

Merit System Protection Board Annual Report FY 2003

Members:

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Rodella E. Berry, *Vice Chairperson*
Mary A. Lamary, *Associate Member*

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2003
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 2003 were:

Harold D. Kessler	-	Chairman (Appointed 2/97)
Rodella E. Berry	-	Vice Chairperson (Appointed 1/03)
Mary A. Lamary	-	Associate Member (Appointed 1/03)

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.

COMPENSATORY TIME

Case No. 03-08

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on Appellants appeal from the decision of Chief Administrative Officer, denying a request for compensatory time earned more than one year prior to the filing of the instant grievance.

FINDINGS OF FACT

Background

The Appellant is a Lieutenant in the Montgomery County Police Department. The Appellant who is an attorney, had, since 1994, been the Director of Legal and Labor Relations. In August, 1999, the Appellant began to report directly to Department Chief, and was moved to an office in the immediate area of the Chief. According to the Appellant, at the time Appellant started reporting directly to the Chief, the Chief told Appellant that the Chief did not want Appellant to formally enter compensatory time earned, but to informally adjust Appellant's schedule to accommodate those hours. Accordingly, the Appellant did not enter claimed compensatory time into the system, but recorded claimed hours on the top portion of Appellant's time sheets, which were signed by the Chief. It is uncontested that between August 25, 1999, and January 26, 2002, the Appellant worked hours that would qualify Appellant for 105.5 hours of compensatory time, pursuant to applicable provision of the County Code and Personnel Regulations, and the Department's "Overtime Compensation and Premium Pay" policy (Function Code 316). It is also undisputed that only 20 of those hours were worked within the one year period prior to the filing of the instant grievance.

The Appellant contends that Appellant did not seek to take any of the earned compensatory time because the Chief had, in various ways, indicated the Chief's displeasure with the idea of Appellant taking such time, and that as Appellant loved their job, Appellant did not want to risk displeasing the Chief. During the processing of the instant grievance, the Chief contended that the Chief never told the Appellant not to put in for compensatory time, nor did the Chief say whether or not the Chief endorsed such time for executive staff - those at the level of Lieutenant or above. In April 2002, the Appellant was transferred from Appellant's position reporting directly to the Chief, and was assigned to the Bethesda Police Station.

The Grievance

On April 18, 2002, the Appellant filed a grievance, contending that “during the past year,” Appellant had been required to work in excess of 13 hours per day and 45 hours per week, and on Appellant’s days off, the majority of which were without compensation. Appellant further contended in the grievance that it was Appellant’s “reasonable belief that any requests for the overtime compensation to which Appellant was entitled would have adverse career consequences,” citing two alleged incidents one where the Chief denied a request to use compensatory time, and another where the Chief indicated the Chief’s displeasure. As a remedy, the Appellant sought compensation for all excess hours worked.

In a June 4, 2002, response to the grievance, the Chief stated as to the relief requested,

In an effort to resolve this grievance the Department is willing to compensate the for the 20 hours of compensatory leave that was requested for January 18, 25, and 26 of 2002, the only requested relief that falls squarely within the one year period preceding the filing of the Grievance.

Applicable Regulations

County Personnel Regulations, Section 34, *Grievances*, provides in subsection 34-5, *Limits on relief*,

An employee is entitled to receive relief in a grievance for the period that extends no further than one year before the grievance was filed.

ISSUE

1. Does Personnel Regulation Section 34-5 bar the Appellant from receiving compensatory time for hours worked more than one year prior to the April 18, 2002 date of the filing of the grievance?
2. Should the Appellant’s request for a hearing be granted?

ANALYSIS AND CONCLUSIONS

Set forth and discussed below are the Appellant’s contentions as to why Personnel Regulations Section 34-5 should not bar Appellant from being credited for all of the claimed compensatory time, including that earned more than one year from the date of the grievance. The Board is reviewing the appeal *de novo*, considering all issues raised by the Appellant, without regard to whether they were raised during the processing of the grievance prior to the appeal to the Board.

1. The one year limitation on relief is directory rather than mandatory.

In this regard, the Appellant contends that while Section 34-5 does not create an entitlement to relief past one year from the date of the grievance, “it does allow the relief to extend beyond the year.” It is argued that if the section was intended to bar the relief requested, it would have provided that such relief “must” not be accorded.

As noted by the Appellant, Section 34-5, replaced language from the previous grievance procedure set forth in Administrative Procedure 4-4, which provided in Section 4.0,

... the 1986 Personnel Regulations, as amended, states that, “Any remedies for actions instituted by an employee under the Personnel Regulations may not extend earlier than one year from the date of filing the action.” Therefore, any relief granted under this procedure is limited to one year from the date a grievance is filed.

While the language in the applicable 2001 regulations is certainly less declaratory than its predecessor, in the Board’s view, it no less bars relief for that which goes beyond one year from the date of the grievance. The current language provides that entitlement to relief from a grievance is limited to a period that extends no further than one year before the grievance was filed. That is, a grievant who prevails may not have his/her relief extend further than one year before the grievance was filed. Accordingly, the specific language of Section 34-5 would bar the grievant from receiving, as a result of Appellant’s grievance, compensatory time for time earned prior to one year from April 18, 2002. Accordingly, this contention is rejected.

2. The Appellant accrued compensatory time informally until Appellant was transferred.

The Appellant contends in this regard, that Appellant accrued all of the claimed compensatory time under an informal arrangement, and that once Appellant was transferred from working for the Chief, the Chief’s refusal to credit Appellant with this accrued time constituted the denial of compensatory time. It is contended, “Assuming *arguendo*, that MCPR (Section) 35-4 is a mandatory prohibition on granting relief upon one year from the filing of the grievance, Appellant would be entitled to all of the compensatory time Appellant requested, because this time had already accrued under the informal arrangement established by the Chief.”

