Circuit Court findings that the Police Department denied the candidates "a fair opportunity to be considered for promotion," by failing to observe the County's personnel laws and regulations and, an order for the payment of allowed attorney fees and costs is appropriate.

CONCLUSION AND ORDER

Accordingly, having found that priority consideration for the next available Captain position was the appropriate remedy, and that the Appellant has retired from County service, the Board finds that no further remedy with regard to promotion is required. The Board finds no new issues of fact or substantive information that would necessitate holding a hearing. The request for a hearing is therefore denied. The County is hereby ordered to reimburse to the Appellant such attorney fees and costs that the Board determines are appropriate. The Board orders the Police Department to revise its promotional procedures to comply with applicable County rules and regulations.

Case No. 01-13

DECISION AND ORDER

This is a final decision of the Montgomery County, Maryland Merit System Protection Board (Board) on the appeals of four Appellants from the decision of Chief Administrator Officer (CAO), denying their consolidated grievances regarding the 1999 promotional examination for the rank of Police Lieutenant.

FINDINGS OF FACT

Background

Candidates for promotion to the grade of Lieutenant are ranked for consideration on the basis of an examination, which is developed by the County Office of Human Resources (OHR). The development of the test given in September 1999, was the responsibility primarily an OHR staff member. The record contains the description of a multi-step developmental process beginning in February 1999, culminating in a promotional examination consisting of a written exercise, a presentation exercise, and a structured oral interview. On June 23, 1999, a Personnel Bulletin (Bulletin) was issued which contained information on the examination, including scoring procedure. The latter portion provided, in pertinent part:

Based on an overall evaluation of all examination components, each candidate will receive consensus scores for the managerial dimensions The highest score attained will be set equal to 100, using the following formula An Eligible List will be established and each eligible promotional candidate will be placed in alphabetical order in the adjectival category of either "Well Qualified," or "Qualified." The final standing for each promotional candidate will be determined as follows:

80 and above	= Well Qualified
70 to 79	= Qualified
below 70	= Not Eligible for Promotion

As part of the process of preparation for the examination, the Police Department (Department) obtained from other area police departments Police Captains and Lieutenants, who would serve as "raters" of the candidates as they went through the examination. The raters, who were prepared to serve on a three-person rating panel for each of the three exercises, were given two days of training on all aspects of what they were to do. The final score for a candidate for each dimension was to be arrived at by a consensus process. A candidate's final raw score was to be the sum of the raters' consensus scores for the candidate, on the seven test dimensions. The final score would later be standardized using a method described in the Bulletin.

A second group of Department Lieutenants and Captains were designated and trained to be "proctors," who were to give the candidates their instructions and any materials they would need to prepare for each of the three exercises of the examination. They practiced verbatim scripts that they would read to the candidates to insure consistency in the instructions that all candidates received. The instructions and materials were designed for each of the specific exercises.

Promotional Examination

The first five days of the examination process took place as scheduled. However, on the last day, one proctor failed to read from the script, failing to provide one group of five candidates some written information that they needed to prepare for their oral presentation portion of the examination. By the time the error was discovered, the five affected candidates had already begun their oral presentations. Following the oral presentations of the candidates who had not received all of the necessary instructions, an employee apprised the rating panel and asked them if they thought the lack of complete instructions had affected performance. Most of the raters were of the opinion that the candidates did fine and that they could proceed with their rating of those candidates. The raters continued the rating process. The grievance decision statement of facts concludes,

However, it was clear that the consistent and uniform application of the examination process was flawed by the proctor error. Five candidates could have been unfairly affected by the proctor failure.

Resolution of the Flawed Administration of the First Examination

Soon after the examination, an employee advised the OHR Director and other OHR staff members of the incident that had occurred. According to the grievance decision statement of facts, the OHR Director initially favored creating a new presentation exercise, putting all candidates through it, and then giving them the better of their two scores, but the Director wanted to first call the Police Chief to get the Chief's opinion. After the Chief was advised of these events, it was determined that the Chief would like to have a mandatory meeting of all applicants and give them the options of: 1. keeping their scores as they were done (with the error in it); 2. dropping the presentation exercise and have their score on the eligibility list be an average of their scores from the other two exercises, or if they did not like either of those, give them the option favored by the OHR Director, 3. creating a new presentation exercise for all candidates to take and giving them the better of their two scores. The employee was to compute scores that would exist using the two options favored by the Chief, which were to be provided to the candidates.

Following the employee's scoring analysis, on October 6, the employee sent an E-mail to the OHR Director and the Chief, which set forth the following options and the possible effects on the candidates:

1. For the most part candidates did better using their consensus scores assigned by the raters (Option 1). (But we still cannot say that 3 candidates affected by the proctor error who received "Qualified" ratings . . . could not have done better. They would probably prefer a new presentation and try to achieve "Well Qualified.")

2. Dropping the Presentation exercise (Option 2), two candidates who were not involved in the proctor error are affected: One goes from “Well Qualified” to “Qualified” and one goes from “Qualified” to “Well Qualified” (These two are sure to disagree on the options they prefer). One of the 3 affected by the error with a “Qualified” rating fails the exam if the presentation exercise is dropped. The other 2 applicants referenced in #1 receive “Qualified” ratings using Option 1 and 2.
3. If the decision is between Option 1 and 2 it will probably become a battle between the 3 mentioned in # 2 who have something to lose/gain by which option is selected. If Option 3 is presented . . . , all candidates who received “Qualified” ratings or who did not pass will support that option. The other 29 of 39 who received “Well Qualified” ratings will not care, unless they have reason to think scores may count in some way in the selection. In that case, they will be concerned about their scores before deciding for Option 1 or 2 and will have more of a reason to be interested in Option 3 as a way to boost their score. However, at this time scores do not play a part in selection and I do not think it would be good to discuss scores at the meeting.

Over the next several days, there were discussions between the OHR Director, the Police Chief, and other OHR staff members concerning the existing options and their potential effects, and on the Chief’s plan to hold a meeting of all candidates for the purpose of arriving at a consensus solution or generate new ideas. The grievance decision statement of facts describes the Chief as “looking for inclusivity in the decision-making process rather than just shutting the door and making a decision.”

The meeting of all candidates was held at noon on October 11, 1999. At the outset of the meeting, the Chief, who conducted it, explained the problem with the exam, and the proctor responsible for the error explained what had happened, and apologized to the candidates. At some point, the Chief went to a chalkboard upon which four options had been written. They were described as throw out the flawed exercise, give 100% to everyone on the flawed exercise, redo the flawed section, and keep the test results as they were. It is undisputed that not listed as an option, or discussed, was redoing the entire exam. After considerable discussion and, what the grievance decision statement of facts describes as, “a semblance of voting on the options,” it became clear that no consensus could be reached. The grievance decision statement of facts describes the Chief’s demeanor as being “agitated,” and “out of the blue,” he stopped the meeting and said that there comes a time when he had to pull rank and he thought they should redo the whole process.

According to the grievance decision statement of facts, the Chief acknowledges that the Chief had not discussed the option of redoing the entire exam with anyone, but that it was in the Chief’s mind, making the decision at the October 11 meeting. Following the meeting, the Chief discussed this option with OHR staff, including the OHR Director, whose concurrence was necessary if this option was to be effectuated. The OHR Director did not communicate any

opposition to redoing the entire exam, apparently just acquiescing to the Chief 's decision, and initiated the steps necessary to accomplish it.

Development and Administration of Second Examination

Following the administrative steps of canceling the first exam, OHR staff developed a second exam, with the goal "to develop an alternate examination identical to the first in terms of the knowledge, skill and abilities being tested and the number and type of exercises." The new examination was reviewed by Department management and pre-tested. Arrangements were made for new raters and proctors, who were given training. The second examination was administered to all of the candidates who took the first, except for one who had dropped out. When the results were announced, one Appellant received a rating of "Well Qualified," while three Appellants received ratings of "Qualified." While no eligibility list was issued after the first examination, the grievance decision statement of facts states that it is undisputed that all of the Appellants would have received a rating of "Well Qualified."

Analysis of the Results of the First and Second Examination

During the processing of the grievance leading to the instant appeal, OHR staff and a consultant from the University of Maryland analyzed the results of the two examinations, and found that there was a "somewhat low" correlation, specifically 0.2165456 on a scale of 1 - 10. Of the top eighteen scores from the first exam, only two went up on the second exam, the rest went down significantly.

POSITIONS OF THE PARTIES

Appellants

The Appellants contend that the entire initial examination process was "arbitrarily and capriciously invalidated" as the result of an error which affected only one aspect of the exam process. The Appellants note in this regard that OHR staff never considered invalidating the entire exam, and that the Chief never discussed this alternative with OHR, nor was it one of the choices presented to the attendees at the meeting. In the Appellants' view, "The decision of (the Chief) to throw out the entire initial testing process was the result of unsystematic, almost random decision-making." Further, the invalidation of the exam was inconsistent with the only prior comparable circumstance, where only the flawed component was eliminated. In the Appellants' view, it is clear that the very nature of the decision, "on a whim of the Chief and without any prior discussion with OHR is, by its very definition, arbitrary and capricious." Appellants cite Section 33-9(c) of the Montgomery County Code, which states,

Any applicant for . . . promotion. . . may appeal decisions of the chief administrative officer with respect to their application for . . . promotion. . . Appeals [may] allege that the decisions of the chief administrative officer were arbitrary and capricious, illegal, [or] based on . . . nonmerit factors.

The Appellants additionally contend that the results of the first and second exams establish that the two exams did not measure the same knowledge, skills, and abilities. It is contended in this regard that, “The lack of statistical correlation between the overall results of the first and second tests is ipso facto proof of the failure of the testing procedure.” Appellants view as the fundamental flaw of the second test that it did not rate the seven dimensions for the rank of Lieutenant with an intensity level and internal ratio comparable to that from the first exam. Appellants rely on Section 56 of the Personnel Regulations that requires that promotion examinations be a “professionally acceptable selection instrument which fairly appraises and determines the qualifications, fitness and ability of competitors.”

Appellants seek as a remedy retroactive promotions and backpay. Alternatively, at a minimum, an order that the Appellants receive priority consideration for the next Lieutenant positions.

County

The County contends that the decision to invalidate the first exam was not arbitrary and capricious - without reason or merit. In this regard, it is contended that the Chief had great latitude on the selection of remedial choices available. While the choice selected had not been listed during the meeting, once the Chief decided on a course of action as the one which would fairly address the problem of the flawed examination, OHR staff confirmed that it was “doable,” and the Director of OHR reviewed and concurred with the Chief’s choice.

With respect to the low correlation between the two examinations, the County contends that this can be attributed to random error rather than a systematic error. The County also contends that there is a high correlation on the internal consistency reliability and inter rater reliability of the second examination.

The County maintains that even if the Appellants’ grievance had merit, an award of retroactive promotion and backpay would be inappropriate, citing Maryland State Law for the proposition that the remedy for a “fatally flawed” examination is readministration of the flawed examination.

ISSUES

1. Was the decision to invalidate the first examination and conduct an entire new examination an arbitrary and capricious violation of law or regulation, or otherwise improper?
2. Does the low correlation between the scores of the first and second examination render the second examination fatally flawed, and, thereby, make utilization of the second examination violative of law or regulation, or otherwise improper?

ANALYSIS AND CONCLUSIONS

1. The Appellants do not dispute that there was a procedural flaw in the administration of the first examination that raised issues as to its validity, nor do Appellants appear to contest that it would have been appropriate for the County to take one of the options listed on the chalkboard when the Police Chief met with all applicants to discuss the situation. The Appellants allege that the taking of an action not listed on the chalkboard was arbitrary and capricious and, therefore, violative of law and regulation.

The Appellants cite a dictionary definition of “arbitrary,” “arising from unrestrained exercise of the will, caprice, or personal preference . . .,” and of “capricious,” “given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose” In the Appellants view, these definitions are met by fact that the Chief selected a course of action that was not considered by OHR, not presented to the meeting of applicants, and at variance with the course followed in an analogous past situation. The County offers up as the test of arbitrary and capricious, “without reason or merit,” and contends that the Chief felt that the only way to be fair to all candidates was to repeat the entire examination process. “Since all candidates would be treated the same, the possibility for any claim of unfair treatment would be reduced, no manipulation of scores would be required, and all would be certified to the new eligibility list based on merit not a compromise solution.”

The Board’s own research discloses other definitions of “arbitrary and capricious.” A definition of “arbitrary” found in Black’s Law Dictionary is “founded on prejudice or preference rather than on reasoned fact,” and of “capricious,” “characterized by unpredictable or impulsive behavior.” A Legal Thesaurus uses such synonyms as “contrary to reason,” “determined by no principle,” “fanciful,” “illogical,” “irrational,” “unreasonable,” etc. In the Board’s view, none of these definitions, including that offered by the Appellants, encompasses the instant invalidation of the first examination. The

County found itself in a difficult situation, needing to consider among choices, each of which would likely be viewed as undesirable to some number of applicants. The Police Chief thought that the selection of a solution should be based on consensus, a reasonable course of action. However, the meeting did not go as hoped. In the absence of consensus for any of the listed options, the Chief moved to a course of action that did in fact treat all applicants equally, and avoided tinkering with the first examination process. It should be noted in this regard that Personnel Regulation Section 5-8 provides that an examination “must be invalidated in whole or in part when the (CAO) determines that there has been any impropriety in the examination process” (Emphasis supplied). The Chief then sought OHR’s input on this course of action, and they did not object. This, in the Board’s view, is not arbitrary and capricious.

On the basis of the above, the Board rejects the contention that the invalidation of the entire first examination was arbitrary and capricious and, therefore, violative of law or regulation, or that it was in any other manner improper.

2. The theory offered by the Appellants is that the low correlation between the scores on the first and second examination is “ipso facto proof of the failure of the testing procedure.” The Appellants contend in this regard that the “fundamental flaw is that the second test did not rate the seven dimensions . . . with an intensity level and internal ratio comparable to that from the first exam.” The Appellants note in this regard that the top ten scorers on the first examination all had a lower score on the second examination.

The Board rejects the Appellants’ logic that the low correlation between the two examinations renders the testing procedure of the second examination flawed, so as to be violative of law or regulation. The requirement on the County is to construct an examination which, in the words of Personnel Regulation Section 5-6 “fairly appraises and determines the qualifications, fitness and ability of competitors.” There is nothing offered by the Appellants which would be evidence that either the first or second examination failed to meet that test, contending only that the scores were different. While the second examination may well have been more difficult, leading to the lower scores, the Board sees no basis for invalidating the second examination because of this. In this regard, there is no basis presented that would lead to the presumption that the first examination was a better measure of the qualifications, fitness and ability of the competitors than the second.

On the basis of the above, the Board rejects the contention that the utilization of the second examination violates law or regulation, or is otherwise improper?

ORDER

On the basis of the above, the Board denies the appeals from the decision of the CAO denying their consolidated grievances regarding the 1999 promotional examination for the rank of Police Lieutenant.

Case No. 01-13

SUPPLEMENTAL FINAL DECISION AND ORDER

This is a supplemental final decision and Order of the Montgomery County, Maryland, Merit System Protection Board (Board) on Appellant's appeals from the decision of Chief Administrative Officer (CAO), denying their consolidated grievances regarding the 1999 promotional examination for the rank of Police Lieutenant. This matter is now before the Board on Remand from the Circuit Court for Montgomery County, Maryland (Court). (Falcinelli et al., and Montgomery County Government, Circuit Court for Montgomery County, Maryland, Civil Action No. 226818, June 11, 2002) Following the Court Remand, pursuant to an Order by the Board, the parties filed briefs on issues raised by the Remand.

FINDINGS OF FACT

Background

The initial appeal concerned a decision by the Montgomery County Police Department (Department) to invalidate the September 1999 promotional examination for the rank of Lieutenant, and to develop and administer a second examination, which was done in December. In their appeal to the Board, the Appellants contended that the first examination was "arbitrarily and capriciously invalidated." The Appellants additionally contended that the results of the first and second examinations establish that the two did not measure the same knowledge, skills, and abilities, relying on "The lack of statistical correlation between the overall results of the first and second tests"

The Board rejected the contention that the invalidation of the entire first examination was arbitrary and capricious, or violative of law or regulation, or in any other manner improper. As to the issue of whether the low correlation between the scores rendered the second examination fatally flawed, thereby making its utilization violative of law or regulation, or otherwise improper, the Board noted that the Personnel Regulations require an examination that "fairly appraises and determines the qualifications, fitness and ability of competitors," and concluded, in pertinent part,

There is nothing offered by the Appellants which would be evidence that either the first or second examination failed to meet the test, contending only that the scores were different. While the second examination may well have been more difficult, leading to lower scores, the Board sees no basis for invalidating the second examination because of this. In this regard, there is no basis presented that would lead to the presumption that the first examination was a better measure of the qualifications, fitness and ability of the competitors than the second.

The Appellants appealed the Board's decision to the Court, which held on the issue of the invalidation of the first examination, that "there was substantial evidence to support the Board's finding that the Chief's decision was not arbitrary, capricious, or otherwise improper." As to the lack of correlation between the two examinations, the Court held as to the above-quoted Board conclusion that it "substantially misstates the evidence and the reasonable inferences that could be drawn there from." In the Court's view, the Board's conclusion ignored the fact that the uncontested evidence was that the results of the two tests did not correlate as would be expected if both tests were reliable. The Court concluded that the Board failed to address this evidence of lack of correlation and decide whether the inconsistency was explained by "random error or systemic error." "Absent such a determination, there is no basis upon which the Board could conclude that the testing process was fair and reliable."

Granting the petition in part, the Court remanded the case to the Board, "to make a determination in light of the unrebutted evidence of a lack of correlation between the two tests as to the reason for that lack of correlation and whether the second test is reliable and 'fairly appraises and determines the qualifications, fitness and ability of the competitors' notwithstanding the lack of correlation." The Court's order provided that the Board, if deemed necessary or desirable, may permit either party to offer evidence on the reason for the lack of consistency between the two tests. Consistent with the Court's decision, the Board ordered the parties to file briefs on the following issues:

- Whether the lack of correlation between the test scores is a result of random or systemic error?
- Whether the lack of correlation between the test scores is evidence that the second examination did not fairly appraise and determine the qualifications, fitness and ability of the competitors?