As the Board understands this contention, Appellant argues that at the time Appellant transferred from the Chief’s direct supervision, Appellant informally accrued compensatory time automatically became formally granted. Hence, Appellant’s right to all of it cannot be denied, regardless of the one year limitation on remedy. In the Board’s view, this contention begs the question of the 35-5 limitation on remedies granted under the grievance procedure. The grievance sought what Appellant thinks is due Appellant, the crediting of all earned compensatory time. However, as discussed above, Section

35-5 bars a remedy that extends further than one year from the filing of the grievance. Hence, Section 35-5 bars Appellant from being credited for compensatory time earned more than one year from the April 18, 2002, date of the filing of the grievance. Accordingly, this contention is rejected.

3. A one year limitation on relief should not be applied to earned compensation.

This contention relies on the fact that a one year limitation conflicts with the Federal Fair Labor Standards Act, which has a two year statute of limitation, and the Maryland Wage Payment and Collection Act, which allows employees to recover wages over three years. The Appellant does not contend that either of these laws apply to the instant case, but that, "As a matter of public policy, Montgomery County employees should not be treated less favorably."

What should be public policy in Montgomery County is not the issue. The Board is bound to abide by the provisions of the County Personnel Regulations, unless those regulations are found to be contrary to controlling law, e.g., the County Charter or Code. No such variance is argued, nor does any appear to the Board. Accordingly, this contention is rejected.

4. The Appellant relied on representations by the Chief.

The Appellant contends that the Chief initiated and implemented arrangement for compensatory time, knew that Appellant expected to receive compensatory time for Appellant's excess hours, and knew from Appellant's time sheets how many excess hours Appellant worked. Thus, to deny Appellant such time satisfies "the elements of the tort of detrimental reliance," "the elements of fraud," and "unjustly enriches the County at Appellant's expense."

While the Chief denies saying or doing anything that would have kept the Appellant from formally accruing and taking compensatory time, the Board views the credibility issue as irrelevant. The Board assumes, for the purpose of analysis, that the Chief did in fact communicate to the Appellant that the Chief wanted Appellant to handle compensatory time informally, adjusting Appellant's schedule to accommodate excess hours, and that the Chief indicated the Chief's displeasure with the Appellant actually taking or seeking to use earned compensatory time. Personnel Regulations Section 34-4(b), *Time limits for filing a grievance*, provides, in pertinent part, that a grievance may be dismissed by the Director of OHR if it is not filed within 20 calendar days of:

(1) The date on which the employee knew or should have known of the occurrence or action on which the grievance was based. That is, a timely grievance must be filed within 20 calendar days of the date the employee knew or should have known of the occurrence or action on which the grievance is based. The Appellant knew from the outset of coming to work directly for the Chief that the Chief did not want Appellant to formally claim compensatory time, and, according to Appellant's testimony, the Chief wanted Appellant to instead informally adjust Appellant's hours. For understandable reasons,

Appellant chose not to contest this policy by filing a grievance, instead abiding by the system proposed by the Chief. Choosing to wait until April 18, 2002, to file the grievance, Appellant cannot escape the limitation on remedy from the application of 34-5. Accordingly, this contention is rejected.

On the basis of the above, the Board concludes that Personnel Regulation Section 34-5 bars the Appellant from receiving compensatory time for hours worked more than one year prior to the April 18, 2002 date of the filing of the grievance.

2. Pursuant to Section 35-10(a), the holding of hearings in cases other than specified discipline matters is optional, and the Board has held such hearings only where it is concluded that there are material issues of fact. The Appellant's request for a hearing is based on the alleged differences between Appellant's account and that of the Chief as to what the Chief said about earning and using compensatory time. As discussed above, the Board has analyzed the contentions as if the Appellant's contentions are accurate. Accordingly, the Board concludes that there are no material issues of fact, and the Appellant's request for a hearing is denied.

ORDER

On the basis of the above, the Board denies Appellant's appeal of the decision of the Chief Administrative Officer denying Appellant's request for compensatory time earned more than one year prior to the filing of the instant grievance. The County is ordered to assure that the Appellant is credited for the 20 hours of compensatory time earned during the one year period prior to Appellant's April 18, 2002 grievance. The Appellant's request for a hearing is denied.

DISCIPLINE

Case No. 02-13

SUPPLEMENTAL DECISION AND ORDER

On August 19, 2002, the Montgomery County Merit System Protection Board (Board) issued its Decision and Order on the above-entitled appeals filed by Kensington Volunteer Fire Department, Inc., (KVFD) and an Appellant, the latter a volunteer fire fighter. The Appellants prevailed, the Board concluding in pertinent part, that the Montgomery County Fire and Rescue Commission erred when it affirmed the authority of the Fire Administrator to impose disciplinary measures on the Appellant, in addition to those imposed by the KVFD. The County has appealed the Board's decision to the Circuit Court for Montgomery County, where it is currently pending. Appellants have now petitioned the Board to order the County to reimburse them for attorney fees and costs.

In a response to Appellants' request for attorney fees and costs, the County questions whether it is a "timely" request that the Board can entertain, in that there was no such request in the original pleadings, and that under Maryland law, once a party notes an appeal, the lower tribunal no longer has jurisdiction over the case. In the Board's view, the circumstances of this case do not preclude consideration of Appellants' request for attorney fees. Neither applicable law nor regulation require that a request for attorney fees be made prior to a Board decision, although efficient case processing would dictate such a filing within a reasonable period following a decision. Further, the Board rejects the contention that the pendency of an appeal bars it from ruling on the attorney fee request, noting particularly that the issue of attorney fees is not currently present in the matter under judicial review. Accordingly, the Board concludes that it is not barred from ruling on the merits of the Appellants' request for attorney fees.

In its response, the County also contends that controlling law and regulation bar an award of attorney fees to either Appellant, as the County Code limits such awards to "employees." Chapter 33, Personnel and Human Resources, is the legislative dictate for the establishment of a merit system for County employees, and for the creation and operation of the Board. Section 33-14 of Chapter 33, governs hearings and decision of the Board, including its remedial authority, which provides in subsection (c)(9), the authority to "Order the County to reimburse or pay all or part of the employee's reasonable attorney's fees." (Emphasis supplied) Code Section 33-6, defines "County employees," as "All persons employed by the County regardless of merit system status," and defines "Merit system employees," as "All persons who are employed by the County in full-time or part-time year-round permanent career positions..." Clearly, the literal language of the Code provides authority for the Board to order the reimbursement of attorney fees to only County employees, and there is no indication found in the Code that the word "employees" means any prevailing appellant, regardless of employee status.

Appellant KVFD, is one of the local fire and rescue Departments that make up the newly organized Montgomery County Fire and Rescue Service, and not an “employee” for whom the Board can order be reimbursed attorney fees. The other Appellant is a volunteer fire fighter at KVFD. The recently passed County Bill 37-97, which reorganized the County Fire and Rescue Service, defines “volunteer” as “an individual who, without salary, performs fire, rescue, emergency, medical, or related services...” That is, volunteers are defined not as “employees,” but as “individuals.” While Bill 37-97 provided volunteers with certain appeal rights to the Board, there is nothing in that legislation which would indicated an intent to make them “employees” who could be reimbursed for attorney fees within the provisions of Code Section 33-14. As argued by the County, if it was intended that volunteer fire fighters be authorized to be reimbursed for attorney fees, the Council could have so provided when passing Bill 37-97.

Accordingly, based on the above, the Appellants’ request for reimbursement of attorney fees is denied.

Case No. 03-03

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 the level of discipline imposed on Appellant. The Appellant waived their right under Montgomery County Personnel Regulations (MCPR), Section 35-2, to a hearing before the Board.

FINDINGS OF FACT

The Appellant is a Corrections Officer employed with the Montgomery County Government (County), Department of Corrections (Corrections). Appellant has been employed with Corrections for the last 28 years, and holds the rank of Lieutenant.

On February 8, 2002, Appellant was observed reading the Washington Post by a Captain. When asked what Appellant was doing, Appellant did not respond. When the Captain commented to that effect, Appellant allegedly responded “you better watch it.” When asked “how should I take that”, Appellant allegedly responded “you can take it anyway you want.”

On February 20, 2002, the Captain summoned the Appellant to the office to deliver a counseling memo, relating to the incident of reading a newspaper while on duty. Appellant stated, and it is undisputed, “I am not taking that from you. You can (left out).” Appellant then left the office.

On March 27, 2002, Appellant was issued a “Notice of Disciplinary Action”, effective April 7, 2002, stating that Appellant was in violation of the Montgomery County Personnel Regulations, Section 33-5 (f), Causes for Disciplinary Action, which states in pertinent part;

The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who: behaves insubordinately or fails to obey a lawful direction from a supervisor.

The “Notice of Disciplinary Action” additionally stated that Appellant was in violation of Departmental Policy and Procedure 3000-7, Standards of Conduct, Section VI (D) (9) (a) which states in pertinent part:

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.

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

This is the second reported incidence of insubordination. Your comments are disrespectful and will not be tolerated. Furthermore, there can be no reoccurrence. It has been reported that you complied with the order to provide a personal apology to your supervisor/colleague.

On April 5, 2002, Appellant filed a timely grievance, stating that the discipline imposed by the Department was wrong and inappropriate. Appellant further noted that the discipline was not in keeping with the concept of progressive discipline.

On May 30, 2002, a Grievance Meeting was conducted by a designee of the CAO. During the Grievance Meeting, Appellant acknowledged that Appellant’s comments to the Captain and actions on February 20 were inappropriate, but didn’t believe they warranted a five day suspension. Appellant stated that the use of such language is part of the unique working environment and culture of the Detention Center. Appellant further stated that Appellant’s comment was not personally directed at the Captain, but rather toward the substance of the DCA #52 being presented by the Captain.

POSITION OF THE PARTIES

Appellant

The Appellant does not dispute the account of the facts relied upon by the County to discipline Appellant, but contends that the level of discipline is too severe in view of:

- Appellant has a 28 year career, during which there has been no similar incident;
- Appellant has acknowledged that Appellant’s conduct was inappropriate and

Appellant has apologized for it;

- The type of language Appellant used was common on the work place and similar verbal interactions have not led to disciplinary action;
- Appellant's comments were not personally directed at the Captain, but at the "DCA #52" being presented by the Captain;
- Communications differences between men and women.

The Appellant contends that a written reprimand is more appropriate.

County

The County contends that Appellant's action in telling Appellant's supervisor during an official meeting "I am not taking that from you. You can (left out)," and walking out of the meeting is unacceptable behavior and constitutes insubordination. The Appellant's conduct demonstrated flagrant disrespect and disregard for Appellant's supervisor, and was compounded by an earlier incident involving derogatory comments directed at Appellant's supervisor. The County further contends that progressive discipline as defined by MCPR, Section 33-2 (c) (2), Progressive Discipline, does not require a department to apply discipline in a particular order, or to always begin with the least severe penalty. The County contends that Appellants actions warrant a suspension, and note that they are foreclosed by MCPR, Section 33-3 (e) (3), Suspension, from imposing a suspension of less than five days because of the Appellant's Fair Labor Standards Act-exempt status.