Examination Development and Administration

First Examination

The findings of fact description of the development and administration of the first examination, which are not contested by the Appellants, describe in detail the process utilized by an experienced Human Resources Specialist, which included:

- The completion of a job analysis for the rank of Lieutenant, which included the conducting of a series of meetings with a representative cross section of existing Lieutenants, who reviewed and revised, as appropriate, the task statements representation of the major and most important tasks of a County Police Lieutenant. Additionally, the Lieutenants reviewed the managerial dimensions, which were to be used to rate applicants.
- The writing of the examination, a process which started with the job analysis, and included meeting with a group consisting of a Department Major or Captain, and Lieutenants. This group reviewed previous examinations for format, and wrote a new examination based on the dimensions and tasks from the updated job analysis. The end product was then reviewed by Department Majors.
- The pretesting of the examination, where two or more sample candidates who are current Lieutenants went through the exercise as if they are candidates, to see if there were any problems with the exercise. The pretests were videotaped so that they could be used in training sessions for raters.
- The obtaining of raters from police departments from other area jurisdictions, in this case Captains and Lieutenants, who were to rate candidates as they went through the examination to demonstrate their ability to perform as Lieutenants.
- The training of raters through a two day training process, which included familiarization with the County, the structure of the Department, and the work of Department Lieutenants. The raters were also given instruction on proper note taking techniques, use of provided worksheets, and on avoiding rating errors.
- The selection and training of Department Captains and Lieutenants to act as proctors, who would monitor the exercises.

Second Examination

The findings of fact description of the development and administration of the second examination, which are not contested by the Appellants, describe a repeat of the process used for the first examination, with the goal “. . . to develop an alternate examination identical to the first in terms of the knowledge, skill and abilities being tested and the number and type of exercises.” The description of the content of the second as opposed to the first examination, is as follows:

The two examinations differed with regard to the specific exercises and the scenarios on which they were based. The order and relationship of the exercises was also different. In the first examination, the initial, oral questioning exercise was followed by the second, written exercise which was linked by its subject matter to the third, oral presentation exercise. In the

exercise which was linked by its subject matter to the third, oral presentation exercise. In the second examination, none of the exercises was linked to another by their subject matter. Also, the sequence of exercises in the second examination was: first, oral questioning exercise; second, oral presentation exercise; and third, written exercise.

To do the rating, a different group of officers from area police departments was obtained and trained in the same manner as the training for the first examination.

Results Variances

While an eligibility list was not prepared after the first examination, it is undisputed that the Appellants would have all been in a “Well Qualified” group. When an eligibility list was prepared after the second examination, one of the Appellants was rated Well Qualified, while the others were rated Qualified. Following the second examination, the Office of Human Resources first had a staff member other than the one who had constructed the examinations do a correlation between the two examinations, and then had this reviewed by a consultant from the University of Maryland. The correlation was determined to be 0.2165456, on a scale of 1-10. It is undisputed that this was a “low correlation” between two examinations that were constructed to equally test applicants qualification for the rank of Lieutenant.

POSITIONS OF THE PARTIES

Appellants

In its original submission to the Board, Appellants contended that the lack of statistical correlation between the two examinations “is ipso facto proof of the failure of the testing procedure.” Appellants specifically took no issue with the County’s testing consultant’s finding of high “internal consistency reliability,” and “inter-rater reliability” in the second examination process, contending that this simply suggests that the design and rater training for the second process were internally consistent. “Rather, the fundamental flaw is that the second test did not rate the seven dimensions for the rank of Lieutenant with an intensity level and internal ratio comparable to that from the first examination.”

In their submission following the remand, Appellants contend that “It is the reliability concept, and related standards, which were violated here.” Appellants cite a report from a consultant retained by them, who found that “there was no statistical support that the (Appellants) would be classified the same way on the second exam.” “. . . an exam is said to be reliable if there is some likelihood that the exam will produce consistent results among applicants who reportedly take it or a similar . . .” “What is required is not perfect reliability, but rather a sufficient degree of reliability to justify the use being made of the test results.”

Appellants contend that such a dramatic lack of correlation between the examinations is not random, but that “even if the County is correct that random error is responsible . . . it cannot establish that the second test was a reliable measure of knowledge, skill or ability.”

Appellants contend that under the circumstances, the only fair remedy is retroactive promotion for all of them, who all tested in the well qualified range on the first examination. In this regard, Appellants note that: they should not be penalized for the long grievance process; the eligibility list created by the second examination has expired, and more than ten promotions have already been made off of the second examination list; it is impractical and unrealistic to redo the entire process; and “there is no indicator that a third test would prove any more reliable.”

The Appellants’ expert concluded,

. . . it is impossible to support the idea that the two promotional tests were the same or that the differences in scores between the two tests were random. The tests results support the conclusion that the two tests were unlike each other in significant, if unknown, ways and that the differences in scores were not random. The test score data alone do not permit an analysis of how or why the tests differed, but all three statistical tests find the differences in test scores to be great enough to preclude the possibility that the differences were random.

Appellants have filed a motion for oral hearing, noting particularly that the County’s expert did not appear at the grievance process and was not subject to cross examination.

County

The County contends that credible evidence supports the conclusion that the lack of correlation between the first and second examination scores is attributable to random, not systemic error. In support of this, the County contends, relying on their retained consultant, that the record shows that each examination was developed and administered in a consistent and thorough way, noting that the second examination, like the first, included a written exercise, a presentation exercise, and a structured oral interview. The County describes their consultant’s finding that the internal consistency reliability and inter-rater reliability of the second examination were extremely high and met professional standards for reliability.

As to the second issue posed by the Board, the County contends that the lack of correlation between the two examination scores does not prove that the second examination did not fairly appraise and determine the qualifications, fitness and ability of the competitors. The County notes in this regard that the Appellants failed to present evidence of any systemic error in the second examination. Rather, the Appellants “jump from the undisputed fact that some candidates’ scores between the two exams were different to the unsupported conclusion that the second exam was unfair.”

ISSUES

1. Was the lack of correlation between the test scores of the first and second examination the result of random or systemic error?
2. Was the lack of correlation between the test scores of the first and second examination evidence that the second examination did not fairly appraise and determine the qualifications, fitness and ability of the competitors?
3. Is there a need for an oral hearing, as requested by the Appellants?

ANALYSIS AND CONCLUSIONS

1. It must first be noted that while the issue remanded by the Court grew out of a subsidiary contention raised by the Appellants in their challenge to the invalidation of the first examination, the possibility of error causing lack of correlation goes to either the first or the be the basis for determining the list of best qualified candidates, throwing out the second examination, it could just as well be argued that the first examination was somehow flawed and that the second examination is an accurate determinate of qualifications, fitness and ability to be promoted to the rank of Lieutenant. For this reason, in order to comply with the Court Order, the Board has reviewed the construction and administration of both examinations.

In lay terms, systemic errors in the context of promotional examinations such as the ones at issue in this case, are flaws in the construction and/or administration of the examination that produce results that don't reflect the intended purpose, which in this circumstance was to identify those candidates best qualified to be Lieutenants. For instance, a flaw in construction would be testing for other than relevant knowledge, and a flaw in administration of the examination would be the use of raters who had some bias. There is no allegation, nor evidence of any such flaws in either the first or second examination. Rather, the record reflects that for both examinations, a process was utilized which would ensure the construction of an examination that would identify candidates best qualified to be Lieutenants. Further, the record reflects that the examination was administered in a way that would be fair to all candidates, as evidenced by the decision to redo the examination when it was disclosed that a proctor had inadvertently failed to read the script to one group of candidates. Accordingly, the Board concludes that there is no basis for finding that the lack of correlation between the two examinations was caused by systemic errors.

The essence of the Appellants' argument is that the low correlation was too great to be caused by random errors. The Board rejects this argument, noting particularly that it is based on a rather small number of people whose scores on the two examinations varied so greatly, the cause of which can only be speculative. For example, the second examination consisted of different exercises, which candidates might score differently on, even if in both cases the

exercises reflect the duties of a Lieutenant. Similarly, the raters were different, and while each group of raters received the same training, they were different people rating different exercises. The Board concludes that such “random” factors produced the lack of correlation, and the fact the correlation was quite low does not support a contrary finding.

Based on the above, in response to the issue raised by the Court in the Remand, the Board concludes that the lack of correlation between the test scores of the first and second examination were the result of random rather than systemic error.

2. The Board has concluded above that there is no evidence of systemic error in the construction and/or administration of either the first or second examination, and that the low correlation between the two examinations is the result of random error. Apart from reliance on the low correlation, there is no evidence, or contention, that the individual examinations failed to fairly appraise and determine the qualifications, fitness and ability of the competitors. Rather, the evidence indicates only that different tests content, each of which does what it is intended to do, led to somewhat different results, a point acknowledged by the Appellants when in support of their sought remedy, they state that “there is no indicator that a third test would prove more reliable.” Having concluded that the construction and administration of the second examination was free of systemic error, and that the low correlation between the test scores of the first and second examination were the result of random errors, the Board concludes that the second examination did fairly appraise and determine the qualifications, fitness and ability of the competitors.

3. The Board concludes that there are no issues of fact necessitating the holding of an oral hearing. In this regard, the Appellants base their request for an oral hearing on the need to cross examine the County’s expert witness. While the Board has reviewed and considered the competing views of both the County’s and Appellants’ experts, they were not the basis for the resolution of the issues.

ORDER

On the basis of the above, the Board concludes that the low correlation between the test scores of the first and second examination were the result of random rather than systemic error, and that the second examination did fairly appraise and determine the qualifications, fitness and ability of the competitors. Accordingly, the Board reaffirms its denial of the appeals from the decision of the CAO denying Appellants consolidated grievances regarding the 1999 promotional examination for the rank of Police Lieutenant.

Case No. 02-04

DECISION AND ORDER

This is a final decision on Appellant from the decision of Chief Administrative Officer (CAO) denying Appellant's grievance regarding Appellant's non-promotion to the rank of Lieutenant.

FINDINGS OF FACT

The Appellant's Work History

The Appellant joined to the Montgomery County Police Department (Department) in 1971, and was a patrol officer until 1976, when Appellant transferred to the youth division. In 1983, Appellant was promoted to Master Police Officer. In April of 1994, Appellant was promoted to Sergeant, and was transferred to patrol. In November 1994, the Appellant returned to the Youth Division, where Appellant was a supervisory detective sergeant.

Promotion Announcement and Testing Process

On June 23, 1999, the Montgomery County Office of Human Resources (OHR) issued a Personnel Bulletin (Bulletin) for a "1999 Promotional Examination For the Rank of Police Lieutenant." The Bulletin provided for "Minimum Qualifications," a "Promotional Examination," "Application Procedure," "Scoring Procedures," and "Use of Eligibility Lists." With respect to the latter, the Bulletin provided, in pertinent part,

In accordance with the 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 Office of Human Resources. The appointing authority is 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 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 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 that 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). . . .

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.

In the description of the promotion examination, the Bulletin states that it is designed to evaluate candidates on the basis of listed dimensions “as they relate to the tasks performed at the rank of Police Lieutenant.” The seven listed and defined “Police Lieutenant - Dimensions,” were “Problem Analysis,” “Decision Making,” “Planning and Organization,” “Leadership/Supervision,” “Sensitivity,” “Oral Communication,” and “Written Communication.”

The examination was conducted, and on December 29, 1999, OHR issued a certified eligibility list, which listed, in alphabetical order, first the candidates in the rating category, “Well Qualified,” and then the candidates rated “Qualified.” There were 17 candidates, including the Appellant, rated Well Qualified on the original list, with an 18th added later. Candidates’ examination scores were not shown on the certified list. Upon receipt of OHR’s certified eligibility list, the Department produced a “departmental eligibility list,” listing, in alphabetical order, first all Well Qualified and then Qualified candidates, with the addition of each candidates race, gender, date of hire, and date of promotion to Sergeant. The Department list did not show examination scores. Candidates were however, individually told their own examination score.

Committee Review of Candidates and the Chief’s Selection

On January 19, 2000, the Police Chief issued a written “Delegation of Authority” “to . . . review and consider candidates for promotion,” with instruction to “submit to me in writing, the names of officer(s) being recommended by the committee/panel for promotion to the rank of Lieutenant.” The Committee was composed of seven Department Officers, three Majors and four Lieutenants. The Committee was required to attend a training session on the recommendation process and documentation forms, which was conducted by a Department Personnel Specialist, and an OHR representative. The Police Chief also attended and stayed for most of the session.

At the training session, the Committee was provided with folders containing assorted materials related to the rating process. Included in the folders were the Bulletin, the Delegation, an instruction sheet on avoiding “rating errors,” “promotional document review checkoff” sheets, and “training guide/notes” documents which provided tools/benchmarks for judging the “dimensions” that each candidate was to be rated on. The “dimensions,” provided to the Committee were the first five that had been described in the Bulletin, “Problem Analysis,” “Decision Making,” “Planning and Organization,” “Leadership/Supervision,” “Sensitivity,” but did not include “Oral Communication,” and “Written Communication,” which had been listed in the Bulletin. The record describes a training session of approximately 1.5 hours, wherein the use of the materials in the folder were discussed, but the Committee was not told exactly what kind of information they were to look for, but were told to look for information which went to the dimensions.

In addition to the materials related to the mechanics of the rating process, there was a May 21, 1999 memorandum from the County Executive describing the County’s “diversity program.” The memorandum contains a bolded sentence which reads, “Managers and supervisors must be held accountable for ensuring that diversity initiatives are implemented effectively in their departments and agencies.” According to the grievance decision factual account, the Committee testified that during the training, they were made aware of the memorandum, but that the subject was not discussed in detail, and they were not advised to consider diversity as a determinant of who was to be selected.

The Committee’s review was only of the eighteen candidates rated Well Qualified. According to the record, during an approximately three day period, each member of the Committee conducted their review by examining each of the applicant’s personnel file, Office of Internal Affairs (OIA) summaries, and resumes, and noted information from the documents reviewed which exhibited a particular dimension. The record contains descriptions of each Committee members individual process in reviewing materials, areas of focus, recordation methods, and basis for ratings. The descriptions reflect considerable variations in these aspects among the Committee members, although each describes reviewing materials against the five rating dimensions. While each Committee members stated that they were not officially provided with test scores, one member stated that they knew one candidate’s score because the candidate had told it to him prior to the appointment of the Committee; a second Committee member stated that she had heard “through the rumor mill” of one candidate’s score, and that another candidate had showed her his score; a third Committee member stated that she knew one candidate’s score, but can’t recall how she found it out; and a fourth Committee member stated that he had learned the scores of a couple of the candidates. All state that any knowledge they had of test scores played no part in their rating of the candidates.

Each Committee member was required to list their top eight candidates, which they did, and the record of their testimony in the grievance procedure lists each of the Committee members top eight candidates. The Appellant was not on the list of any of the Committee members top eight candidates. Thereafter, the Committee held a meeting for the purpose of

reaching a “consensus” on the officers to be recommended to the Chief for promotion to Lieutenant. The Chief did not attend the meeting. Personnel staff attended, providing oral instructions on the process that the Committee was to follow, and their instruction to come up with a consensus list. The handwritten notes of the Personnel staff person reflect a listing of “process,” which includes “Diversity Policy.” The Committee members were told that there were to be three or four vacancies to be filled, with the exact number not yet decided.

At the consensus meeting, the top eight choices of each Committee member were listed on a matrix, and displayed on a whiteboard. The Committee members then discussed their respective views on the candidates, at the conclusion of which no consensus was reached, there being some disagreement on the top candidates. Participants’ accounts of the meeting reflect that the discussion was certainly spirited, sometimes angry, as Committee members advocated particular choices. The Committee members’ accounts reflect that there was no discussion of the County Executive’s memorandum on diversity. The Chairman of the meeting filled out the “consensus recommendations” sheet, which lists in a one through eight listing the candidates recommended for promotion to “four (4) current Lieutenant vacancies.” On the second page, are the signatures of the Committee members, and notations as to the recommendations of certain Committee members which were at variance from the “consensus listing.” The Appellant was not among the eight listed candidates. This list was then transmitted to the Police Chief.

The Chief testified that while reading the candidates’ personnel files, OIA summaries, and resumes, the Chief decided to use the Committee because having other people participate improves the process by bringing different experience and perspective to the evaluation, which helps make a better decision. The Chief states that the Chief had only seen the alphabetical listing of Well Qualified candidates and did not know their scores or rank order. The Chief received from the Committee only the list of names, not receiving any information on why that list had been recommended. In reviewing the personnel files, the Chief states that the Chief looked for information related to the dimensions set out in the Bulletin. The Chief states that the Committee recommendations “were a factor in my promotion decisions,” and that “gender and race were not factors in my decisions.” The Chief selected five of the candidates for promotion, selecting those rated 1, 2, 3, 4, and 7. The record does not disclose the Chief’s reasons for passing over the 5th and 6th rated candidates. The promotions to Lieutenant for those five officers were effective February 13, 2000.

Committee Members Assistance to Candidates

The record reflects that prior to being appointed to the Committee, one Committee Member (CM) met with three of the candidates approximately one month before a September 1999 Lieutenant’s examination, which was subsequently voided, and “. . . that they may have met before the second exam.” The Committee member states that they cannot recall if the candidates approached the CM, but the CM extended the offer to assist them. According to the CM’s statement, the CM provided them books and “some information that the CM kept on tests

that the CM had taken,” and discussed “building the dimensions into their answers.” One of the three persons this member provided training was recommended by the CM, and was one of the selectees.

Another Committee member states that prior to being named to the Committee, they “convened a study group of candidates” for the purpose of providing some advice on how to write examination answers. This member says that they met with this group three or four times over a five week period prior to the test and shortly after the June 23 Personnel Bulletin. One of the four persons this member provided training to was recommended by them, and was one of the selectees. This person was the same one as trained and recommended by the other Committee member providing training.

It is clear that subsequent to being named to the Committee, at least one, but possibly both of the two members who had provided the assistance informed the Department personnel specialist of their role in providing such training. They were asked if they could be fair and impartial, and when they said yes, they were left on the Committee.

Other Fact Contentions

The following are contentions of fact in the grievance record which are relevant to the Appellant’s positions:

- The Appellant’s examination score was 97%, which places the Appellant fourth among those taking the examination.
- Only two of the promoted candidates test scores were equal to or higher than the Appellant, with three of those promoted having lower test scores.
- The candidate whose test score was equal to the Appellant was junior in time-in-grade, and never held the rank of Master Police Officer.
- The Appellant is more qualified than the candidates promoted by virtue of higher examination score, experience, time-in-grade, and exemplary performance evaluations. In this regard, Appellant notes 30 years experience and the fact that Appellant has a Master’s Degree.
- Appellant’s supervisor from July 1998 through the processing of Appellant’s grievance had done two performance evaluations of the Appellant, wherein was rated “exceeds requirements.”
- Subsequent to the selection process, the Appellant reviewed Appellant’s personnel file, and questioned: whether the 1994-95 evaluation should have still been included; the inclusion of 1995-96 evaluation, which was done by someone

who had been in Appellant's unit for only five months when the rating was done; the inclusion three years in a row of comments about a speech Appellant had written for the Chief when Appellant had written only one speech; the fact that Appellant's 1998-99 evaluation is not on the list of documents purportedly reviewed by the Committee, but Committee members have referred to that evaluation; that "good guy" letters were in Appellant's unit personnel file, but had not been forwarded to Appellant's Departmental personnel file; and that Committee members had referenced a 1979 OIA case.