ISSUE

Was the penalty as imposed, consistent with law and regulation, and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

Section 33, Disciplinary Actions, 33-5, Causes for Disciplinary Actions, (f), specifies as a basis for discipline, "behaves insubordinately or fails to obey a lawful direction from a supervisor." In the Board's view, the conduct of the Appellant at issue was exactly that which is covered by this prohibition. Appellant received from Appellant's supervisor what is undisputedly a lawful direction and Appellant's responses were clearly insubordinate to those directions. Accordingly, the Board concludes that discipline of the Appellant was consistent with law and regulation, and otherwise proper.

As for Appellant's arguments in support of Appellant's contention that the appropriate penalty would be a reprimand, the Board sees no basis for such mitigation. While the Appellant is a long service employee with no similar incidents in the record, Appellant's long service, and rank, make Appellant's egregious conduct more unacceptable. Appellant should know better. Appellant's after the fact recognition that Appellant's conduct

was inappropriate and apology does not make Appellant's actions any less serious - insubordination such as that at issue does not warrant the reduction of a five day suspension. As for Appellant's reliance on Appellant's use of foul language being a part of a unique work environment, while the Board does not condone such language in a County work place, what is at issue is not just foul language, but its use in conduct that is insubordination. Similarly, the Board totally rejects the defenses that the remarks weren't intended to be personal, or were somehow the result of gender differences in communication. Responsiveness to supervisory direction must certainly be the same regardless of gender. In the Board's view, the serious insubordination at issue warrants a suspension.

Finally, as to the length of the suspension, the Board has taken into consideration the CAO's statement that ". . . a good argument can be made that a suspension of between 1-3 days would have been sufficient," but was foreclosed by the Personnel Regulations prohibition of imposing a suspension of less than five days for an FLSA exempt employee. While the Board is of the view that the Personnel Regulation at issue does not preclude the exercise of its remedial authority to reduce the suspension, it is not felt that such a reduction is appropriate. As noted above, the Board views the Appellant's conduct as a serious act of insubordination, totally inappropriate of a senior officer, particularly in the setting of a corrections facility where discipline is required. Accordingly, the Board concludes that the five days suspension is appropriate.

Finally the Board further rejects Appellant's contention that the disciplinary action chosen violates the concept of progressive discipline, noting in that regard that two such incidents occurred in a short period of time, and that MCPR, Section 33-2, (c) does not require that the Department apply discipline in a particular order or to begin with the least severe penalty.

ORDER

Having concluded that Appellant's penalty was consistent with law and regulation, and not otherwise improper, the appeal is denied.

GRIEVABILITY

CASE NO. 02-19

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board), on Appellant's appeal from the determination of Montgomery County, Maryland, Acting Director of the Office of Human Resources (OHR), that Appellant's "complaint" was not grievable under Administrative Procedure 4-4, Grievance Procedure.

FINDINGS OF FACT

The Complaint

On March 23, 2002, the Appellant filed a document containing a "Statement I," which begins, "I feel that I have been the victim of an unfair and improper act by two employees," both of whom were peers of Appellant's in the Department of Public Works and Transportation. The document describes the two employees as having presented to the Chief of the Division, a list of complaints against the Appellant; Appellant's concern over what the two employees might have said about Appellant; and the on-the-job conduct of the two employees. The document concludes with the following "bullets,"

- I feel the way this was handled was careless, reckless and damaging behavior on the part of (two employees). It certainly qualifies as arbitrary and capricious, i.e., without reason or merit, in the terms of the grievance procedure.

- They have created a hostile work environment that prevents me from working with either one of them, which prevents me from fully doing my job.

- The fact that my supervisor was excluded from this meeting of complaints against me clearly show they were more interested in hurting someone's reputation than correcting a perceived problem.

The document concludes with a "Statement II (Relief Requested)," containing the following bullets:

- A written apology from both (two employees)

- I think a third party, independent of the Division, should review/ investigate the personnel issues as to why so many employees have left. There is a serious pattern of mismanagement by (two employees). Many

good employees have either left or have been hurt to the point that they are looking to leave.

- I would like the complaints against me to be made more formal so they can be addressed and the truth can be determined, with appropriate disciplinary action taken.

Applicable Law and Regulation

Administrative Procedure 4-4, Grievance Procedure, defines “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:

.

C. arbitrary and capricious, i.e., without reason or merit

Montgomery County Personnel Regulations Section 34-1, Policy on grievances, states, in pertinent part:

(a) an eligible employee . . . may file a grievance if adversely affected by an alleged:

.

(2) improper or unfair act by a supervisor or other employee, which may include coercion, restraint, reprisal, harassment or intimidation.

POSITIONS OF THE PARTIES

Appellant

While the complaint grew out of conduct of fellow employees, “. . . the gravamen of (Appellant’s) complaint is really one of the failure of (the Division Chief) to handle appropriately the charges against (Appellant).” “The omission of (Division Chief) was in direct violation of the County’s sexual harassment charge and thus (Appellant’s) complaint was grievable.” “Although Appellant may have inarticulately phrased Appellant’s grievance, the thrust of Appellant’s complaint is against the Chief of the Division for failure to address the issues” Appellant “. . . really is complaining against the management for permitting this matter to go unresolved.”

Appellant seeks a determination that the complaint is grievable and a remand to OHR to proceed with the appropriate grievance procedure.

County

The Appellant's complaint, the gravamen of which is that Appellant is a victim of slander and lies by two fellow employees who lodged unknown complaints against Appellant with the Division Chief, is not grievable under A-P 4-4 because it fails to state a claim upon which relief can be granted. The complaint does not relate to a disagreement between an employee and a supervisor concerning a term or condition of employment. Although the language of PR Section 34-1(a)(2) appears to encompass act by another employee, that does not mean that any act by a fellow employee alleged to be improper is per se grievable. In this regard, the County contends,

The (grievance procedure) is premised on some action or failure to act by the department or management representatives that is the basis for the grievance. For example, there may be instances in which actions by fellow employees might create a hostile work environment and in those circumstances a department's failure to act, when specifically requested to, may be grievable. . . . In the instant case it appears that the department's only failure to act was its failure to take any action against the Appellant as a result of the unknown complaints lodged against Appellant by the two employees.

ISSUE

Has the Appellant filed a grievance within the meaning of applicable regulations?

ANALYSIS AND CONCLUSIONS

It must be noted at the outset, that the matter before the Board is the grievability of Appellant's complaint, there having been no consideration or determination by the CAO on the merits of that complaint. While it is clear, and actually undisputed, that the source of Appellant's discontent was the conduct of two fellow employees, who Appellant believed had gone to the Division Chief to complain about some conduct by the Appellant, this alone does not render the complaint non-grievable. Rather, the resolution of the grievability issue turns on whether Appellant, in Appellant's original document, was stating a grievance against supervision. In the Board's view, Appellant was, albeit lacking precision.

In Appellant's complaint document, the Appellant narrates a sequence of events, or at least perceived events, and then contends, in pertinent part, that these two employees have created a hostile work environment that prevents Appellant from working with them, and "which prevents me from fully doing my job." Appellant further complains about the exclusion of Appellant's supervisor from this meeting. In the Board's view, the complaint is sufficient to constitute a disagreement with supervision over the way the meeting with the fellow employees had been conducted, and a plea to supervision to take some remedial action, thereby constituting a grievance within the meaning of applicable regulations.

As quoted above, the County has characterized as appropriately grievable “instances in which actions by fellow employees might create a hostile work environment.” In the Board’s view, this is what Appellant sought to do. Otherwise, why would Appellant have grieved to supervision, and sought from supervision the compelling of certain remedial actions.

Accordingly, the Board concludes that the Appellant has filed a grievance within the meaning of applicable regulations, and that it should be remanded to OHR for processing of the grievance on the merits.

ORDER

Based on the above, the Board sustains Appellant’s appeal of the determination that Appellant’s complaint was non-grievable, and orders that the County proceed with the processing of Appellant’s grievance, pursuant to the provisions of AP 4-4.

MEDICAL

Case No. 03-01

DECISION AND ORDER

This is the final decision of the Montgomery County Maryland, Merit System Protection Board (Board) on the appeal of an Applicant from the determination of the Employee Medical Examiner (EME) that was medically unacceptable for the position of Firefighter/Rescuer I (Recruit).

FINDINGS OF FACT

In conjunction with an application for the position of Firefighter/Rescuer I with the Department of Fire and Rescue Services (DFRS), Applicant was evaluated with a pre-placement medical examination on May 14, 2002. On Applicant's medical history questionnaire, Applicant indicated "... mild asthma controlled with Albuterol", and that Applicant experienced occasional wheezing that is controlled by an Albuterol inhaler. Applicant also reported that no severe asthma attacks in fifteen years.

Spirometry performed during this visit indicated that Applicant suffered mild airflow obstruction, as well as a low vital capacity, which might have been due to a concomitant restrictive defect. Because of the abnormalities noted on the initial spirometry, two additional spirometries were performed during this examination to establish accuracy and reproducibility. These abnormal findings were confirmed with these repeat spirometries.

Applicant was referred to a consulting pulmonary specialist. In a letter dated May 28, 2002, the specialist noted that Applicant,

"has a very mild form of asthma which almost never bothers Applicant very much and has been treated over the years only with intermittent rescue medication. Applicant is able to participate in the very vigorous training program for Applicant's prospective job and it seems clear to me that in terms of a position in be Emergency Medical Technician realm there would be absolutely no problem in Applicant performing these duties. In terms of the firefighting activities, one can certainly say that in the patient with asthma it would be better not to be exposed to those conditions but, on the other hand, there are many asthmatics who serve successfully as firefighters."

The specialist also noted "chronic rhinitis and postnasal drip," and prescribed a plan of treatment that included:

A trial of Advair 100/50 to see if it improves spirometry to the point where there will be no problem in terms of employment.

Flonase 2 puffs q.d. or b.i.d.

Return in 2-3 weeks for reevaluation and flows.

By letter dated June 24, the Office of Human Resources (OHR) notified the Applicant that the EME had determined that Applicant did not meet the applicable requirements at that time, attaching a copy of what is identified as the “medical examiner’s report which led to this determination,” but what in fact was the specialist’s report. OHR’s letter to the Applicant states,

It is the opinion of the physician that your condition is not correctable in the immediate future, and since it is not possible for the County to accommodate your condition by altering the work requirements of the Firefighter/Rescuer I job, it is necessary that your name be removed from the eligible list for that position.