Post Grievance Activity

Step III Grievance Meeting

During the Step III grievance "meeting," Appellant's counsel sought to question Committee members about the subjectivity of the candidates' performance evaluations, and the resulting impact on their comparisons. The Assistant County Attorney representing the Department instructed the Committee members not to answer these questions, and the OHR Personnel Specialist conducting the session refused to allow such questioning because the Personnel Specialist deemed it as "not relevant." It is undisputed that in subsequent Step III meetings on grievances filed by other candidates, such questioning was allowed.

Remedy of Part of Appellant's Grievance

During the processing of the Appellant's grievance, the CAO determined that the Appellant had been negatively impacted when the Committee and the Chief misinterpreted comments in Appellant's final two performance evaluation. As a remedy, the CAO directed that the Appellant was to be provided "the first opportunity to be selected upon announcement of the next Lieutenant vacancy." According to the County, "This meant that the Appellant was to be considered as to Appellant's suitability for promotion before considering any other candidate." On September 19, 2001, the Appellant was given such first consideration, but was not selected by the Chief.

APPLICABLE LAW AND REGULATION

The attached Appendix sets forth the laws, regulations, and court cases cited by the parties as applicable to the resolution of the issues presented by this appeal.

POSITIONS OF THE PARTIES

The Appellant contends that the Montgomery County Charter, Code, merit system law, Personnel Regulations, and the Department regulations mandate promotional procedures which

guarantee open, equal and rational consideration of all candidates based on demonstrated merit and fitness, and that the selection process at issue deprived Appellant of equal consideration, fairness, and rational, informed decision making. Summarized below are the Appellant's specific contentions and the County responses as to those contentions:

1. Appellant's contention - The Failure to provide the Chief and the Committee with the candidates' examination scores deprived them of the only meaningful measure of the candidates' knowledge, skills, and abilities.

County's Response - There is no requirement to report candidate's examination scores to the appointing authority, and placing candidates in their adjectival categories reflects an individual's relative standing.

2. Appellant's contention - The Department's use of subjective performance evaluations to compare and rank the candidates deprived them of consistent, fair and equal consideration and rational, informed decision making.

County's response - Use of performance evaluations in the selection process is not restricted by applicable regulations, and performance evaluations are structured to foster uniform standards.

3. Appellant's contention - The selection process lacked guidelines or standards to assure fairness and consistency.

County's response - The providing of prepared materials used to conduct the evaluation, and the training provided the Committee ensured that the Committee process was conducted in an orderly and consistent manner. Similarly, the Chief in the role as appointing authority, attended training, reviewed each candidate's materials, and considered the dimensions set forth in the Bulletin.

4. Appellant's contention - The selection process was rushed.

County's response - Although some Committee members testified that they would have preferred a longer span of time for the selection process, no one testified that they did not have enough time to fairly evaluate candidates.

5. Appellant's contention - The Committee and Chief reviewed irrelevant documents about the Appellant, and other relevant documents were not properly included in Appellant's personnel file.

County's response - While a 1979 "conduct unbecoming" charge was recorded by all evaluators and an "at fault accident report" was noted by some Committee members, there is no evidence that either had a negative impact on the Appellant's evaluation. The inclusion of "good

guy” letters in the Appellant’s file would not have positively affected Appellant’s promotion chances.

6. Appellant’s contention - The selection process did not take into account that officers holding the same rank have different duties and responsibilities.

County’s response - Although candidates had differing duties and responsibilities in their assignments, the opportunity to demonstrate the dimensions was available in all assignments.

7. Appellant’s contention - The Bulletin misinformed candidates about the selection process, specifically that candidates were not informed that the Chief and the Committee would evaluate them on the basis of five dimensions. Rather, they were told that there would be seven dimensions, but that in making the decision, the Chief may consider other listed criteria.

County’s response - The promotional announcement did not specifically inform candidates that the dimensions used in the assessment center portion of the examination process would be used in the selection process. However, lack of notification of the use of the dimensions affected all candidates equally and the “Appellant was not solely impacted by this commission.”

8. Appellant’s contention - The Committee’s review of the candidates personnel files violated Personnel Regulations 2-4(E) - Access to Records, which authorizes only the appointing authority, i.e., the Chief, to review the files.

County’s response - Access to confidential personnel records are available on a “need to know” basis to the appointing authority. Appointing authority is not specifically defined. The Bulletin clearly states that the Chief may delegate the authority to review and consider personnel files, which has been the practice for many years.

9. Appellant’s contention - The fact that two Committee members assisted some candidates with preparing for the examination created an appearance of unfairness or bias.

County’s response - There is no evidence that the assistance provided to certain candidates had any affect on the Committee process or recommendations. At the beginning of the process, both Committee members stated that they could be fair and objective.

10. Appellant’s contention - The Appellant was denied a fair Step III process because the Human Resources Specialist who presided refused to accept evidence regarding the subjectivity of performance evaluations and the impact on the Department’s selection process.

County's response - During the testimony, evidence was allowed or disallowed on the basis of relevancy. Sufficient testimony and evidence was presented to enable the CAO to make a fair and impartial decision.

11. Appellant's contention - The CAO should have appointed an outside fact-finder to conduct the Step III meeting.

County's response - OHR did not make any of the decisions related to the promotional process, nor were they involved in that process. Accordingly, there was no reason for OHR to recuse themselves from conducting the grievance meeting or administering the grievance process.

12. Appellant's contention - Retroactive promotion with back pay is the appropriate remedy for the violation of Appellant's merit system rights, and the only thing that will provide a remedy to the Appellant, who has retired under the Discontinued Retirement Service Plan.

County's response - The only improper procedure in the selection process was the misinterpretation by the Committee and the Chief of certain information in the Appellant's last two evaluations, which was remedied by giving the Appellant priority consideration in the next Lieutenant promotional process. As there is no evidence that the Appellant would have been selected over any of the promoted candidates, had comments on Appellant's performance evaluation not been construed as negative, the relief requested is not appropriate. Nor, in the facts and circumstances presented, is a redoing of the selection process appropriate.

ISSUES

1. Was the failure to provide test scores to the Committee and Chief violative of law or regulations, or otherwise improper?
2. Was the Committee and Chief's use of performance evaluations to rate candidates violative of law or regulation, or otherwise improper?
3. Did the selection process have adequate guidelines and standards to assure fairness and consistency?
4. Was adequate time provided for the selection process?
5. Was the Committee's consideration of certain documents in the Appellant's personnel file, and/or failure to consider positive information not in the file, violative of law or regulation, or otherwise improper?

6. Did the selection process adequately take into account the differing duties and responsibilities of the candidates?
7. Did the Bulletin misadvise candidates about the use of dimensions for rating purposes, and, if so, was this violative of law or regulation, or otherwise improper?
8. Was the Committee's access to candidates' personnel files violative of law or regulation, or otherwise improper?
9. Was the inclusion of two Committee members who had previously provided instruction to some candidates violative of law or regulation, or otherwise improper?
10. Was the Appellant denied a fair Step III grievance process, and, if so, is further fact-finding appropriate?
11. Should the CAO have appointed an outside fact-finder to conduct the Step III meeting?
12. What is the appropriate remedy for conduct found to be violative of law or regulation, or otherwise improper?

ANALYSIS AND CONCLUSIONS

1. Failure to provide test scores - Appellant contends that a selection process that deprived the Committee of the specific test scores of the applicants fails to meet merit provisions set forth in the County Charter, Code, and Personnel Regulations. Appellant contends in this regard, "Because the Chief and the selection committee members did not know the examination scores, their evaluations of the candidates were not based upon any consistent assessment of their relative abilities, knowledge and skills." "Their decision making was not fair, rational, or informed."

It must first be noted, that the test scores were a significant aspect of the selection process, specifically that they were the determinant of selecting candidates to be rated Well Qualified. The Committee and the Chief therefore knew that they would be rating and selecting from a group of employees who had demonstrated by their examination scores that they had the abilities, knowledge and skills to perform as Lieutenants. Once the Well Qualified candidates were identified by test scores, the Committee's role was to bring to the rating process other criteria for promotion.

A procedure similar to that used in the selection process at issue in the instant case, including the use of an examination to create a list of Well Qualified candidates, provided to the selecting official in alphabetical order, without examination scores, was recently reviewed and approved by the Court of Special Appeals of Maryland, in Montgomery County, Maryland v. Edward A Clarke . In Clarke, the Court of Special Appeals specifically noted with approval systems where the selecting official can make a selection on a basis other than examination scores. There

appears to be one possibly relevant difference between the facts in Clarke and those in the instant case, in that in the former, the rating group seemed to have had access to the examination scores as they developed the alphabetized list of Well Qualified candidates. In the Board's view, this difference does not impact on the application of Clarke. The crucial principle in Clarke is, the endorsement of a system that creates for the selecting official a Well Qualified list to select from, without regard to their examination score.

Accordingly, in the Board's view, the failure to provide the test scores to the Committee and Chief was not violative of law or regulation, or otherwise improper.

2. Use of Performance Evaluations - The Appellant contends that in rating candidates, rather than using a "validated, structured examination process which treated candidates equally," the Committee used performance evaluations, which contained "subjective judgments without any objective criteria for measuring performance." In support of the contention that performance evaluations are "subjective," the Appellant recites a litany of arguably subjective phrases lifted from candidates' evaluations.

Performance evaluations are a supervisor's personal observations and conclusions about an employee's performance. Supervisors bring their own concepts and vocabulary to the process. One supervisor's standard for an outstanding performance could be another supervisor's standard for just doing your job. Notwithstanding a certain subjectivity of the process, the use of performance evaluations to ascertain the ability of a candidate to perform at a higher position is a universal aspect of promotion processes. Further, their use has received judicial endorsement both in the above-referenced Court of Special Appeals Clarke decision, and in Joseph Anastasi v. Montgomery County, 123 Md.App. 472, 719 A.2d 980d (Anastasi II). Moreover, in the promotion process at issue in the instant case, the procedure used was designed to reduce the impact of the kind of subjectivity cited by the Appellant. The Committee was not just wandering through performance evaluations to glean whatever information caught their eye, but seeking that which would directly relate to the specified job dimensions. The Board views this procedure as consistent with approved processes, meeting merit system requirements.

Accordingly, in the Board's view, the use of performance evaluations in the rating of candidates was not violative of law or regulation, or otherwise improper.

3. Process lacked guidelines and standards - The Appellant, relying on the Court of Special Appeals 1988 decision in Montgomery County, Maryland v. Joseph R. Anastasi, et al, 77 Md.App. 126, 549 A.2d 733 (Anastasi I), contends that the training and materials given were not sufficient. In this regard, it is contended that the instructions did not insure consistency, leaving the Committee and the Chief to use their own criteria. The Appellant recites examples from the testimony and notes of the Committee and the Chief of what are alleged to be lack of consistency between information noted by different Committee members and the Chief.

Contrary to Appellant's contention, the Committee and the Chief were given considerable training and guidance necessary to perform their task. First, the Bulletin itself set forth what the Committee and the Chief could consider. The Committee was given a required training session, where they were provided with instructional sheets on avoiding rating errors, promotional document review sheets, and documents setting forth tools/benchmarks for judging the specified dimensions. When the Committee began their task of reviewing personnel files, they did so with the specified dimensions to guide their search. The Committee members were to utilize the material provided in that process. All of this is considerably different than the "casual, unmethodical, and unrecorded" procedure reviewed by the Court of Special Appeals in Anastasi I. A fact that should also be noted is something noted by the Court of Special Appeals in Clarke, that being that the Committee and the Chief were "experienced high ranking officers fully conversant with the requirements of the position to be filled."

Accordingly, in the Board's view, the selection process had adequate guidelines and standards to assure fairness and consistency.

4. The selection process was rushed - In support of this contention, the Appellant notes that the training was held on January 19, that the Committee began reviewing files the next day, and that three of the members were still reviewing files the morning of the meeting where they were to arrive at a consensus list. Additionally, one of the Committee members had noted "not enough time - not fair to candidates."

In the Board's view, there is no evidence that the process was rushed to the point that the Committee lacked the opportunity to fairly evaluate the candidates. The fact that one member of the Committee stated a concern as to sufficiency of time, does not detract from the fact that seven experienced officers had time to look at the files of each Well Qualified candidate, and have input into the process of developing a consensus list. The accounts of the Committee members generally have them saying that they took between 30 to 60 minutes per file, paralleling the 45 minutes noted by the Court of Special Appeals in Clarke.

Accordingly, in the Board's view, there was adequate time provided for the selection process.

5. Personnel file materials reviewed by Committee - It is undisputed that the Appellant's personnel file contained a 1994 "supervisor's incident investigation report" and "motor vehicle accident report containing an at-fault accident," and the Appellant contends that pursuant to Personnel Regulations provisions, neither of those documents should have been in that file. It is also undisputed that Committee members referenced these documents in their notes. The Appellant also contends, without specifying fault, that Appellant was disadvantaged by the fact

that numerous complimentary letters and commendations had not been forwarded to the Department personnel office, and were therefore not in Appellant's personnel file.

The County's response as to the investigation report, which it refers to as a "conduct unbecoming" charge in the OIA summary, is that such sustained charges were recorded for all candidates reviewed, and that Committee members testified that they gave little weight to such old charges if there was no repeat charge. The County also contends that there is no requirement to remove sustained charges from the OIA file after five years. As to the accident report, the County contends that as the Committee accounts reflect little note of it, and it had little or no negative impact. As for the absence of what are referred to as "good guy" letters, the County acknowledges that their inclusion may have led to additional positive comments by the Committee, but that numerous positive comments about the Appellant were noted, and "It is not clear that the inclusion . . . would have significantly impacted the recommendations of the . . . Committee." In this regard, the County notes that the Appellant was not recommended by any of the Committee members.

The Board notes that in Anastasi II, the Court of Special Appeals felt a remedy was required over the fact that the Appellant in that case had in Appellant's file, recordation of an incident that Appellant did not have an opportunity to respond to, reflecting judicial concern over fairness in what is reviewed in a personnel file. While there is a dispute over whether materials in OIA files should be removed after five years, there is no dispute over the fact that the vehicle accident report should have been removed, and that the so-called "good guy" letters should have been in the personnel file, both of which are the responsibility of the Department. The Department's defects in this regard are not mitigated by conjectures as to how much weight was or was not given to documents either in or absent from the personnel file. If the Department is to have a promotion procedure where great weight is given to personnel files, it is incumbent on the Department to assure that the files are essentially consistent with applicable regulations.

Accordingly, in the Board's view, the Committee's consideration of certain documents in the Appellant's personnel file, and lack of consideration of other relevant documents, was violative of regulations, and improper.

6. Consideration of differing duties and responsibilities - The Appellant notes that the *Personnel System for Police Officer Class Positions*, which outlines advancement procedures within the Department personnel system, specifies that ". . . the police personnel plan recognizes that police officers holding the same rank may have differing duties and responsibilities," but that the Committee was instructed not to take into account that a candidate's assignment could affect their ability to demonstrate the dimensions. The Appellant cites examples of how Appellant's assignment limited Appellant's ability to demonstrate the performance of certain dimensions.

While one Committee member's account of their training included being told not to consider a candidate's assignments, others testified to either no such recollection, or, being told to consider everything in the files. The thrust of the accounts of the Committee members were that they were instructed to utilize the dimensions to rate each candidate, and to utilize anything in the file that would assist them in that task. Moreover, the accounts of the Committee members reflect carrying out the letter and spirit of their assignment, that is, utilizing the dimensions as a guide and endeavoring to find in a candidate's file anything that could be used to do that.

The Appellant's allegation that the nature of Appellant's assignments put Appellant at a disadvantage in the review file process is inherent in any promotional system that is available to employees in a large organization. Throughout an organization like the Department, each candidate for a position like that of a Lieutenant would have had differing assignments, although in the instant case, each would have at some time functioned as a supervisor. What the process did in this situation was create as even a playing field as possible by using one set of dimensions to rate each candidate, and then require that the Committee find in the files a basis for rating each candidate against those dimensions.

Accordingly, in the Board's view, the selection process more than adequately took into account the differing duties and responsibilities of the candidates.

7. Bulletin's advise on the use of dimensions - The Appellant contends that the Bulletin advised candidates that they would be evaluated on seven dimensions, rather than the five dimensions ultimately used by the Committee, and that had they known that the evaluation would have been on five dimensions, they could have targeted their resumes to address them. The Appellant contends that this was particularly important to Appellant because Appellant's performance evaluations lacked detail and were virtually identical for several years.

The County contends that the Bulletin did not specifically inform candidates that the dimensions used in the assessment portion of the examination process would be used in the selection process, and that while such notification would have allowed candidates to target their resumes, the other (personnel file) documents reviewed by the Committee couldn't have been targeted anyway. The County also contends that the lack of notification affected all candidates equally. The County supplies no explanation for the elimination of the "Oral Communication," and "Written Communication" dimensions that had been listed in the Bulletin.

The Board views as "hair-splitting" the County's attempt to make a distinction between the assessment and selection portion of the examination process. The Bulletin describes the process by which candidates will be selected for promotion, including that

the Chief may delegate to others authority to review and consider personnel files. Candidates were clearly informed of seven dimensions, and the subsequent unexplained decision to reduce the dimensions to be considered to five, was contrary to the stated design of the selection process.

Accordingly, in the Board's view, the Committee's consideration of only five of the seven dimensions listed in the Bulletin was improper.

8. Committee access to personnel files - This allegation of the Appellant is based on the fact that Personnel Regulation Section 2-4(e) states that personnel records are confidential and available on a "need to know basis" and specifies to whom they may be disclosed. Listed are: (1) the employee's supervisor; (2) The CAO or a designee; (3) the Personnel Director or a designee; (4) a member of the Merit System Protection Board or a designee; (5) Personnel Office staff; and (6) the appointing authority considering the employee or applicant for appointment, transfer, or promotion. Appellant notes the absence of "or a designee" for the appointing authority category.

The County notes that "appointing authority" is not defined, and that the Bulletin specifically provided for the Chief to delegate the authority to review and consider personnel files, OIA summaries, etc., items which would be covered by the Personnel Regulations mandating confidentiality.