Subsequent to the Applicant’s appeal, and in response to it, in a letter to OHR, the EME references having referred the Applicant to the specialist and states, “The specialist expressed reservations about patients with asthma being exposed to the conditions encountered in fire fighting activities.” The EME described the specialist’s treatment regimen as a “more extensive treatment,” and a return visit to reflect “a concern about (Applicant’s) condition.” The EME “. . . determined that (the Applicant) continues to be at risk for an asthma exacerbation or attack despite (Applicant’s) reported ‘mild form of asthma’ and the treatment Applicant has received for the asthma to date.”

The EME concluded “I remain convinced that the Applicant’s medical condition is not acceptable for a position as a Firefighter/Rescuer with (DFRS), based upon my review of Applicant’s medical condition as it relates to the class specification for Firefighter/Rescuer I (Recruit), Montgomery County Government Code No. 3172.”

POSITION OF THE PARTIES

Applicant

Based on the current treatment program prescribed by the specialist, lung function has improved, and the doctor advises that current treatment could result in continued improvement. Additionally, an x-ray on June 20, 2002, revealed no signs of the disease, and that Applicant has been a-symptomatic for years. Applicant feels that Applicant poses little risk of having any problems as a firefighter/rescuer. Applicant also notes the agreement of the specialist that there would be no problem in performing Applicant duties.

County

The County relies on the medical evaluation and conclusions of the EME that Applicant is medically unacceptable for the position of Firefighter/ Rescuer I.

ISSUE

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

ANALYSIS AND CONCLUSION

The establishment of "medical standards", the requiring of a medical examination of Applicants for employment, and the disqualification of Applicants based on physical condition are all specifically provided for by Section 8 of the County Personnel Regulations and Administrative Procedure 4-13, Medical Standards.

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

In the instant case, in carrying out the required medical examination, the EME chose to seek the opinion of a pulmonary specialist, on the issue of the Applicant's asthma. Thereafter, the EME relies upon the specialist's report, which was what was provided to the Applicant with notification of medical disqualification. However, the EME's determination, as described in the OHR letter to the Applicant, seems to be at variance with the opinion of the specialist. The specialist says "in terms of firefighting activities, one can certainly say that in the patient with asthma it would be better not to be exposed to those conditions, but on the other hand, there are many asthmatics who are successful firefighters." The EME concluded from that statement, that the specialist expressed reservations about patients with asthma being exposed to the conditions encountered in firefighting activities. In the Board's view, the specialist was not making a finding of disqualification, but was indicating that while it was not the most desirable situation, but also noted that there are many asthmatics who serve successfully as firefighters.

With respect to Applicant's medical condition, the specialist in a letter dated July 2, 2002, says that Applicant has absolutely no symptoms and is continuing to participate in the vigorous training program for Applicant's position. Applicant is currently taking medications which have led to 10 percent improvement in FEV1 and 20 percent improvement in FVC. Also, the diagnosis of a June x-ray indicates that the lungs are free of infiltrates and no pleural effusions are identified. The cardiac silhouette is within normal limits. In the Board's view, the EME determination that Applicant is a risk for asthma exacerbation, appears to be unsupported by the report of the consulting specialist.

While it is laudatory of the EME to seek the opinion of a specialist in making a medical determination, in the Board's view in such a circumstance the EME should either be guided by the resulting opinion, or, if disagrees, explain the reason for a contrary result. This was clearly not done in the instant case. Accordingly, the Board concludes that the case should be remanded to the EME to either make a determination consistent with that provided by the consulting physician, or explain the reason for a differing result.

ORDER

Based on the above, the Board remands this case to the County for a determination from the EME that is either consistent with the findings of the consulting specialist, or one that is independent of consultation and clearly supported by the facts.

NON-SELECTION

Case No. 02-18

DECISION AND ORDER

This is a final decision of the Montgomery County Merit System Protection Board (Board) on the Applicant's appeal 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 a 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 told Applicant that 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, Applicant was contacted by the Code Enforcement 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 Code Enforcement 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 states that on February 7, Applicant contacted the Code Enforcement Manager 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 Code Enforcement Manager attributed to the hiring freeze. The Code Enforcement 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 Code Enforcement Manager to check on the status of Applicant’s hiring, with the Code Enforcement Manager 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 a Human Resources Specialist. The County contends that in Applicant’s review of the forms, the Human Resources 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 7-2(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 Human Resources Specialist contacted the Code Enforcement Manager and an 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 Human Resources Specialist cautioned the Code Enforcement Manager that such requests are not always approved.

By memorandum dated February 26, Davison 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 Human Resources 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 Human Resources Specialist if Applicant should notify Applicant's current employer, the Human Resources Specialist responded that Applicant should not do that until after the physical examination was passed.

On March 18, the 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 the Acting OHR Director 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 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 Human Resources 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 Human Resources 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 Human Resources 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 said Applicant did on Applicant's resume. On April 12, the Department 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 mis-rated because of where in Applicant’s application Applicant described Applicant’s knowledge and experience, and the speculation that such mis-rating must have resulted from some improper motive. As to the former, Applicant relies exclusively on the fact that the Human Resources 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 Human Resources Specialist’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, Appellant 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.

PROMOTIONAL PROCESS

Case No. 99-14

SUPPLEMENTAL DECISION AND ORDER

This is a Supplemental decision of the Montgomery County Merit System Protection Board (Board) on the Appellant's appeal from the decision of Chief Administrative Officer, (CAO), denying Appellant's grievance over the 1998 promotion process used by the Montgomery County Police Department (Department) in the selection of Department Sergeants.

ADJUDICATION HISTORY

In the original processing of this case, the CAO's designee for conducting fact-finding at Step III of the grievance procedure was a subordinate of the Director, Office of Human Resources (OHR), which the Board concluded was not inconsistent with the Personnel Regulations, and would not preclude the issuance of an unbiased investigative report. The Appellant appealed to the Circuit Court for Montgomery County (Court), which decided that the Appellant did not receive a fair and impartial review of Appellant's grievance, and that the Board's review was not *de novo* in a curative sense, in that it merely relied on the information generated during the review process. The Circuit Court ordered that the case be remanded to the Board to direct the CAO to conduct a new fact-finding hearing before a non-OHR designee, and to provide the Appellant with any documents considered by the designee. Upon the County's appeal, the Court of Special Appeals for Maryland affirmed the Court's holding and remedy. Upon being remanded to the Board, consistent with the Courts' decisions, the Board remanded the matter to the County to conduct a new fact-finding hearing before a non-OHR designee on the merits of the grievance.

Following the remand, a fact-finder was designated by the County to conduct a grievance meeting, determine the relevant facts, and draft a decision for consideration by the CAO. It is undisputed that the fact-finder's appointment is consistent with the Courts' decision, and there is no contention that the fact-finding process was not fair and impartial. The Board's *de novo* review relies on the record developed following its remand to the County for conducting a new fact-finding process.

FINDINGS OF FACT

REQUEST FOR INFORMATION

During the Step III grievance process, the Appellant requested that Appellant be provided with,

. . . all written documents relating to the training, instructions, and engagement of “role players” in the “Assessment Component,” including but not limited to any documents reviewed and/or signed by the role player; and all documents relating to the notes, consideration, and review by the assessors who reviewed (Appellant’s) performance in the Assessment Component.

In response, the County provided the role player disclosure form, and “Feedback sheets” on the Appellant’s performance, but refused to release the requested “documents relating to the notes, consideration, and review by assessors who reviewed Appellant’s performance.” The assessors completed a “Rater Disclosure Form,” which provided,

As a competent subject-matter expert in the field, I will fairly and objectively evaluate all candidates scheduled to appear before me as a rater. To assure my unbiased and candid evaluations of these candidates, Montgomery County agrees to maintain the confidentiality of my ratings by not releasing any notes or evaluation forms completed by me to promotional candidates. Montgomery County also agrees that conversations or discussions among raters regarding scores will not be recorded. I understand that final consensus scores agreed to by all members of the rating panel will be released to candidates.

The fact-finder denied the Appellant’s request for the disputed information, and there is no indication in the fact-finding report, or the decision of the CAO, that the disputed information was considered.

PROMOTION EXAMINATION

Personnel Bulletin No. 443 (PB), dated January 30, 1998, announced the 1998 Promotional Examination for the ranks of Master Police Officer and Police Sergeant. The Appellant, a Master Police Officer, applied to take the Police Sergeant’s examination. The examination included a written multiple choice component, and also an “assessment center” component, which was divided into three parts: a written exercise, an oral interview exercise, and a structured oral exercise. The assessment center component was intended to test the candidates’ abilities in seven management dimensions, and would constitute 50 percent of the candidate’s overall score.

The oral interview exercise portion of the assessment center involved candidates counseling a subordinate, with the performance to be rated by a rating panel made up of three assessors. A role player was provided to act as the subordinate being counseled. The role player did not rate the candidates. All role players were required to review the list of candidates and complete a “Role Player Disclosure Form,” which states, in pertinent part,

I have reviewed the list of individuals scheduled to compete in the examination procedure(s) for the (Police Sergeant) position in which I will act as a role player.

There are individuals competing in this examination whom I work with directly or individually who I feel I should not role play with based upon personal knowledge or affiliation. I have listed below names of those individuals and the nature of the affiliation.

* * * * *

I will fairly and objectively interact with all candidates scheduled to appear before me as a role player. I will maintain an unbiased, candid and consistent portrayal of my role with all candidates.

The Appellant's role player for the exercise was Blank, then a Lieutenant in the County Fire and Rescue Service.

According to the Appellant, when Blank entered the room, Appellant immediately realized that Appellant knew who Blank was. As described in the fact-finding report,

. . . that Blank knew Appellant's spouse as a colleague in the Fire and Rescue Service and socially, including hunting together. . . that Blank had called Appellant's house, that Appellant had seen Blank at Appellant's house and at the fire station, and that Appellant had met Blank's brother years ago. Appellant testified that Appellant continued with the oral interview exercise because Appellant was aware that Appellant was being graded already and felt that if Appellant said something, Appellant would be marked down.

Appellant does not have the same last name as Appellant's spouse, whose name is -----. Blank testified during fact-finding as to Blank's knowledge of -----, although Blank could not recall the Appellant and ---- ever being in Blank's house. Blank states that when reviewing the list of candidates and completing the disclosure form, Blank did not recognize Appellant as anyone Blank knew, and, therefore, did not list Appellant as a candidate with whom Blank should not role play. Blank further testified that it was only after the completion of the exercise that Blank realized that the Appellant was the spouse of ----.

It is undisputed that at the conclusion of the exercise, the Appellant did not object or raise a question with either the examination proctor, the OHR staff member administering the examination process, or the assessors, about knowing Blank, or any impact of Appellant knowing Blank on Appellant's performance on the examination. However, the fact-finding report reflects that the Appellant testified that,

. . . Appellant was surprised and embarrassed and could not get Appellant's thoughts together . . . Appellant found it difficult to role play with someone who was a friend of Appellant's spouse, found it difficult to call Blank by Blank's first name, and found it difficult to stay in the role player exercise. Appellant was distracted by what Blank might say to the other role players and what Blank might say to Appellant's spouse.