The Appellant is correct that a strict literal reading of the Personnel Regulations could be interpreted as not allowing the Committee access to the personnel files. However, the Board views the instant circumstances as falling within the grant to the appointing authority. The Chief, who was clearly the appointing authority, constituted the Committee to be part of the appointing process. Specifically, high ranking officers, who, as supervisors themselves, had access to the personnel files of employees they supervise, were to assist the Chief by bringing their experience to bear, to help review personnel files. To exclude the Committee from having this type of access could not, in the Board's view, have been the intent of Personnel Regulation Section 2-4(e). It should also be noted that in all three of the above referenced court cases, Anastasi I, Anastasi II, and Clarke, committees of high ranking officers reviewed personnel files, all without challenge to their ability to do so, without violating the Personnel Regulations.

Accordingly, in the Board's view, the Committee's access to the candidates personnel files was not violative of law or regulation, or otherwise improper.

9. Committee members assisted some candidates - It is undisputed that prior to their appointment to the Committee, two members had provided training assistance to some of the candidates. The Appellant contends that the participation of these candidates tainted

the selection process. “By helping only some candidates, they demonstrated a potential bias in favor of those candidates.” The County’s response is that there is no evidence that the assistance rendered, affected the selection process or recommendations, and at the beginning of the selection process, both of these Committee members stated that they could be fair and objective.

It may be correct that the fact that two Committee members provided assistance to certain candidates did not affect the selection process, noting that only one of the people receiving such assistance made the consensus list. However, the Board is of the view that utilizing persons who had performed this training clearly created a situation where, at a minimum, the appearance of bias existed. These two Committee members were being asked to rate all candidates with the same degree of fairness, when they had at least a “vested interest” in the success of those they trained. There are inherent, but acceptable, problems created by the fact that Committee members knew and had supervised some candidates, but this is unavoidable. An avoidable problem was using the two members who had recently given special attention to certain candidates.

Accordingly, in the Board’s view, the use as Committee member officers who had recently provided training and assistance to certain candidates was improper.

10. Denial of a fair Step III process - The Appellant contends that the Administrative Procedure 4-4 grievance procedure provides for a Step III meeting where 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 that the refusal to allow its desired line of questioning about the subjectivity of performance evaluations was arbitrary and capricious, and constituted a denial of a fair hearing. As a remedy of this alleged defect, the Appellant requests that the Board hold a hearing to receive evidence from the Chief and the Committee about how the subjectivity and lack of uniformity of candidate performance evaluations impacted the selection process.

The County contends that the Personnel Specialist allowed or disallowed evidence based on relevancy, and that sufficient testimony and evidence was presented to enable the CAO to make a fair and impartial decision.

As contended by the Appellant, the Step III meeting provided for by AP 4-4 is intended to provide an opportunity for both the grievant and County to develop a complete record on all matters relevant to the grievance so that the CAO can make a reasoned judgment. Moreover, should the decision of the CAO be appealed to the Board, the Step III fact-finding report is utilized for the Board’s consideration of the appeal. Completeness is the guiding principle. Of course, relevance is important to the

development of the record, and the person(s) responsible for fact-finding may exercise authority to make judgments on whether particular material is relevant to the grievance. However, in making such judgments, the fact-finder must maximize the information available to the CAO to render a decision. Judgments made should clearly favor inclusiveness. When some area of information has been excluded, if the CAO's decision is appealed to the Board, such a judgment can be reviewed, and, if necessary, corrected.

The area of inquiry at issue, questioning the Committee on "the subjectivity of the candidates' performance evaluations, and the resulting impact on their comparisons of the candidates," is, in the Board's view, within the scope of the grievance, and it is a line of questioning that should have been permitted, as was apparently done in related grievances filed by other non-selected candidates. However, the Board does not view its exclusion as prejudicing the Appellant's rights, in the circumstances of this case. As discussed above, the Board recognizes that performance evaluations reflect personal, and sometimes arguably subjective views of the evaluator. It was the task of experienced, senior officers, who, in this situation had received training on their responsibilities, including specific training on avoiding "rating errors," to review file materials related to specified dimensions. The Board therefore sees no prejudice from the fact that Appellant was precluded from questioning the Committee on matters related to subjectivity in the performance evaluations.

Accordingly, in the Board's view, the Appellant was not denied a fair Step III grievance process, and no basis for a Board hearing is established.

11. Refusal to appoint an outside fact-finder - The Appellant contends that the Board should either conduct a de novo hearing, or remand the case to the CAO with instructions to appoint a Step III designee unconnected with OHR. In support of this, the Appellant references the above-discussed refusal to allow questioning on the subjectivity of performance evaluations, the alleged failure of the CAO to include in the decision the response to the proposed findings of fact, and the rejection of two exhibits that were not produced until after the Step III meeting. Finally, Appellant contends that OHR involvement in all aspects of the promotion process created "command influence" over the OHR staff member who conducted the fact-finding process.

The County responds by contending that OHR made none of the decisions in the selection process, portraying their role as, in essence, advisory, and that there was therefore no reason for OHR to recuse themselves from conducting the grievance meeting or administering the grievance process.

With respect to the fact that the fact-finder excluded from the Step III meeting a line of testimony about the subjectivity of performance evaluations, as noted above, while the Board views this decision as incorrect, for the reasons described, in our view it does not render the Appellant's Step III meeting as so flawed so as to justify either a remand for the appointment

of an outside fact-finder, or the holding of an evidentiary hearing by the Board, a process discussed below.

With respect to the Appellant's response to the initial findings of fact, the procedure used in this case, and that routinely used in Step III proceedings, was to prepare a draft Findings of Fact, which was then sent to the Appellant for comment. The transmitted draft is dated March 16, 2001, and on May 31, 2001, Appellant's attorney provided comments on the Findings of Fact. The CAO Grievance Decision document, which includes all of the Findings of Fact, issued August 17, 2001. It states therein,

The Grievants' response to the findings of fact in this case contain numerous requested additions/deletions to the paragraphs below. These requested changes have not been incorporated into this document, but are made part of the record and should be considered along with the information presented below. The response to the findings of fact are attached to the May 31, 2001 letter from Appellant's attorney to OHR's Labor/Employee Relations Manager, and are attached to this document.

Accordingly, the Appellant's response to the Findings of Fact were part of the record provided to the CAO, and are part of the record before the Board.

The two exhibits referred to as not being produced until after the Step III meeting are hand-written notes made by Committee members during their review of the personnel files. Grievance exhibit 32 reflects the conclusion of one rater, "not enough time - not fair to candidates," which is information the Board has taken into account. Grievance exhibit 33, the hand-written rating check list of one of the Committee member's, does not add anything to the facts in record.

With respect to the allegation that "command influence" tainted the Step III process, the Board rejects the view that the use of an OHR employee to conduct it is, in and of itself, improper. The County Administrative Procedures set up the Step III procedure as the method of collecting information for the CAO to make the final decision. OHR, with the use of a specialist, is well equipped to be part of the process of collecting information. The procedure provides for the issuance of a draft findings of fact, which appellants have the right to respond to, and the response becomes part of the record that goes to the CAO. While we have found, and disposed of, that the fact finder in the instant case erred when a particular line of questioning was not allowed, we see nothing about the use of an OHR person that inherently taints the process.

In rejecting Appellant's request for a outside fact-finder, the Board has considered the decision of the Circuit Court in Nancy A. Hudson v. Montgomery County, Maryland, Civil No. 202453, March 2, 2000, and the Court of Special Appeals review of that decision, Montgomery

County, Maryland v. Nancy A. Hudson, No. 216, September Term 2000, wherein the Board was ordered to remand the case to the CAO, with instructions to appoint a Step III designee unconnected with OHR. The Board does not read those decisions as always requiring such a fact-finder, and views the instant case as distinguishable. In Hudson, the Circuit Court had shown concern over “command influence” in a circumstance where the fact-finder at the Step III process was a subordinate of the OHR Director, who had rendered the Step II response. However, in the instant case the Step II response was rendered by the Chief of Police, who was not in the OHR chain of command. Moreover, in Hudson, the Circuit Court noted that the record “. . . includes not only the factual information . . . but also impressions and conclusions of (OHR fact-finder and Director) which are perceptually tainted by the appearance of command influence.” In the instant case, Appellant’s concern is the refusal of the OHR fact-finder to allow a particular line of questioning, but a line that the Board views as irrelevant to its resolution of the issues before it. The Circuit Court also noted that in Hudson, the OHR fact-finder had an opportunity to consider information that was not available to the Petitioner, which is not a factor present in the instant case.

Finally, with respect to the request that the Board conduct a hearing, Section 35-10(a) of the County Personnel Regulations provides,

An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a promotion, suspension, dismissal, termination, or involuntary resignation. **In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a de novo review based on the written record developed before the MSPB.** (Emphasis supplied)

It is the practice of the Board to hold evidentiary hearings only where there are genuine disputes of material facts presented. As discussed above, the Appellant seeks a hearing to present evidence on what was not permitted to be included in the grievance procedure, that is, were the performance evaluations reviewed subjective, and, equally subjective, how the Committee may have been affected by the allegedly subjective performance evaluations. As the Board has acknowledged that performance evaluations may reflect the personal, and sometimes subjective views of the person doing the evaluation, and as the Board does not view as a genuine dispute of a material fact the subjective opinions of the Committee as to how they were affected by such evaluations, we see no issues of fact warranting the holding of an evidentiary hearing.

It should also be stressed that while the Board concludes that an evidentiary hearing is not required, as is our practice, our review of the record, which includes all materials submitted by the Appellant, is de novo.

Accordingly, in the Board's view, the CAO's refusal to appoint an outside fact-finder was not violative of law or regulation, or otherwise improper, nor is there presented a basis for the Board to conduct an evidentiary hearing.

12. What is the appropriate remedy for conduct found to be violative - The Appellant, on the basis of all of Appellant's allegations of violations of law and regulation, and improprieties, contends that the only appropriate remedy is retroactive promotion with backpay. Appellant contends that priority consideration for the next vacancy, the remedy already ordered by the CAO over matters not at issue in the instant case, is an inadequate remedy in the facts of the case, and would allow the Department to use "its tainted selection procedures." The Appellant notes in this regard that since February 2001, the Appellant has been in the Department's "Discontinued Retirement Service Plan." Appellant states an agreement with the County that nothing would be served by re-doing of the promotion procedure.

The County, noting that on September 19, 2001, the Appellant was given "first consideration" for an additional Lieutenant vacancy, with the corrected information on the performance evaluation, and was not selected, contends that no further relief is appropriate or should be provided to the Appellant.

Of all of the Appellant's allegations, the Board has found merit to items:

6. What personnel file documents were and were not considered by the Committee. Specifically, the vehicle accident report should have been removed, and the "good guy" letters should have been included.
7. The Committee's consideration of only five dimensions rather than the seven that had been listed in the Bulletin.
9. The use of Committee members who had recently provided training and assistance to certain candidates.

The Board does not include in this list, allegations concerning the procedures used in the processing of Appellant's grievance, as they have nothing to do with the legality or propriety of Appellant's non-selection for promotion. Of these three defects, items 7 and 9 were "systemic," that is, they affected all candidates equally, and there is no evidence that the Appellant was, in anyway, more affected than other candidates. Item 6 was, however, specific to the Appellant, although it is likely that other candidates personnel files were similarly in less than perfect shape.

It is the practice of the Board to grant retroactive selections only where the evidence shows that but for the conduct at issue, the person would have been selected. The Court of Appeals in the Clarke decision confirmed this policy. The Court stated therein,

If we were to find the promotional process in the present case deficient, and we expressly do not so decide, the relief sought by Captain Clarke would not be available. A flawed promotional process entitles no one to the remedy of a promotion without establishing entitlement. All of the individual candidates on the list are equally entitled to consideration. Selection, however, involves discretionary decision-making by the chief of police.

It is clear that the “but for” test is not met in the instant case. The improper inclusion and exclusion of material in Appellant’s personnel file were relatively minor items, and the testimony of Committee members reflect that the items at issue were of little concern to their review. The Appellant did not make the top eight selection lists of any of the Committee members. Accordingly, the Board rejects the request for a retroactive promotion. As for other remedies specific to the Appellant, as Appellant could have been disadvantaged to some degree by the content of Appellant’s personnel file, the Board finds appropriate that Appellant again be granted priority consideration to the next available Lieutenant position, should Appellant participate in a promotion selection process, noting in this regard that the Appellant is currently in a discontinued service retirement status. Should Appellant so participate, it is incumbent on the Department to assure that the content of the Appellant’s personnel file is complete and consistent with all applicable rules and regulations.

With respect to remedies for the systemic flaws found, the Board concludes that appropriate remedies be:

In all future promotion processes, it is incumbent on the Department to assure that promotional bulletins accurately describe processes to be followed. If “dimensions” are to be used in evaluating candidates, the dimensions used should be the same as what is described in the bulletin.

If rating committees are to be used in evaluating candidates, steps should be taken to mitigate any real or perceived conflict of interest. The Board recognizes that in an organization like the Department, high ranking officers who might serve on a committee, may know, or even have served with, or been the supervisor of candidates, and in our view, this alone is not a basis for finding a real or perceived conflict of interest. However, the Department should attempt to assure that no one serves on a committee who has been personally involved in any candidates attempt to obtain a promotion, as was evident in the instant case.

Accordingly, in the Board’s view, the Appellant is not entitled to retroactive promotion but is entitled to priority consideration for a future Lieutenant promotion vacancy, should Appellant participate. Further, in the Board’s view, the Department must take such steps as our necessary to assure that promotion bulletins accurately state the procedures that will be followed, and to assure that persons placed on rating committees have not been personally involved in any of the candidates attempts to be promoted.

ORDER

Appellant's request for a retroactive promotion is denied. The Department is directed to grant the Appellant priority consideration for promotion to the rank of Lieutenant, should Appellant participate in the next promotion procedure. If Appellant does participate, the Department must assure that the contents of Appellant's personnel file is complete and consistent with applicable rules and regulations. The Department is directed to take necessary steps to assure that promotion bulletins accurately reflect procedures to be followed and that procedures utilized are consistent with the bulletin. The Department is further directed to take necessary steps to assure that no one serves on rating committees that have had involvement in any candidates attempts to be promoted.

CASE NO. 02-06

DECISION AND ORDER

The Appellant appealed the decision of Chief Administrative Officer, (CAO) denying Appellant's grievance regarding Appellant's non-promotion to the rank of Lieutenant.

FINDINGS OF FACT

Promotion Announcement and Testing Process

On June 23, 1999, the Montgomery County Office of Human Resources (OHR) issued a Personnel Bulletin (Bulletin) for a "1999 Promotional Examination For the Rank of Police Lieutenant." The Bulletin provided for "Minimum Qualifications," a "Promotional Examination," "Application Procedure," "Scoring Procedures," and "Use of Eligibility Lists." With respect to the latter, the Bulletin provided, in pertinent part:

In accordance with the 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 Office of Human Resources. The appointing authority is 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 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 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 that 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).

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.

In the description of the promotion examination, the Bulletin states that it is designed to evaluate candidates on the basis of listed dimensions "as they relate to the tasks performed at the rank of Police Lieutenant." The seven listed and defined "Police Lieutenant - Dimensions," were "Problem Analysis," "Decision Making," "Planning and Organization," "Leadership/Supervision," "Sensitivity," "Oral Communication," and "Written Communication."

The examination was conducted and, on December 29, 1999, OHR issued a certified eligibility list, which listed, in alphabetical order, first the candidates in the rating category, "Well Qualified," and then the candidates rated "Qualified." There were 17 candidates, including the Appellant, rated Well Qualified on the original list, with an 18th added later. Candidates' examination scores were not shown on the certified list. Upon receipt of OHR's certified eligibility list, the Department produced a "departmental eligibility list," listing, in alphabetical order, first all Well Qualified and then Qualified candidates, with the addition of each candidates race, gender, date of hire, and date of promotion to Sergeant. The Department list did not show examination scores. Candidates were however individually told their own examination score.

Committee Review of Candidates and the Chief's Selection

On January 19, 2000, the Police Chief issued a written "Delegation of authority" "to . . . review and consider candidates for promotion," with instruction to "submit to me in writing, the

names of officer(s) being recommended by the committee/panel for promotion to the rank of Lieutenant.” The Committee was composed of seven Department Officers, three Majors and four Lieutenants. The Committee was required to attend a training session on the recommendation process and documentation forms, which was conducted by a Department Personnel Specialist, and an OHR representative. The Chief also attended and stayed for most of the session.

At the training session, the Committee was provided with folders containing assorted materials related to the rating process. Included in the folders were the Bulletin, the Delegation, an instruction sheet on avoiding “rating errors,” “promotional document review check-off” sheets, and “training guide/notes” documents which provided tools/benchmarks for judging the “dimensions” that each candidate was to be rated on. The “dimensions,” provided to the Committee were the first five that had been described in the Bulletin, “Problem Analysis,” “Decision Making,” “Planning and Organization,” “Leadership/Supervision,” “Sensitivity,” but did not include “Oral Communication,” and “Written Communication,” which had been listed in the Bulletin. The record describes a training session of approximately one and one-half to two hours, wherein the use of the materials in the folder were discussed, but the Committee was not told exactly what kind of information they were to look for, but were told to look for information which went to the dimensions.

According to the Findings of Fact:

The training provided included no specific training to address (evaluate) the following: that officers of the same rank may have different assignments; addressing comments that were stated in the documents more than once; addressing performance evaluations that a committee member may have authored; addressing comments repeated in “good guy letters,” and how to address internal inconsistencies contained in or the date (age) of the performance evaluation. In regard to the training attachment on rating errors, committee members were instructed to be mindful of various kinds of rating errors that could occur when reviewing the documents.

In addition to the materials related to the mechanics of the rating process, there was a May 21, 1999 memorandum from the County Executive describing the County’s “diversity program.” The memorandum contains a bolded sentence which reads, “Managers and supervisors must be held accountable for ensuring that diversity initiatives are implemented effectively in their departments and agencies.” According to the grievance decision factual account, the Committee testified that during the training, they were made aware of the memorandum, but that the subject was not discussed in detail, and they were not advised to consider diversity as a determinant of who was to be selected.

The Committee's review was only of the eighteen candidates rated Well Qualified. According to the record, during a three day period, each member of the Committee conducted their review by examining each of the applicant's personnel file, Office of Internal Affairs (OIA) summaries, and resumes, and noted information from the documents reviewed which exhibited a particular dimension. The record contains descriptions of each Committee members individual process in reviewing materials, areas of focus, recordation methods, and basis for ratings, along with their actual notes from reviewing each candidate's file. The descriptions reflect considerable variations in these aspects among the Committee members, although the record reflects that each reviewed materials against the five rating dimensions. While each Committee member stated that they were not officially provided with test scores, some testify to having found out the scores of a few of the candidates, either because a candidate told them their score, or hearing of a particular candidate's score from some informal source. Those who heard any scores state that any knowledge they had of test scores played no part in their rating of the candidates.

Each Committee member was required to list their top eight candidates, which they did on a "Promotional Recommendation Committee Member Individual Worksheet." The Appellant was not on the list of any of the Committee member's top eight candidates. Thereafter, the Committee held a meeting for the purpose of reaching a "consensus" on the officers to be recommended to the Chief for promotion to Lieutenant. The Chief did not attend the meeting. Personnel staff attended, providing oral instructions on the process that the Committee was to follow, and their instruction to come up with a consensus list. The handwritten notes of the Personnel staff person reflect a listing of "process," which includes "Diversity Policy." The Committee members were told that there were to be three or four vacancies to be filled, with the exact number not yet decided.

At the consensus meeting, the top eight choices of each Committee member were listed on a matrix, and displayed on a whiteboard. The Committee members then discussed their respective views on the candidates, at the conclusion of which no consensus was reached, there being some disagreement on the top candidates. Participants' accounts of the meeting reflect that the discussion was certainly spirited, sometimes angry, as Committee members advocated particular choices. The Committee members' accounts reflect that there was no discussion of the County Executive's memorandum on diversity. An Assistant Chief, who was functioning as Chairman of the meeting, filled out the "consensus recommendations," sheet, which lists in a one through eight listing, the candidates recommended for promotion to "four (4) current Lieutenant vacancies." On the second page, are the signatures of the Committee members, and notations as to the recommendations of certain Committee members which were at variance from the "consensus listing." The Appellant was not among the eight listed candidates. This list was then transmitted to the Chief.

The Chief testified that while reading the candidates' personnel files, OIA summaries, and resumes, the Chief decided to use the Committee, because having other people participate improves the process by bringing different experience and perspective to the evaluation, which

helps make a better decision. The Chief states that the Chief saw only the alphabetical listing of Well Qualified candidates and did not know their scores or rank order. The Chief received from the Committee only the list of names, not receiving any information on why that list had been recommended. In reviewing the personnel files, the Chief states that the Chief looked for information related to the dimensions set out in the Bulletin. The Chief states that the Committee recommendations “were a factor in my promotion decisions,” and that “gender and race were not factors in my decisions.” The Chief selected five of the candidates for promotion, selecting those rated 1, 2, 3, 4, and 7. The record does not disclose the Chief’s reasons for passing over the 5th and 6th rated candidates. The promotions to Lieutenant for those five officers were effective February 13, 2000.

Committee Members Assistance to Candidates

The record reflects that prior to being appointed to the Committee, one of the member met with three of the candidates approximately one month before a September 1999 Lieutenant’s examination, which was subsequently voided, and “. . . that they may have met before the second exam.” A Committee member states that they cannot recall if the candidates approached them, but they extended the offer to assist them. This committee member provided them books and “some information that they kept on tests that they had taken,” and discussed “building the dimensions into their answers.” One of the three persons this member provided training to was recommended by them, and was one of the selectees.

Another Committee member states that prior to being named to the Committee, they “convened a study group of candidates” for the purpose of providing some advice on how to write examination scores. This member says that they met with this group three or four times over a five week period prior to the test and shortly after the June 23 Personnel Bulletin. One of the four persons this member provided training to was recommended by her, and was one of the selectees. This person was the same one as trained and recommended by the other Committee member providing training.

It is clear that subsequent to being named to the Committee, at least one, but probably both of the two members who had provided the assistance informed the Department personnel specialist of their role in providing such training. The response they were given was to be asked if they could be fair and impartial, and when they said yes, they were left on the Committee.

Other Fact Contentions

The following are contentions of fact in the grievance record which are relevant to the Appellant’s positions:

- The Appellant’s examination score was 85%, resulting in his name being placed on the Well Qualified rating category on the eligibility list.

- Two candidates with lower examination scores, i.e., 84 and 82, were promoted.

APPLICABLE LAW AND REGULATION

The attached Appendix sets forth the laws, regulations, and court cases referenced by the parties as applicable to the resolution of the issues presented by this appeal.

POSITIONS OF THE PARTIES

The Appellant contends that the Montgomery County Charter, Code, merit system law, Personnel Regulations, and the Department regulations mandate promotional procedures which guarantee open, equal, and rational consideration of all candidates based on demonstrated merit and fitness, and that the selection process at issue deprived Appellant of equal consideration, fairness, and rational, informed decision making. Summarized below are the Appellant's specific contentions and the County responses as to those contentions:

1. Appellant's contention - The Failure to provide the Chief and the Committee with the candidates' examination scores deprived them of the only meaningful measure of the candidates' knowledge, skills, and abilities.

County's Response - There is no requirement to report candidate's examination scores to the appointing authority, and placing candidates in their adjectival categories reflects an individual's relative standing.

2. Appellant's contention - The Department's use of subjective performance evaluations to compare and rank the candidates deprived them of consistent, fair and equal consideration and rational, informed decision making.

County's response - Use of performance evaluations in the selection process is not restricted by applicable regulations, and performance evaluations are structured to foster uniform standards.

3. Appellant's contention - The selection process lacked guidelines or standards to assure fairness and consistency.

County's response - The providing of prepared materials used to conduct the evaluation, and the training provided the Committee ensured that the Committee process was conducted in an

orderly and consistent manner. Similarly, the Chief in his role as appointing authority, attended training, reviewed each candidate's materials, and considered the dimensions set forth in the Bulletin.

4. Appellant's contention - The selection process was rushed.

County's response - Although some Committee members testified that they would have preferred a longer span of time for the selection process, no one testified that they did not have enough time to fairly evaluate candidates.

5. Appellant's contention - The selection process did not take into account that officers holding the same rank have different duties and responsibilities.

County's response - Although candidates had differing duties and responsibilities in their assignments, the opportunity to demonstrate the dimensions was available in all assignments.

6. Appellant's contention - The Bulletin misinformed candidates about the selection process, specifically that candidates were not informed that the Chief and the Committee would evaluate them on the basis of five dimensions. Rather, they were told that there would be seven dimensions, but that in making the decision, the Chief may consider other listed criteria.

County's response - The promotional announcement did not specifically inform candidates that the dimensions used in the assessment center portion of the examination process would be used in the selection process. However, lack of notification of the use of the dimensions affected all candidates equally and the "Appellant was not solely impacted by this omission."

7. Appellant's contention - The Committee's review of the candidates personnel files violated Personnel Regulations 2-4(E) - Access to Records, which authorizes only the appointing authority, i.e., the Chief, to review the files.

County's response - Access to confidential personnel records are available on a "need to know" basis to the appointing authority. Appointing authority is not specifically defined. The Bulletin clearly states that the Chief may delegate the authority to review and consider personnel files, which has been the practice for many years.

8. Appellant's contention - The fact that two Committee members assisted some candidates with preparing for the examination created an appearance of unfairness or bias.

County's response - There is no evidence that the assistance provided to certain candidates had any affect on the Committee process or recommendations. At the beginning of the process, both Committee members stated that they could be fair and objective.

9. Appellant's contention - The CAO should have appointed an outside fact-finder to conduct the Step III meeting.

County's response - OHR did not make any of the decisions related to the promotional process, nor were they involved in that process. Accordingly, there was no reason for OHR to recuse themselves from conducting the grievance meeting or administering the grievance process.

10. Appellant's contention - Retroactive promotion with back pay is the appropriate remedy for the violation of Appellant's merit system rights, and is the only remedy that will make Appellant whole.

County's response - Even if the selection process were determined to be deficient, which it was not, the relief sought would not be appropriate. A flawed promotional process entitles no one to the remedy of a promotion without establishing entitlement. No entitlement was established, as all of the individuals on the list are equally entitled to consideration and final selection is a discretionary decision made by the Chief.

ISSUES

1. Was the failure to provide test scores to the Committee and Chief violative of law or regulations, or otherwise improper?
2. Was the Committee and Chief's use of performance evaluations to rate candidates violative of law or regulation, or otherwise improper?
3. Did the selection process have adequate guidelines and standards to assure fairness and consistency?
4. Was adequate time provided for the selection process?
5. Did the selection process adequately take into account the differing duties and responsibilities of the candidates?
6. Did the Bulletin misadvise candidates about the use of dimensions for rating purposes, and, if so, was this violative of law or regulation, or otherwise improper?

7. Was the Committee's access to candidates' personnel files violative of law or regulation, or otherwise improper?
8. Was the use of two Committee members who had previously provided instruction to some candidates violative of law or regulation, or otherwise improper?
9. Should the CAO have appointed an outside fact-finder to conduct the Step III meeting?
10. What is the appropriate remedy for conduct found to be violative of law or regulation, or otherwise improper?

ANALYSIS AND CONCLUSIONS

On January 8, 2002, the Board issued its decision in the matter of Richard L. Cage and Montgomery County Government, Case No. 02-04, which arose from the same promotion process as the instant case. As all of the issues in the instant case, and the contentions of the parties on those issues, were considered and addressed in Cage, the Board relies on its decision in that case to resolve the issues in the instant case.

1. Failure to provide test scores - Appellant contends that a selection process that deprived the Committee of the specific test scores of the applicants fails to meet merit provisions set forth in the County Charter, Code, and Personnel Regulation. Appellant contends in this regard, "Because the Chief and the selection committee members did not know the examination scores, their evaluations of the candidates were not based upon any consistent assessment of their relative abilities, knowledge and skills." "Their decision making was not fair, rational, or informed."

It should be noted, that the test scores were a significant aspect of the selection process, specifically that they were the determinant of selecting candidates to be rated Well Qualified. The Committee and the Chief therefore knew that they would be rating and selecting from a group of employees who had demonstrated by their examination scores that they had the abilities, knowledge and skills to perform as Lieutenants. Once the Well Qualified candidates were identified by test scores, the Committee's role was to bring to the rating process other criteria for promotion.

The Court of Special Appeals of Maryland recently reviewed a procedure similar to that in the selection process at issue in the instant case, including the use of an examination to create a list of Well Qualified candidates, provided to the selecting official in alphabetical order and without examination scores. Montgomery County Maryland v. Edward A Clarke, No. 2580 (Sp. App. Md., 2001). In that case, Captain Clarke alleged a violation of County regulations and an invalid selection process in the 1998 examination for police major. This Board had held that the process used in Clarke was in compliance with applicable County laws and regulations, and the Circuit Court for Montgomery County reversed this Board's Decision. In reinstating the Board's decision,

the Court of Special Appeals stated “all of the individuals on the list are equally entitled to consideration. Selection, however involved decision-making by the Chief of Police.” Clarke at 12. The Court further stated “...we...cannot say that the Merit System Board’s conclusion, that the process used in the selections was based on substantive evidence, and not violative of any law, regulation, or other improper consideration[,] was erroneous.” Clarke at 14-15.

With respect to applicable regulation, the Appellant cites Section 5-10 of the Personnel Regulations in effect at the time of this selection procedure, which provides, in pertinent part, “The names of qualified applicants must be placed on an eligible list and grouped in a manner which will accurately reflect the individual relative standings.” Here as in Clarke the Board does not believe that “reflecting the individual relative standing” requires a listing that conveys test scores, as opposed to the procedure reviewed in Clarke where the candidates relative standing was reflected by their having a test score high enough to put them in the Well Qualified group.

There appears to be one possibly relevant difference between the facts in Clarke and those in the instant case, in that in the former, the rating group seemed to have had access to the examination scores as they developed for the Chief, the alphabetized list of Well Qualified candidates. In the Board’s view, this difference does not impact on the application of Clarke. The crucial principle in Clarke is the endorsement of a system that creates for the selecting official a Well Qualified list to select from, without regard to their examination score.

Accordingly, in the Board’s view, the failure to provide the test scores to the Committee and Chief was not violative of law or regulation, or otherwise improper.

2. Use of Performance Evaluations - The Appellant contends that in rating candidates, rather than using a “validated, structured examination process which treated candidates equally,” the Committee used performance evaluations, which contained “subjective judgments without any objective criteria for measuring performance.” In support of the contention that performance evaluations are “subjective,” the Appellant recites a litany of arguably subjective phrases lifted from candidates’ evaluations. With respect to the training given on handling rating errors, Appellant contends that the training alerted the Committee to avoid making these errors during their review of the candidates’ files, but “It did not teach them to identify rating errors in the documents they review.”

Certainly, performance evaluations can, and frequently are, all that the Appellant claims they are, a supervisor’s personal observations and conclusions about an employee’s performance. Supervisors bring their own concepts and vocabulary to the process. One supervisor’s standard for an outstanding performance could be another supervisor’s standard for just doing your job. Notwithstanding a certain subjectivity of the process, the use of performance evaluations to ascertain the ability of a candidate to perform at a higher position is a universal aspect of promotion processes. Further, their use has received judicial endorsement both in the above-referenced Court of Special Appeals Clarke decision, and in Joseph Anastasi v. Montgomery

County, 123 Md.App. 472, 719 A.2d 980d (Anastasi II) Moreover, in the promotion process at issue in the instant case, the procedure used was designed to reduce the impact of the kind of subjectivity cited by the Appellant. The Committee was not just wandering through performance evaluations to glean whatever information caught their eye, but seeking that which would directly relate to the specified job dimensions. The Board views this procedure as consistent with approved processes meeting merit system requirements.

Accordingly, in the Board's view, the use of performance evaluations in the rating of candidates was not violative of law or regulation, or otherwise improper.

3. Process lacked guidelines and standards - The Appellant, relying on the Court of Special Appeals 1988 decision in Montgomery County, Maryland v. Joseph R. Anastasi, et al, 77 Md.App. 126, 549 A.2d 733 (Anastasi I), contends that the training and materials given were not sufficient. In this regard, it is contended that the instructions did not insure consistency, leaving the Committee and the Chief to use their own criteria. The Appellant recites examples from the testimony, and notes of the Committee and the Chief of what are alleged to be lack of consistency between information noted by different Committee members and the Chief.

Contrary to the impression the Appellant seeks to give, the Committee and the Chief were given considerable training and guidance necessary to perform their task. First, the Bulletin itself set forth what the Committee and the Chief could consider. The Committee was given a required training session, where they were provided with instructional sheets on avoiding rating errors, promotional document review sheets, and documents setting forth tools/benchmarks for judging the specified dimensions. When the Committee began their task of reviewing personnel files, they did so armed with the specified dimensions to guide their search. The Committee members were to utilize the material provided in that process. All of this is considerably different than the "casual, unmethodical, and unrecorded" procedure reviewed by the Court of Special Appeals in Anastasi I. It should also be noted, as it was by the Court of Special Appeals in Clarke, that the Committee and the Chief were "experienced high ranking officers fully conversant with the requirements of the position to be filled."

Accordingly, in the Board's view, the selection process had adequate guidelines and standards to assure fairness and consistency.

4. The selection process was rushed - In support of this contention, the Appellant notes that the training was held on January 19, that the Committee began reviewing files the next day, and that three of the members were still reviewing files the morning of the meeting where they were to arrive at a consensus list. Additionally, one of the Committee members had noted "not enough time - not fair to candidates."

In the Board's view, there is no evidence that the process was rushed to the point that the Committee lacked the opportunity to fairly evaluate the candidates. The fact that one member of the Committee stated a concern as to sufficiency of time, does not detract from the fact that seven experienced officers had time to look at the files of each Well Qualified candidate, and have input into the process of developing a consensus list. The accounts of the Committee members generally have them saying that they took between 30 to 60 minutes per file, paralleling the 45 minutes noted by the Court of Special Appeals in Clarke.

Accordingly, in the Board's view, there was adequate time provided for the selection process.

5. Consideration of differing duties and responsibilities - The Appellant notes that the *Personnel System for Police Officer Class Positions*, which outlines advancement procedures within the Department personnel system, specifies that ". . . the police personnel plan recognizes that police officers holding the same rank may have differing duties and responsibilities," but that the Committee was instructed not to take into account that a candidate's assignment could affect their ability to demonstrate the dimensions.

While one Committee member's account of their training included being told not to consider a candidate's assignments, others testified to either no such recollection, or to being told to consider everything in the files. The thrust of the accounts of the Committee members were that they were instructed to utilize the dimensions to rate each candidate, and to utilize anything in the file that would assist them in that task. Moreover, the accounts of the Committee members reflect carrying out the letter and spirit of their assignment, that is, utilizing the dimensions as a guide and endeavoring to find in a candidate's file anything that could be used to do that.

While possibly true that a candidate's particular assignments may put he or she at a disadvantage, in the Board's view, such a result is inherent in any promotional system that is available to employees in a large organization. Throughout an organization like the Department, each candidate for a position like that of a Lieutenant would have had differing assignments, although in the instant case, each would have at some time functioned as a supervisor. What the process did in this situation was create as even a playing field as possible by using one set of dimensions to rate each candidate, and then require that the Committee find in the files a basis for rating each candidate against those dimensions.

Accordingly, in the Board's view, the selection process more than adequately took into account the differing duties and responsibilities of the candidates.

6. Bulletin's advice on the use of dimensions - The Appellant contends that the Bulletin advised candidates that they would be evaluated on seven dimensions, rather than the five dimensions ultimately used by the Committee, and that had they known that the evaluation would have been on five dimensions, they could have targeted their resumes to address them.

The County's explanation for dropping the dimensions on oral and written communication is that they were difficult to evaluate from the resume, and they had been previously evaluated during the examination process. The County contends that the Bulletin did not specifically inform candidates that the dimensions used in the assessment portion of the examination process would be used in the selection process, and that while such notification would have allowed candidates to target their resumes, the other (personnel file) documents reviewed by the Committee couldn't have been targeted anyway. The County also contends that the lack of notification affected all candidates equally.

The Board views as "hair-splitting" the County's attempt to make a distinction between the assessment and selection portion of the examination process. The Bulletin describes the process by which candidates will be selected for promotion, including that the Chief may delegate to others authority to review and consider personnel files. Candidates were clearly informed of seven dimensions, and the subsequent decision to reduce the dimensions to be considered to five was contrary to the stated design of the selection process.

Accordingly, in the Board's view, the Committee's consideration of only five of the seven dimensions listed in the Bulletin was improper.

7. Committee access to personnel files - This allegation of the Appellant is based on the fact that Personnel Regulation Section 2-4(e) states that personnel records are confidential and available on a "need to know basis" and specifies to whom they may be disclosed. Listed are: (1) the employee's supervisor; (2) The CAO or a designee; (3) the Personnel Director or a designee; (4) a member of the Merit System Protection Board or a designee; (5) Personnel Office staff; and (6) the appointing authority considering the employee or applicant for appointment, transfer, or promotion. Appellant notes the absence of "or a designee" for the appointing authority category.

The County notes that "appointing authority" is not defined, and that the Bulletin specifically provided for the Chief to delegate the authority to review and consider personnel files, OIA summaries, etc., items which would be covered by the Personnel Regulations mandating confidentiality.

The Appellant is correct that a strict literal reading of the Personnel Regulations could be interpreted as not allowing the Committee access to the personnel files. However, the Board views the instant circumstances as falling within the grant to the appointing authority. The Chief, who was clearly the appointing authority, constituted the Committee to be part of the appointing process. Specifically, high ranking officers, who, as supervisors themselves, had access to the personnel files of employees they supervise, were to assist the Chief by bringing their experience to bear to help review personnel files. To exclude the Committee from having this type of access could not, in the Board's view, have been the intent of Personnel Regulation

Section 2-4(e). It should also be noted that in all three of the above referenced court cases, Anastasi I, Anastasi II, and Clarke, committees of high ranking officers reviewed personnel files, a point specifically noted by the Court in Clarke, where it was stated, “Equally important is the fact that each of the selection committee members was an experienced high ranking officer fully conversant with the requirements of the position to be filled.”

Accordingly, in the Board’s view, the Committee’s access to the candidates personnel files was not violative of law or regulation, or otherwise improper.

8. Committee members assisted some candidates - It is undisputed that prior to their appointment to the Committee, two members had provided training assistance to some of the candidates. The Appellant contends that the participation of these candidates tainted the selection process. “By helping only some candidates, they demonstrated a potential bias in favor of those candidates.” The County’s response is that there is no evidence that the assistance rendered affected the selection process or recommendations, and at the beginning of the selection process, both of these Committee members stated that they could be fair and objective.

It may be correct that the fact that two Committee members provided assistance to certain candidates did not affect the selection process, noting that only one of the people receiving such assistance made the consensus list. However, the Board is of the view that utilizing persons who had performed this “private,” “unofficial” training clearly created a situation where, at a minimum, the appearance of bias existed. These two Committee members were being asked to rate all candidates with the same degree of fairness, when they had at least a “vested interest” in the success of those they trained. There are inherent, but acceptable, problems created by the fact that Committee members knew and had supervised some candidates, but this is unavoidable. An avoidable problem was using the two members who had recently given special attention to certain candidates.

Accordingly, in the Board’s view, the use of a Committee member, officers who had recently provided training and assistance to certain candidates was improper.

9. Refusal to appoint an outside fact-finder - The Appellant, noting OHR’s involvements in the promotion process at issue, contends that the use of an OHR employee as fact finder created “command influence that denied (Appellant) a fair and impartial hearing which is guaranteed by the (County) Code.” The County responds by contending that OHR made none of the decisions in the selection process, portraying their role as, in essence advisory, and that there was therefore no reason for OHR to recuse themselves from conducting the grievance meeting or administering the grievance process.

The Board rejects the view that the use of an OHR employee to conduct the Step III process creates “command influence” that, in and of itself, taints the process. The County Administrative

Procedures set up the Step III procedure as the method of collecting information for the CAO to make the final decision. OHR, with the use of a specialist, is well equipped to be part of the process of collecting information. The procedure provides for the issuance of a draft findings of fact, which appellants have the right to respond to, and the response becomes part of the record that goes to the CAO. Further, there is nothing in the record which indicates that in carrying out the fact finding function, the OHR staff member took any action which in anyway prejudiced the Appellant's ability to have a complete record to go to the CAO. Accordingly, the Board sees nothing about the use of an OHR person that inherently taints the process.

In rejecting Appellant's request for a outside fact-finder, the Board has considered the decision of the Circuit Court in Nancy A. Hudson v. Montgomery County, Maryland, Civil No. 202453, March 2, 2000, and the Court of Special Appeals review of that decision, Montgomery County, Maryland v. Nancy A. Hudson, No. 216, September Term 2000, wherein the Board was ordered to remand the case to the CAO, with instructions to appoint a Step III designee unconnected with OHR. The Board does not read those decisions as always requiring such a fact-finder, and views the instant case as distinguishable. In Hudson, the Circuit Court had shown concern over "command influence" in a circumstance where the fact-finder at the Step III process was a subordinate of the OHR Director, who had rendered the Step II response. However, in the instant case, the Step II response was rendered by the Chief of Police, who was not in the OHR chain of command. Moreover, in Hudson, the Circuit Court noted that the record ". . . includes not only the factual information . . . but also impressions and conclusions of (OHR fact-finder and Director) which are perceptually tainted by the appearance of command influence." The Circuit Court also noted that in Hudson, the OHR fact-finder had an opportunity to consider information that was not available to the Petitioner. Neither of these considerations are present in the instant case.

Accordingly, in the Board's view, the CAO's refusal to appoint an outside fact-finder was not violative of law or regulation, or otherwise improper.

10. What is the appropriate remedy for conduct found to violative - The Appellant, on the basis of all of Appellant's allegations of violations of law and regulation, and improprieties, contends that the only appropriate remedy is retroactive promotion with backpay. Appellant contends that, ". . . based on the examination, which was the only objective measurement in the entire promotion process, Appellant was more qualified than two of the candidates who were promoted." "The parties have accepted the examination results as valid."

The County contends that, based on the facts presented there is no evidence that the Appellant was adversely impacted by the selection process at issue, which culminated in the promotion of five candidates to the rank of Lieutenant effective February 13, 2000, noting that Appellant was later selected for promotion to the rank of Lieutenant effective February 11, 2001. The County additionally contends that the selection process at issue was consistent with County Charter, law, process, policy, and prior decisions of the Board. Further, the County argues that

even if the selection process was determined to be deficient, the relief sought would be inappropriate, as a flawed promotional process entitles no one to the remedy of a promotion without establishing entitlement, which was not done in the instant case.

Of all of the Appellant's allegations, the Board has found merit to items:

6. The Committee's consideration of only five dimensions rather than the seven that had been listed in the Bulletin.
8. The use of Committee members who had recently provided training and assistance to certain candidates.

Each of these defects were "systemic," affecting all candidates equally, and there is no evidence that the Appellant was, in anyway, more affected than other candidates.

The Board has previously granted retroactive selections only where the evidence shows that but for the conduct at issue, the person would have been selected. The Court of Appeals in the Clarke decision confirmed this policy. The Court stated therein,

If we were to find the promotional process in the present case deficient, and we expressly do not so decide, the relief sought by Captain Clarke would not be available. A flawed promotional process entitles no one to the remedy of a promotion without establishing entitlement. All of the individual candidates on the list are equally entitled to consideration. Selection, however, involves discretionary decision-making by the chief of police.

It is clear that the "but for" test is not met in the instant case. The Appellant did not make the top eight selection lists of any of the Committee members, and was not on the consensus list provided to the Chief. Accordingly, the Board rejects the request for a retroactive promotion.

With respect to remedies for the systemic flaws found, the Board concludes that appropriate remedies be:

In all future promotion processes, it is incumbent on the Department to assure that promotional bulletins accurately describe processes to be followed. If "dimensions" are to be used in evaluating candidates, those used should be the same as what is described in the bulletin.

If rating committees are to be used in evaluating candidates, steps should be taken to mitigate any real or perceived conflict of interest. The Board recognizes that in an organization like the Department, high ranking officers who might serve on a committee may know, or even have served with, or been the supervisor of candidates, and in our view, this alone is not a basis for finding a real or perceived conflict of interest. However, the Department should attempt to ensure that no one serves on a committee who has been personally involved in any candidate's attempt to obtain a promotion, as was the circumstance in the instant case.

Accordingly, in the Board's view, the Appellant is not entitled to retroactive promotion, or any remedy specific to Appellant. Further, in the Board's view, the Department must take such steps as are necessary to assure that promotion bulletins accurately state the procedures that will be followed, and to assure that persons placed on rating committees have not had any personal involvement with the tutoring/training of individuals participating in the promotional process.

ORDER

Appellant's request for a retroactive promotion is denied. The Department is directed to take necessary steps to assure that promotion bulletins accurately reflect procedures to be followed and that procedures utilized are consistent with the bulletin. The Department is further directed to take necessary steps to assure that no one serves on rating committees that have had involvement in any candidates attempts to be promoted.

Case No. 02-07

DECISION AND ORDER

Appellant appealed the decision of the Chief Administrative Officer denying Appellant's grievance and requested relief over being disqualified from taking the 2000 promotion examination for the rank of Lieutenant.

FINDINGS OF FACT

Promotional Examination Personnel Bulletin/Training Requirements/Disqualification

On June 2, 2000, the County Office of Human Resources (OHR) issued a Personnel Bulletin announcing the "2000 Promotional Examination for the Ranks of Master Firefighter/Rescuer and Fire/Rescue Lieutenant." The "Minimum Qualifications" statement provided:

In order to be eligible to take the promotional examination, a candidate must meet the following experience, education, training and ability requirements by the closing date of September 8, 2000. (Underlining in original text)

Relevant to the instant case were certain “Training” requirements for the rank of Fire/Rescue Lieutenant. The Training requirement stated,

Candidates for the Fire/Rescue Lieutenant examination must have successfully completed the following courses by the closing date of September 8, 2000. Questions about training or certification requirements should be directed to the Bureau of Program Support Services. (Emphasis supplied)

A portion of the training requirements provided,

Human Relations Course (8 hours)*

*EEO/AA and the Law (Affirmative Action & Sexual Harassment)

*Managing Diversity

or

*EEO/AA and the Law (Affirmative Action & Sexual Harassment)

*Cultural Diversity

*EEO and More: What Officers Need to Know

or

*Managing EEO/AA and the Law

*Managing Diversity

While Appellant’s application has the date of September 1, 2000 on the signature line, it is undisputed that Appellant’s application was actually submitted on September 8, the closing date of the application period. Submitted with the application, was Appellant’s Public Service Training Academy transcript as evidence of required training courses completed. The transcript reflects courses entitled: “Sexual Harassment Awareness,” “Cultural Diversity,” “Affirmative Action & Sexual Harassment,” and “ EEO/AA and the Law.”

After review of your application, we have ruled that you are ineligible to participate in the 2000 Lieutenant Promotional Examination.

This ruling is based on the fact that you have not completed all the training requirements. According to our records and to the documentation you submitted, you have not completed EEO and More: What Officers Need to Know course.

If you have any questions regarding this decision, please don't hesitate to contact my office.

The record reflects that from the required human relations training courses, Appellant was credited for those courses **bolded** below:

***EEO/AA and the Law (Affirmative Action & Sexual Harassment)**

*Managing Diversity

or

***EEO/AA and the Law (Affirmative Action & Sexual Harassment)**

***Cultural Diversity**

*EEO and More: What Officers Need to Know

or

***Managing EEO/AA and the Law**

*Managing Diversity

This determination left the Appellant missing "Managing Diversity" from the first and third alternative groupings, and "EEO and More: What Officers Need to Know" from the second alternative grouping.

Additional Training Opportunities

The record indicates quite clearly that the Department of Fire and Rescue Services (DFRS) was reviewing submitted applications for the promotional examination prior to the September 8 closing date, and was informing applicants of deficiencies. (Because the Appellant did not apply until the last day of the application period, Appellant, of course, did not receive a notification of deficiencies until after the closing date.) Apparently in response to discovered deficiencies in required human resources training courses, on August 30, 2000, a Training Course Announcement for the course "EEO and More, What Officers Need to Know," was faxed to all stations. The announced course was to be taught on September 5, with a registration deadline of September 2. The County states in their submission to the Board, that the announcement was not sent to applicants needing the course for promotion eligibility, nor is there a contention by the Appellant that it was. While not specifically stated in the record, it is clear that those applicants who took the course on September 5, were credited with having taken it, even if they had submitted their application before that date.

Grievance and Post-Grievance Procedures

On September 23, the Appellant grieved disqualification for taking the examination. Subsequent to the filing of the grievance, Appellant was allowed to take the 2000 Lieutenant examination, with the results sealed while the grievance was being processed.

POSITIONS OF THE PARTIES

Appellant

Disqualification for the Promotional Examination

Appellant contends that the County has not been consistent in the titling of courses and that the course requirements listed in the Personnel Bulletin were confusing. Specifically, the Appellant contends that it was unclear that the Managing Diversity course was different from the Cultural Diversity course. Similarly, EEO/AA and the Law (Affirmative Action & Sexual Harassment) is listed as one course, while Appellant's transcript shows EEO/AA and the Law as one course, and Affirmative Action & Sexual Harassment as another.

Denial of an opportunity provided to others to take a qualifying course

Appellant contends that it was fundamentally unfair to provide an opportunity to some applicants to qualify for taking the examination by taking the course EEO/AA and More: What Officers Need to Know, but deny Appellant to take the course.

Miscellaneous

Appellant sought relief that would include the voiding of the examination. In Appellant's subsequent submission, Appellant requests that the Board determine that Appellant was eligible to take the examination and allow Appellant's score to be utilized to determine whether Appellant's merits placement on the eligibility list. Alternatively, because there has never been a showing of the factual basis upon which the County provided additional courses, the Board is requested to grant a hearing to develop a full record as to what in fact occurred. Appellant contends that full remedial relief include an award of attorney fees.

County

Disqualification for the promotional examination

The County contends that there is no basis for the allegation of confusion over whether Managing Diversity and Cultural Diversity were the same course, noting that they have different

titles and were listed as separate courses in the Bulletin. As for the alleged confusion over EEO/AA and the Law (Affirmative Action & Sexual Harassment), the County contends that while they are separate courses, it has been common practice in the training academy to teach them as one, and the Appellant was credited for both courses. It is further contended that if the Appellant was confused, Appellant should have sought clarification from the Bureau of Program Support Services, as was specified in the Bulletin.

Denial of an opportunity provided to others to take a qualifying course

The County's responses to the Appellant's contentions related to this allegation are:

- Faxing the August 30 announcement of the training course is the common method by which stations receive such information, and the fact that the Appellant does not recall seeing it does not mean that it wasn't faxed.
- Those applicants who had an opportunity to cure a deficiency by taking a course on September 5 submitted their applications prior to that date, and the Department had an opportunity to review them and advise the applicants of their training course deficiency.
- As the Appellant submitted the application on the last day of the posting period, there was no opportunity to notify Appellant of deficiencies prior to the end of the closing period and, even if Appellant would have been notified on September 8, Appellant would have still been deficient because Appellant missed the September 5 presenting of the needed course.
- Prior to September 5, 2000, the course in question had been taught on 8/9/00, 2/8/00, 9/15/98, 7/27/98, and 3/30/98, giving the Appellant ample opportunity to take it prior to seeking to participate in a promotion examination.
- It was the Appellant's responsibility to find out what was necessary for promotion by the deadline date, and had Appellant submitted an application earlier, Appellant would have found out sooner that Appellant did not meet the training requirements.

ISSUES

1. Does alleged confusion over the training course requirements provide a basis for a finding that the Appellant's disqualification for the promotion examination was improper?
2. Was the failure to provide the Appellant an opportunity to cure deficiencies in training, as was accorded other applicants, improper?

3. What is the appropriate remedy for any findings of improper conduct?
4. Is a basis shown for the holding of an evidentiary hearing?
5. Is Appellant entitled to an award of attorney fees?

ANALYSIS AND CONCLUSIONS

1. The Board sees no basis for Appellant's allegation that the titling of required courses was confusing. While there may have been some confusion over whether EEO/AA and the Law (Affirmative Action & Sexual Harassment) was one course, or the same as the two separate courses shown on Appellant's transcript, Appellant was given credit for the course listed in the requirements. As for Appellant's contention that Appellant had a basis for believing that Managing Diversity and Cultural Diversity were the same course, the Board sees no support for Appellant's view. The two courses have different names, and both are among the listed courses. It is quite clear that they were separate courses. Moreover, the Announcement states quite clearly, "Questions about training or certification requirements should be directed to the Bureau of Program Support Services." If Appellant had any questions, Appellant had ample opportunity to ascertain whether these were the same course. Accordingly, the Board rejects Appellant's contention that alleged confusion over training course requirements provides a basis for finding improper Appellant's disqualification for the promotion examination.

2. An applicant who filed prior to September 2, six days before the close of the posting period, was presumably notified of any deficiencies in training course requirements, and had an opportunity to register for a previously unannounced holding of a training course. While the closing date was not until September 8, an applicant who timely filed after September 2, including the Appellant, did not have the opportunity to cure the deficiency. This, in the Board's view, is disparate treatment that is improper. As long as employees had the opportunity to apply through September 8, all applicants should have the same opportunity to cure deficiencies. If the County review of incoming applications led to the determination that there was a justification for holding a special session of the training course at issue, a proper procedure would have been to wait until the close of the posting period and provide the same opportunity to everyone who had otherwise timely applied.

Accordingly, the Board concludes that the failure to provide the Appellant an opportunity to cure training deficiencies, as was accorded other applicants, is improper.

3. The Board rejects Appellant's requested relief of the voiding of the examination, noting that there is no evidence of systemic irregularities, and the narrow impropriety with respect to the Appellant can be otherwise remedied. As to the Appellant's requested remedy that a determination be made that Appellant was eligible to take the examination, and allow Appellant's score to be utilized to determine whether Appellant's merits placement on the eligibility list, in the Board's view this would only be appropriate if the Appellant has either in

fact completed any of the alternative training course groupings, or does so within a prescribed reasonable period of time. That is, eligibility to take the examination was conditioned on having completed any of the alternative human relations course groupings, which the Appellant had not done, and Appellant should not have a lesser requirement. Accordingly, if the Appellant can now demonstrate that Appellant has satisfactorily completed any of the human relations training course groupings, Appellant's examination should be unsealed and graded. If the Appellant has not completed any of the human relations training course groupings, the County must provide Appellant an opportunity to do so, as was done with the other applicants, within 90 days of the issuance of this decision. Should the Appellant then have satisfactorily completed any of the human relations training course groupings, Appellant's examination should be unsealed and graded. After grading of the examination, as requested by the Appellant, the score should be utilized to determine whether Appellant's merits placement on the eligibility list.

As to what was done by the County in the instant case, the Board concludes that OHR must insure in the future that any post-Bulletin training opportunities be equally available to all applicants who otherwise timely apply for the examination.

4. With respect to the request that the Board conduct a hearing, Section 35-10(a) of the County Personnel Regulations provides,

An employee with merit system status has the right to appeal and an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation. **In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a de novo review based on the written record developed before the MSPB.** (Emphasis supplied)

It is the practice of the Board to hold evidentiary hearings only where there are genuine disputes of material facts present. In the instant case, no such disputes are alleged, nor do any appear. Accordingly, in the Board's view, no basis for an evidentiary hearing exists.

5. Section 33-14, Hearing authority of the Board, of the Montgomery County Code, in providing remedial authority, empowers in section (c), that the Board may "Order the County to reimburse or pay all or part of the employee's reasonable attorney fees." As the Appellant has partially prevailed, Appellant is authorized to request such payment. The Appellant must submit a detailed request 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 the County Code, section 33-14(c)(9).

ORDER

Having found that the County failed to provide the Appellant an opportunity to cure training deficiencies, as was accorded other applicants, the County is ordered to determine if the

Appellant has now satisfied the human relations training course requirements. If Appellant has not, the County is ordered to provide Appellant an opportunity to do so within 90 days of the issuance of this decision. If the Appellant has either already met the training requirements, or does so within the 90 days that the County must provide the opportunity to do so, Appellant's examination should be unsealed and graded. Thereafter, Appellant's score is to be utilized to determine whether Appellant's merits placement on the eligibility list for promotion to the position of Lieutenant. The County is also ordered to ensure that in future examination procedures, that any post-Bulletin training opportunities be equally available to all applicants who otherwise timely apply for the examination.

Case No. 02-11

DECISION AND ORDER

This is a final decision of the Montgomery County, Maryland, Merit System Protection Board (Board) on the appeal of Appellant from the decision of the Montgomery County Chief Administrative Officer, (CAO) denying Appellant's grievance over being determined ineligible to sit for the September 26, 2000 promotional examination for Master Firefighter/Rescuer. The CAO's decision is a part of the record, herein.

FINDINGS OF FACT

The Montgomery County Government's Office of Human Resources issued a Personnel Bulletin, June 2, 2000 (Bulletin) announcing the 2000 Promotional Examination for the rank of Master Firefighter/Rescuer and Fire Rescuer Lieutenant. The Bulletin provides that "In order to be eligible to take the promotional examination, a candidate must meet the following experience, education, training and ability requirements by the closing date of September 8, 2000." Among the training requirements were:

Fire Officer Development I

or

Officership I Course and

Performance Planning and Appraisal Course

Progressive Discipline Course

And Problem Solving and Decision Making Course

(Hereinafter referred to as the three ps)

These course requirements are consistent with the Montgomery County Department of Fire and Rescue Service's (DFRS) Promotion Procedures, dated May 6, 1996. Attachment 6.2 of the Procedure Promotion Requirements for Classification in the Fire Protection Occupation

Series, April 1996. Sections VII contains the same training requirements and for Master Firefighter/Rescuer.

Fire Officer Development I is offered by the Fire and Rescue Service Training Academy, (Academy) a part of Montgomery County Government. Appellant took or was given credit for Fire Officer I and II at the Maryland Fire and Rescue Institute (Institute) in 1997. Appellant filed the application for a determination that the Fire Institute's fire officer courses were equivalent to the Academy's Fire Officer Development I Course. Appellant's application for equivalency was denied because the Fire Officer Courses offered by the Institute did not provide sufficient training in the three ps.

Appellant has requested a hearing before the Board.

In considering this case, the essential findings are:

- Appellant has been employed with the DFRS since November 1988. Appellant was promoted to the rank of Firefighter III in 1991. (FF12 (a),(b)).
- Appellant took or was given credit, in the CAO's decision, for FOD I and II – courses he completed at the Institute in 1997, but filed for equivalency in July 2000. These courses were denied equivalent to FOD I offered by the Academy.
- Appellant did not inquire about equivalency until the Bulletin (Joint Exhibit 5) announcing the 2000 promotional examination for the rank of Master Firefighter Rescuer and Fire/Rescue Lieutenant was posted on June 2, 2000. Appellant stated that the personnel bulletin jogged Appellant's memory. (FF 12(r)).
- Appellant could have submitted Appellant's equivalency for FOD I and FOD II (House Exhibits 2 & 3) after the Fall of 1997, however, Appellant stated that Appellant did not, because it was the least thing on Appellant's mind in 1997. (FF 12(x)).
- FOD 1, with the three ps, was offered and conducted five times in 1998 and 1999. (FF13(f)).

Appellant's Contentions

1. The imposition of the training requirement (FOD I) as a prerequisite to taking the examination, when an opportunity is not afforded to firefighters to take the course prior to the application closing date, violates Appellant's rights under the County's Charter, its Code, its Personnel Regulations and Administrative Procedures.

2. The County did not afford the Appellant an appropriate opportunity to meet the requirements in the promotional personnel bulletin because it cancelled the one course that Appellant needed.
3. That the County relied upon an unwritten policy in determining that the courses taken at the Institute were not equivalent to the Academy's FOD I.
4. The CAO's decision was arbitrary, capricious, and not in accordance with law.
5. The County's actions violated Appellant's rights under Federal and State Constitutions.

The County's Contentions

1. The Applicant was afforded opportunities to take the FOD I Course five times from 1998 to September 8, 2000. During these offerings the three ps were included as part of the FOD I course.
2. That changes in the way FOD I and the three ps were taught did not occur until mid September 2000 - several months after the Appellant's application for equivalency for FOD I was denied - and two weeks after the application closing date.
3. The County can rely upon an unwritten personnel policy when the policy is not in conflict with County Law or Personnel Regulations.
4. DFRS's requirement that firefighters who had taken the Institute FOD Course take additional training in the three ps was not arbitrary or inappropriate even if based on an unwritten policy dating back to 1996.
5. The County did not violate Federal or State Constitutional requirements.

ISSUES

1. Did the Appellant have sufficient opportunity to take the County sponsored FOD I, with the three ps, before the application closing dates?
2. Does the County have an obligation to offer all potential applicants an opportunity to meet their missing training requirements between the time a promotion examination is posted and the application closing date?
3. Can the County rely upon an unwritten policy for determining equivalency of courses taken outside the County?

4. Was the CAO's decision arbitrary and capricious?
5. Was the Appellant's Federal or State Constitutional rights violated?
6. Should the Board conduct a hearing on this matter?

ANALYSIS AND CONCLUSIONS

1. Did the Appellant have sufficient opportunities to take the County sponsored FOD I, with the three ps, before the application closing date?

DFRS Policies and Procedures 512, May 6, 1996, contains the Departmental Promotion and training requirements. Significantly, Attachment 6.2, IV includes the following pertaining to training requirements.

Specific training requirement for each rank must be met prior to receiving a proficiency advancement to that rank or by the closing date for receipt of application for a competitive examination to that rank (See IX). Questions concerning training equivalencies at all rank should be directed to the Public Service Training Academy.

The Board believes that the above language puts all potential applicants on notice that they must strictly comply with training requirements, and take action to clarify any issues pertaining to equivalency.

Appellant took the Institute's (non-County) course, waited two and one half years to file for equivalency, and filed for equivalency only after a Promotion Examination was announced. During the two and one half years between the time Appellant took the non-jurisdictional course, and the Bulletin was issued, the required course (FOD I) was offered five times. In view of these facts, Appellant has not established that Appellant was denied the opportunity to obtain the required course. The Board believes that the yardstick for measuring his opportunity to take FOD I, with the three ps, should run not from the date Appellant's equivalency was denied, but from the date Appellant took the non-jurisdictional course.

2. Does the County have an obligation to offer all or any potential applicants an opportunity to meet their missing training requirements after a Promotion Examination has been announced?

The Board does not believe that a serious contention can be made that the County has an obligation to offer all potential applicants an opportunity to satisfy their missing training

requirements after a Promotion Examination has been announced. Rather, Appellant seems to assert that he should be given that opportunity because of special circumstances.

In MSPB Board case, 02-07, the Board stated that if the Police Department specifically scheduled classes to enable more applicants to qualify after the promotion examination was announced, and a fair number of applications had been received and evaluated prior to the closing date, there was an obligation to extend that opportunity equally.

There has been no showing in this appeal that after the announcement of the promotion examination, the DFRS offered training opportunities specifically to enable some but not others to meet the training requirements for the examination. As previously stated, Appellant's failure to obtain the course was more a result of inaction on Appellant's part than to DFRS action or inaction.

3. Can the County rely upon an unwritten policy for determining equivalency of courses taken outside the County?

The Board believes that although the specific requirements for determining course equivalency were not reduced to writing, personnel in DFRS were on notice of the process to be followed when a non-jurisdiction course was taken. (See Procedure 512). But since the matter at issue involves a personnel matter – whether the Appellant is entitled to have the Institute Course found equivalent to the County's FOD I – the County asserts that personnel rules and policies need not be in writing to be effective. The County cites *Leese v. Baltimore County*, 64 MD. App. 442, 458, 497, A.2d 159, cert. denied, 305 Md 106 (1985). *Leese* contains a statement to the effect that "...rules and understanding [showing an entitlement to benefits] need not be set forth in writing," at 458.

Given the existence of Procedure 512, which clearly shows that if a course other than the County sponsored FOD I is taken, the enhanced three ps should be taken as well, the Board is persuaded by the County's argument that it has authority to make course equivalency determinations, even in the absence of written comparison criteria.

Appellant also claims that the County decided in the fall of 2000 (September) that the three ps would not be a part of FOD I and II, and had to be taken separately. Appellant further asserts that the policy should not have been applied retroactively.

The CAO's decision states:

DFRS denied the Grievant's application for Equivalency on August 2, 2000 and denied Grievant's application for the promotional examination on August 23, 2000, one month

before the change in the MDFRI standard. ...Removing the three ps from DFRS FEDI course had nothing to do with DFRS' decision to deny Grievant's application for the promotional examination because the three ps were not removed from the County FOD I course until sometime in mid to late September [2000]

The Board agrees with the CAO's finding and affirms that the requirements for taking the promotion examination are established as of the application closing date.

4. Was the CAO's decision on the grievance arbitrary and capricious?

The Board has determined that the County had authority to decide whether a non-jurisdictional course was entitled to equivalency. Personnel were made aware of the equivalency requirements and the need to clarify issues pertaining to equivalency.

Appellant seems to think that because County officials reached a conclusion adverse to Appellant's on the course equivalency issue, both they and the CAO have been arbitrary and capricious. Notwithstanding what the Appellant thought, County officials explained that the non-jurisdiction course Appellant completed did not give sufficient instructions in the three ps. Had Appellant sought equivalency in 1998, or 1999, in accordance with Procedure 512, Appellant would have been so advised and could have taken FOD I with the three ps one of the five times it was available.

5. Was the Appellant's Federal or State Constitutional rights violated?

In Appellant's petition, Appellant asserts that it is "fundamentally unfair and a denial of equal treatment for individuals such as myself and others to be disqualified from taking this examination as a result of the County's failure to provide an opportunity to obtain the required courses." In other words, a violation of Federal and State Constitution rights is premised upon the Appellant's not being able to take FOD 1, with the three ps, after the promotional examination was offered.

Having found that, Appellant had ample opportunity to take the County's FOD 1, with the three ps, from 1997, when he took the Officership course at the Institute, and June 2000 (when the Bulletin was issued), the Board likewise finds no basis for Appellant's claims of Federal and State Constitutional deprivations.

6. Should the Board Conduct a hearing on this matter?

In the Board's view, there are no material issues of fact necessitating a hearing before the Board. The CAO's finding of fact, which is very comprehensive and to which Appellant had an opportunity to reply, provides an adequate basis for deciding the case. Therefore, no hearing is required.

We therefore conclude that the CAO's findings and conclusions were not arbitrary and capricious, but are supported by a thorough and reasoned decision.

ORDER

On the basis of the finding and the conclusions herein, the Appellant's appeal of the CAO's denial of Appellant's grievance is denied.

Case No. 02-15

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on the Appellant's appeal from the decision of the Chief Administrative Officer (CAO) denying Appellant's grievance over not being selected for promotion to the rank of Captain. In addition to the extensive written record provided by the parties, the Board ordered oral presentations as to the sequence/chronology and circumstances concerning the Recommendation Committee's development and transmission to the Chief of Police of each of the "consensus recommendations" at issue in the case.

FINDINGS OF FACT

Promotion Bulletin

On November 17, 1999, the Montgomery County Police Department (Department) published a Bulletin for the 1999-2000 Promotional Examination for the Rank of Police Department Captain. The examination process described in the Bulletin consisted of a written exercise, oral interviews, and a brief presentation, leading to the development of eligibility lists. With respect to "Use of Eligibility List," provisions of the Bulletin relevant to the issues present in the instant case are as follows:

The Chief of Police will be provided with scores and consider for promotion only the top five (5) scoring candidates for each vacancy. The top five candidates are defined as the top five scoring candidates remaining on the eligibility for each available vacancy. If more than one vacancy exists, then additional names will be added to the top five. For example, if there were two vacancies, the top six scoring candidates remaining on the eligibility list would be considered for promotion. In the case of tie scores, the number of candidates considered would include all those whose scores tie with the top five candidates. . . .

The Chief of Police will utilize the following procedure in making promotional selection decisions:

1. A final interview Recommendation Committee designated by the Chief of Police will interview the top five scoring candidates (including ties).
3. The candidate may have a departmental advocate, who is familiar with the candidates work performance, present information in person, or in writing, on the candidate's behalf. . . . (Emphasis supplied)
4. The questions asked by the committee will be standardized and will reflect the dimensions stated on pages 3 and 4 of this Bulletin, as well as the following factors:
 - Initiative: energy and aptitude displayed by beginning action. Examples of initiative include establishing new programs or procedures, and developing problem-solving strategies.
 - Commitment to community policing: Knowledge of the community policing philosophy, policies and practices and the ability to use all those in making decisions, in working with departmental personnel, the community and other government agencies and in providing police services.
 - Commitment to a diverse workplace: Awareness and understanding of different cultures and appreciation for the benefits diversity can bring to the Police Department. Knowledge of the contribution of a diverse workplace in community policing.
 - Performance in achieving departmental goals and objectives: Knowledge of the Department's goals and objectives and the ability to contribute to those goals and objectives through your behavior and accomplishments.
 - Overall on-the-job performance: Technical proficiency, professional behavior and work accomplishments.

6. As a result of the above process, the Recommendation Committee will make recommendations to the Chief regarding the best candidate(s) for promotion based on the Recommendation Committee's review of the candidates' relationship to the above criteria.
7. The Chief of Police may elect to review resumes, personnel files, any written comments, OIA summary sheets and any other pertinent documentation of all candidates recommended by the Recommendation Committee.
8. If six months or more have elapsed since a candidate's interview, he/she will be scheduled for a new interview.

With respect to the Police Captain "Managerial Dimensions" the Bulletin specified:

Oral Communications - The ability to express oneself effectively to the intended audience through verbal communications; to convey ideas accurately, clearly, and concisely.

Written Communications - The ability to express oneself effectively to the intended audience through written communications; to convey ideas accurately, clearly and concisely, using appropriate grammar, spelling and punctuation, in a manner to be understood by the intended audience.

Decision Making - The ability to make timely decisions and recommendations, to evaluate information, and to render sound judgment within varying degrees of uncertainty in order to accomplish important goals.

Leadership - The ability to convey performance expectations, to supervise, direct, manage, motivate, progressively discipline and coordinate the activities of others in order to accomplish unit and departmental goals and objectives, and install a climate of teamwork and accountability and a commitment to service improvement.

Planning - The ability to plan, schedule, and coordinate work, to establish priorities, and to implement decisions, programs, policies, and procedures.

Problem Analysis - The ability to identify the existence of problems and to determine possible causes. The ability to identify, assimilate, and comprehend information related to a problem area, to assess both short and long term effects of actions, events and/or requirements, and develop alternative solutions to problems, and recommended logical courses of action.

Interpersonal Sensitivity - The ability to establish and maintain effective working relationships with a wide variety of persons representing numerous organizations, particularly in situations where competing and conflicting concerns, interests, goals and/or objectives require understanding and resolution. The ability to handle sensitive public contacts and to deal effectively with diverse populations, demonstrating and understanding and appreciation of the benefits and contributions of a diverse workforce.

Work Perspective - The ability to recognize the impact of decisions and recommendations on the overall operation of the unit to which assigned and the department, and the need for cooperation and active participation with other regulatory and non-regulatory agencies and the community in providing public safety services to Montgomery County. Demonstrates a commitment to the Department's mission and organizational values of partnership, respect, integrity, dedication, and empowerment.

Examination Results and Interview Process

As a result of the written examination given to all applicants, the County Office of Human Resources (OHR) prepared an eligibility list for the selection of Department Captains from December 21, 1999 thru December 20, 2000, which listed all applicants in test score order, and states their tests scores. Ten applicants with test scores above 80.20 were rated "Well Qualified." Included among the Well Qualified group was the Appellant, who had the eighth highest score. By memorandum dated January 5, 2000 (incorrectly dated 1999), the Well Qualified candidates were notified of a scheduled interview date and time, and an anticipation of having four vacancies to be filled. The interviews were conducted by the designated Recommendation Committee (Committee), which initially consisted of Assistant Chiefs. The descriptions of the interview process reflect that the Committee members were instructed that they were to be guided by the Bulletin's "managerial dimensions," and their testimony is that in conducting the interviews, they focused on those dimensions. To assist the Committee, and to assure their focus, they were provided with "Promotional Recommendation Individual Committee Member Worksheets," which listed the managerial dimensions, and provided space to note "Strengths" and Weaknesses" next to each dimension. The record in the case contains the Committee members filled out Worksheets for the candidates. These interviews, along with a review of the applicants files, provided the basis for the Committee's subsequent ranking of applicants when making selection recommendations to the Chief of Police (Chief).

Committee determinations as to which candidates would be recommended to the Chief for promotion were reached at "consensus meetings." The specifics on the deliberation of the three members and their individual or collective reasons for who was recommended, and in what order, are not documented. Further, Committee members participating in the development of the grievance record in this case frequently testified to little specific recollection on the deliberations leading to their conclusions.

“Rule of Five” Application

As quoted above, the Bulletin provided that the Chief would be provided with scores and consider for promotion only the top five candidates for each vacancy, which Department representatives call the “Rule of Five.” Under this rule, the Chief must make the selection for each vacancy from five candidates referred by the Committee. If there were two vacancies, the Chief must get six names. If there were three vacancies, the Chief must get seven names. If there were four vacancies, the Chief must get eight names. The Committee identified the names it was to consider on the basis of candidates test scores, considering them in order of candidates score. Accordingly, for example, if the first selection was to fill one vacancy, the Committee would be considering and ranking the five persons with the highest test scores. As additional vacancies occurred, the Committee would go to the test score list for additional names, and include them as candidates to be ranked for the Chief’s consideration. In this circumstance, a person newly available for the Committee’s consideration could end up being ranked higher than someone who was on a list previously provided to the Chief.

January 31, 2000 Selections

On January 25, the Committee, prepared and signed a “Consensus Recommendations” form, which listed in ranked numerical order, eight of the Well Qualified candidates to fill four Captain vacancies, with the Appellant being ranked number 7. On January 26, the Department Personnel Director, forwarded to the Chief, a “Promotional Selection and Assignment Information” form listing the same eight names, in test score order. The Chief was also supplied the Consensus Recommendation form, which showed the Committee’s numerical ranking. On January 3, the Chief selected five candidates for Captain, four to fill the earlier identified vacancies, and one to fill an “overage.” The Chief’s selections were the Committee’s first five ranked candidates.

May 17, 2000 Selection

On February 16, the Committee prepared and signed a Consensus Recommendation form, which listed in a ranked numerical order, five of the Well Qualified candidates “For future vacancies only,” with the Appellant being ranked number 3. The first and fourth ranked candidates had not been on the January 25 list. The second, third, and fifth ranked candidates, the third being the Appellant, had been the sixth, seventh, and eighth ranked candidates, respectively, on the January 25 list. On April 20th, an additional Captain vacancy was announced, and the February 16 “For Future Vacancies Only” list was forwarded to the Chief, who on May 17, selected the first ranked candidate from that list.

June 16, 2000 Selection

In June, an additional Captain vacancy developed. On June 16, the Committee signed off on a Consensus Recommendation form that listed only one name, placed on the number 1 line.

The person listed was the candidate who had been immediately ahead of the Appellant on both the January 25 and February 16 lists. Also on June 16, a Promotional Selection and Assignment Information form was forwarded to the Chief, which listed five candidates. In addition to three candidates who had been on the February 16 "For future vacancies only" list, which included the Appellant, two new candidates were listed. On June 16, the Chief selected the candidate who had been the sole person on the Committee's June 16 list.

APPELLANT'S CONTENTIONS AND COUNTY RESPONSE

The Appellant contends that there were numerous violations of rule and law, which led to an irregular, inconsistent, haphazard, unrecorded and unfair promotional process in violation of the County Charter, Code, Personnel Regulations, and governing precedent of both the Board and courts. In response, the County contends that there is no statutory requirement that the Department promote by test score only, as long as the promotional system assured that each candidate was considered equally and according to relevant, rational criteria, which they were. Pertinent facts, along with the Appellant's specific contentions and County response are as follows:

- A. In violation of the Bulletin provision for having as an "advocate," someone from the Department, one of the candidates was permitted to use as an advocate the City of Rockville Chief of Police. Another candidate was allowed to have both an oral and written advocacy. Both of these candidates were among the five persons the Committee recommended for the January 31 selection.

County Response - While factually true, these were "minor procedural violations" that do not affect the overall fairness of the process.

- B. The rating process utilized by the Committee did not ensure fairness, and was actually casual, unrecorded, inconsistent, and contrary to the Department's own rules. In this regard, the testimony of Committee members and the Chief reflects that in their review of the applicants, different standards were considered. Examples given: 1) While the Chief's instructed that length of service was not to be considered, the written criteria permitted it, and one member acknowledged considering it; 2) One member testified to "looking for someone to live with," while another member testified to only looking for "red flags"; 3) One member used a +/- rating system, but not the others; 4) One member considered commendations found in candidates files, while another member didn't read them.

County Response - The Bulletin included the "managerial dimensions" that were to provide the basis for the evaluation of the applicants. Committee members were provided worksheets that set forth the dimensions to use in their evaluation process, and these were used

by the Committee members. The Committee members and the Chief did not use different standards, but were guided by the managerial dimensions.

- C. While recommendations reflect “consensus recommendations,” none of the Committee members can recall actually meeting, nor is there any written record of the meetings in evidence. Further, contrary to the written instructions on the forms and the verbal instructions given the Committee by the Personnel Specialist, only one Committee member ever filled out a pre-consensus individual worksheet, and that was only for the June 16 selection. Without these forms, none of the Committee members could recall who recommended whom or why, or why the persons selected on May 17 and June 16 were recommended.

County Response - There is nothing in the Bulletin, or law or regulation, that requires that certain forms be filled out by the Committee for the promotional process to be valid. The forms are tools used by the Department to assist the Committee and Department personnel in the administration and standardization of the promotion process. As to the absence of a record of consensus meetings, “While it is true that no written record . . . is in evidence, the Committee did reach consensus and made its recommendations to the Chief as procedurally required.”

- D. The first five vacancies were filled from the top eight candidates, while the “rule of five” set forth in the Bulletin would have required that nine candidates be considered. (Having started with eight candidates, when the fifth selection was made, it was from the four remaining candidates, thereby violating the rule of five.)

County Response - While this contention is probably technically correct, there was no prejudice to the Appellant, who was among the eight candidates referred.

- E. After the first selections, the Committee constructed a “for future vacancies only” list, yet there was no provision for such a list in the Personnel Regulations or Bulletin. The management explanation that a future vacancy list is indicated by the Bulletin reference to Committee recommendations being good for six months is inaccurate, as the Bulletin provision is for interviews rather than recommendations to be good for six months. Had the Chief continued to promote off of the January list, rather than the future vacancy list, the Appellant would have been promoted. While the future vacancies list was used to fill the sixth vacancy, thereafter no new such list was prepared, but instead, the initial future vacancies list was used to fill the seventh vacancy.

County Response - While the Bulletin made no reference to a future vacancy list, it did provide that the eligibility list would be in effect for one year, unless exhausted or abolished earlier. The future vacancies list was an administrative tool used to expedite the process of filling vacancies, and there was no need to create a new such list to fill subsequent vacancies.

- F. In April, the Chief replaced a Committee member who had retired with a different officer, who testified that they did not independently review or interview the remaining candidates, or listen to the tapes of the January interviews. That officer instead testified that in the absence of “red flags,” the officer simply affirmed the original Committee’s decision. Moreover, Committee members themselves were unsure of the membership status of the replacement.

County Response - The departure of one Committee member was an unprecedented situation, dealt with by adding someone who had served as head of the Department’s Division of Personnel, and was therefore knowledgeable about the promotion process. While he did not participate in every candidate’s interview, every candidate was interviewed by a full committee. The replacement was not a “reviewing member” of the Committee, but a replacement for the departing member, and his addition did not change the work already performed by the Committee.

- G. The June 16 Committee recommendation to the Chief contained one name, while the Bulletin and the form itself requires that the Committee submit five names to the Chief in a ranked order, based on Committee member consensus. This left the Chief no choice but to select the one name provided.

County Response - While it is true that there was only one name on the Consensus Recommendation form, and it may be a violation of Department’s own procedure that five names do not appear, this candidate ranked ahead of the Appellant on the eligibility list. Thus the recommendation of the one candidate did not violate any law or regulation.

ISSUES

1. Were there procedural defects in the conducting of the promotional examination?
2. What is the appropriate remedy for any violations of law or regulation, or other improprieties?
3. Is there any entitlement to attorney fees?

ANALYSIS AND CONCLUSIONS

1. With respect to the alleged procedural defects in the conducting of the promotional examination:
 - A. The Bulletin provided, in pertinent part, that candidates could have a “department advocate,” and that information could be presented “in person, or in writing. . . .” (Emphasis supplied). It is acknowledged by the County that the Committee

permitting one candidate to have an advocate who was not from the Department, and another candidate was permitted to have both an in person and written advocacy. Contrary to the County's contention that these were "minor procedural violations," because both of the beneficiaries of these errors were on the January 25 list of persons recommended for promotion, and were selected by the Chief on January 31, it can be reasoned that they were violations with major implications.

Accordingly, the Board finds that permitting a candidate to have an advocate not from the Department and permitting another candidate to have both an in person and written advocacy were violative of the Bulletin, and, therefore, defects in the promotional process.

B. In support of the general contention that the rating process utilized by the Committee did not ensure fairness, and was actually casual, unrecorded, and contrary to Department rules, the Appellant places reliance on the Court of Special Appeals 1988 decision in Montgomery County, Maryland v. Joseph R. Anastasi, et al, 77 Md. App. 126, 549 A. 2d 733 (Anastasi I). However, the specifics of the Appellant arguments differ in emphasis from those before the Court in Anastasi I, and before the Board in such recent decisions as Edward A. Clark, Case No. 00-12 Feb 24, 2000, Richard L. Cage, Case No. 02-04 (Jan 8, 2002), and David J. Falcinelli, Case No. 02-06 (Feb 20, 2002). In these cited cases, the contentions primarily went to the format of the process utilized by the County to provide recommendations to the selecting official, e.g., the failure to consider examination scores. As set forth in his filings with the Board, Appellant's contentions in the instant case do not dispute the process outlined in the Bulletin, but go to whether the Committee members sufficiently adhered to that process to satisfy a standard of fairness. In the Board's view they did.

In the instant case, the Bulletin provided with great specificity the process to be followed, including the standard of review of applicants, by dictating the "dimensions" that were to be considered. The Committee members, all of whom were experienced senior officers, were given instructions on how they were to conduct their review of the applicants. Each Committee member was provided for their use "Promotional Recommendation Individual Committee Member Worksheet" that listed the managerial dimensions and provided space to note "Strengths" and "Weaknesses," which they consistently used. In fact, those Committee members who testified in the grievance proceeding describe the dimensions as being the primary focus of their consideration. The file in the case contains copies of extensive notes from Committee members, reflecting their considered judgments of the candidates, in the context of the dimensions.

As to the specific contentions of the Appellant: whether length of service was to be considered; different members articulated different standards of review; one member using a symbol system not used by others; and one member considering commendations, while others did not, these are, in the Board's view, understandable and permissible individual approaches to the common task of determining by use of the dimensions the managerial capabilities of the candidates.

Accordingly, the Board finds that the Appellant's contention related to the rating process used by the Committee provides no basis for finding the process defective.

- C. As to the allegations concerning the "unrecorded" nature of the Committee's development of its recommendations, the lack of documentation and confusion over the sequence/chronology and circumstances concerning the Committee's development and transmission to the Chief of each of its consensus recommendations is troubling, and was the reason the Board ordered oral presentations on these facts. However, the evidence is clear that Committee members did in fact carry out their assigned task of arriving at consensus recommendations in a reasoned and appropriate manner. There are signed forms to reflect the consensus judgment of the Committee members, the Committee members' ultimate conclusions are reflected on the "Promotional Selection and Assignment Information" and "Consensus Recommendation forms, and there is no allegation or evidence that those sheets do not reflect the considered judgment of the Committee members. A review of the case law relied upon by the Appellant shows no indication that ensuring fairness requires recordation of the actual deliberations of the Committee and their individual or collective reasons for arriving at their recommendation. The use of a Committee, which has been sanctioned by court review, by its very nature, will entail a deliberative process not easily reduced to writing.

Accordingly, the Board finds that the lack of further documentation of the consensus reaching process provides no basis for finding the process defective.

- D. The "rule of five" is specified in the Bulletin, and, by the County's acknowledgment, requires that each selection be made from five candidates. Also acknowledged by the County, when the Chief selected the fifth candidate in the January 31 selection, there should have been an additional name.

Accordingly, the Board finds that this inconsistency was violative of the Bulletin, and, therefore, a defect in the promotional process.

- E. Undisputed is the fact that there was no provision in the Bulletin for the creation of the "for future vacancies only" list that was used in the promotional process at issue. It is also undisputed that while this list was used for the May 17 selection, it was not used for the June 16 selection. Hence, the County utilized a procedure not provided by the Bulletin, and, thereafter, was inconsistent in its use. In its defense to this allegation, the County argues, in essence, that the "for future vacancies list" was just an efficiency not inconsistent with the fact that the Bulletin covered promotions for a one year purpose. While an understandable efficiency, if such a list was intended, as opposed to the Committee ranking candidates each time there were vacancies, it should have been provided for by the Bulletin, and the creation of such a list thereafter being consistently used.

Accordingly, the Board finds that the creation of the “for future vacancies only” list was violative of the Bulletin, and, therefore, a defect in the promotional process.

- F. The Department dealt with the exigency of the unpredicted retirement of a member of the Committee by replacing him with an officer knowledgeable about the promotional process, an action not apparently contested by the Appellant. The issue is the propriety of the replacement functioning as a member of the Committee without personal knowledge of the information gleaned from the Committee’s interview process, and utilizing as a test “looking for red flags,” as opposed to reviewing/interviewing candidates against the same dimensions that the Committee was to use. It must be noted that each of the candidates were interviewed by the original three members of the Committee, and those interviews, along with the other file material to be considered, provided the basis for the Committee’s recommendation. Two of the remaining Committee members made up a majority. It is, in the Board’s view, perfectly reasonable for the added Committee member to conclude that he would abide by the Committee’s earlier conclusions, unless some salient “red flag” factor caused him to conclude otherwise.

Accordingly, the Board finds that the use of a replacement Committee member who relied upon the conclusions of the original Committee, and thereafter utilized a “looking for red flags” test, provides no basis for finding the process defective.

- G. The allegation that the June 16 Committee recommendation to the Chief contained only one name rather than the five that would be required by the rule of five appears to be based on understandable confusion caused by the varying forms used by the Committee, and apparent inconsistency in the Committee’s practices. The June 16 Consensus Recommendation form the Committee sent to the Chief listed only one name, which the County contends was because there was only one vacancy to be filled. Accompanying the Consensus Recommendation form sent to the Chief was the Promotional Selection and Assignment Information sheet which listed five names in test score order. However, earlier practice was for the Committee to rank all of the five names sent to the Chief, for example when for the January 31 selections, eight ranked names were given to the Chief for five selections. This was not done for the June 16 promotion action, so the Chief would not have known the ranking of anyone other than the one name referred to the Chief.

In the Board’s view, the Committee’s actions in ranking only one person for the June 16 promotion is inconsistent with the Bulletin’s rule of five provision. While the Chief did know of five candidates for the Chief’s consideration, the Chief knew the ranking of only one of those five. To have known how the remaining four candidates were ranked might have influenced the Chief’s selection process.

Accordingly, the Board finds that the failure to provide the Chief with five ranked candidates for the June 16 selection was violative of the Bulletin, and, therefore, a defect in the promotional process.

On the basis of the above, the Board finds that of the Appellant's contentions, the following were defects in the promotion process:

- Permitting a candidate to have an advocate who was not from the Department, and permitting another candidate to have both an in person and written advocacy.
 - On the occasion of the January 31 selection, violating the rule of five by having only four candidates when the Chief filled the fifth vacancy.
 - Creating a "for future vacancy only" list not provided for by the Bulletin.
 - Failing to provide the Chief with five ranked candidates for the June 16 selection.
2. Over the years, the County has utilized varying processes for arriving at the recommendation and selection of candidates to be promoted in the Department. Many of the varying processes have been subjected to judicial review. In the above-referenced Anastasi I decision, the Court of Special Appeals of Maryland, did not dictate a particular procedure, but set as the standard that ". . . the Chief must proceed by some *system* which ensures: fairness, rational, informed decision making; and compliance with other mandates of both the Charter and the Code." In fact, a promotional process much like that used in the instant case, except for the addition here of the "rule of five," was reviewed and approved by the Court of Special Appeals in Montgomery County v. Edward A. Clarke, (unreported). The Appellant contends, however, that the alleged deviations from what was supposed to be, renders the promotional process defective under the standard required by Anastasi I, regardless of whether the procedure as outlined in the Bulletin is acceptable, and that the appropriate remedy is retroactive promotion to the rank of Captain effective July 2, 2000, with full back pay and benefits and award of additional relief.

It is the practice of the Board to grant retroactive selection only where the evidence shows that but for the conduct at issue, the person would have been selected. The Court of Special Appeals in the Clark decision confirmed the appropriateness of this policy, wherein it stated,

If we were to find the promotional process in the present case deficient . . . , the relief sought . . . would not be available. A flawed promotional process entitles no one to the remedy of a promotion without establishing entitlement. All of the individual candidates on the list are equally entitled to consideration. Selection, however, involves discretionary decision-making by the chief of police.

In the Board's view, none of the above-listed defects in the promotion process satisfy the "but for" test. In this regard,

- While the two beneficiaries of additional advocacy were rated by the Committee higher than the Appellant, it is speculative that the advocacy was the basis for their ranking; that absent such advocacy, the Appellant would have been among the top five names recommended to the Chief; or that the Appellant would have been among the Chief's selectees. In this regard, the Appellant was seventh among the eight names referred to the Chief. Further, as the beneficiaries of the additional advocacy were among those selected on January 31, it had no effect on subsequent selections.

- The failure to satisfy the rule of five by having a fifth candidate for the final January 31 promotion had no effect on the Appellant because Appellant was among the four names that the Chief was selecting from.

- The use of the "for future vacancies only" list did not prejudice the Appellant, who was the third ranked candidate on that list. As described above, the Appellant contends that had the Chief continued to promote off of the January 25 list for filling the next two vacancies, rather than using the "for future vacancies only" list and new lists, as the seventh candidate on the January 25 list, he would have been selected. However, it was never intended that the January 25 list was to be used beyond the filling of the vacancies known at that time. Again, it is speculative that but for the creation of a future vacancy list, that the Appellant would have been the Chief's selection.

- As for the fact that the Committee provided the Chief with only the name of their recommendation for the June 16 promotion, and failed to rank the other four candidates, one of whom was the Appellant, again, it is speculative that it would have been the Appellant who was selected, noting particularly that the person recommended was rated just above the Appellant at the time of the previous selection.

While the Board rejects the request for retroactive promotion because there is not a showing that but for the defects in the promotion process, the Appellant would have been selected by the Chief for promotion, there certainly is a basis for concluding that Appellant was disadvantaged to some degree by the above-described defects. Accordingly, the Board finds appropriate that Appellant be granted priority consideration for the next available Captain position, should Appellant participate in a promotional selection process. (Richard L. Cage, Case No. 02-04, Jan 8, 2002) In this regard, evidence presented at the oral presentation ordered by the Board in this case, disclosed that the Appellant has now retired from the Department.

While rejecting the remedy sought by the Appellant, the Board concludes that the County must take steps to assure that in future promotional processes the type of defects that occurred in the instant case not be repeated. Specifically, announced procedures for such aspects as candidate advocacy, ranking sequence, and number of candidates to be ranked must be strictly adhered to. Additionally, forms used for recordation must be utilized in a complete and consistent manner.

3. With respect to the Appellant's request for attorney fees, section 33-14, *Hearing authority of the Board*, of the Montgomery County Code, in providing remedial authority, empowers in section (c), that the Board may "Order the County to reimburse or pay all or part of the employee's reasonable attorney fees." As the Appellant has partially prevailed, Appellant is authorized to request such payment. The Appellant must submit a detailed request 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

Appellant's request for a retroactive promotion is denied. The Department is directed to grant the Appellant priority consideration for promotion to the rank of Captain, should Appellant participate in the next promotion procedure. Further, the Department is directed to take the necessary steps to ensure that in future promotion processes, announced procedures for candidate advocacy, ranking sequence, and number of candidates to be ranked are strictly adhered to, and that recordation forms are filled out in a complete and consistent manner. The Appellant is authorized to request attorney fees.