Further, Appellant testified,

. . . Appellant was not able to "be Appellant's self" during the . . . exercise because "Blank was there." . . . Blank's presence as Appellant's role player negatively affected Appellant's ability to perform in the problem analysis, decision making, and leadership/supervision areas. . . . Appellant found it difficult to tell blank what to do because Blank was a friend and a friend of Appellant's spouse.

After the oral interview exercise was completed, Appellant went immediately into the structured oral exercise, which required Appellant to answer five questions before the assessors. The fact-finding report states that Appellant testified that this ". . . exercise went terribly and Appellant wanted to leave the room because Appellant had done so poorly in the role playing exercise because "it was Blank there." Appellant testified that ". . . Appellant only spent about 12 of Appellant's allotted 30 minutes answering the five questions."

A final converted score of 80 or above achieved a "well qualified" rating, a score of 70-79 achieved a "qualified" rating, and a score below 70 meant that a candidate was ineligible for promotion. Appellant's assessment score was 26.5, or a converted score of 28.19, and Appellant's written examination score was 79, or a converted score of 36.92, for a combined score of 65.11, or a converted score of 68. Fourteen of the 16 candidates taking the examination were placed on the "well qualified" and "qualified" list, and all 14 were promoted to Sergeant during the following 23 months.

Following the examination, candidates were provided with "Feedback Sheets." The Appellant's showed that across all three exercises, Appellant needed to improve in five of the seven areas: Problem Analysis (where in one of two components the assessors noted a problem with Appellant's written exercise), Decision Making (where the assessors noted a problem with providing definite courses of action and projecting uncertainty), Planning and Organization (where in one of two comments the assessors also noted a problem with Appellant's written exercise), Leadership/Supervision and Written Communication. Appellant's two strongest areas - - areas the assessors indicated Appellant handled well - - were Sensitivity and Oral Communication, areas reflected in the role playing exercise.

ISSUES

1. Is the Appellant entitled to the requested notes from the rating panel assessors?
2. Was the Appellant denied a required “fair and appropriate consideration for higher position” because of the relationship Appellant had with the person who served as Appellant’s role player while Appellant performed an examination exercise?

POSITIONS OF THE PARTIES

Issue 1

Appellant

The Appellant contends that in the CAO’s decision, the CAO blames the Appellant for not producing evidence on how Appellant was harmed, but refuses to provide materials that might reflect that harm. Appellant further disputes the legality of the County declining to furnish the disputed materials as confidential “personnel records.” Relying on the collective bargaining agreement applicable to the Appellant, it is contended that personnel records are defined as “any personnel, medical or departmental operating file,” which would not include examination records. In this regard, Appellant contends that “personnel records” equate with what goes in an employee’s personnel file, and an employee must be provided with copies of anything in such a file. Accordingly, in the Appellant’s view, if the requested information constitute personnel records, it should be in the personnel file, and be made available to the Appellant.

Appellant contends that the denial of the requested documents has harmed Appellant’s ability to present Appellant’s case, and, accordingly, the Board should construe this against the County, and assume that the notes support Appellant’s contentions and award Appellant a retroactive promotion. It is further contended, alternatively, that the Board should order the County to present these documents to Appellant and then hold a hearing so that all of the evidence can be presented to the Board for its determination.

County

The County contends that the examination records in dispute are “personnel records,” and may be denied as a permissive denial under the Maryland Public Information Act (MPIA).

Issue 2

Appellant

The Appellant contends that Montgomery County personnel law requires that

candidates receive a fair opportunity to compete, an opportunity that Appellant was denied because Appellant had a personal relationship with the person who served as Appellant's role player while Appellant performed an examination exercise. According to the Appellant, during the orientation session prior to the examination, someone asked whether candidates would know the role player they would be working with, and that the OHR representative said, "no," "they would be strangers." Appellant asserts that having to perform the examination with this role player served to distract Appellant, affecting Appellant's performance on both the role playing exercise, and the written exercise that followed.

Appellant contends that the appropriate remedy is retroactive promotion with back pay and benefits.

County

The OHR Representative denies ever saying that the candidates would not know their role players, and contends that nothing in the orientation materials, or applicable rules or regulations, require that role players be strangers to the candidate they are role playing with. The OHR Representative does state that if a role player had indicated on the disclosure form that they knew the candidate that they were to role play with, the OHR Representative would have switched the role player to another candidate.

The County contends that the Appellant has failed to show that Appellant was denied a fair opportunity to compete, noting:

- The role player did not recognize the Appellant by name or sight, and did not have any affiliation that would preclude Blank from role playing with Appellant.
- The Appellant failed to show that the County represented that the role players would be strangers.
- The fact-finder credited OHR's representative's contention that the OHR Representative did not say that the role players would be strangers.
- Appellant did not raise Appellant's reaction to Blank serving as Appellant's role player until after Appellant received Appellant's score.
- Appellant did not provide the County an opportunity to address the perceived problem with the examination problem when it first happened.

The County contends as to the Appellant's requested remedy that even if the grievance is granted, the Appellant is not entitled to retroactive promotion and back pay.

ANALYSIS AND CONCLUSIONS

1. The record in this case is replete with contentions by the parties as to the state of Maryland case law on whether the County had waived the right to make “permissible” denials under the MPIA. However, as the matter has come before the Board, the issue has narrowed, in that the County is relying on the provision of the MPIA, which, undisputedly, allows the County to deny access to “personnel records.” The Appellant argues in response that the documents at issue are not “personnel records,” as they are not the type of records placed in an employee’s personnel file.

The Board rejects the Appellant’s contention that the resolution of this issue turns on provisions of the collective bargaining agreement having application to the Appellant. The interpretation and application of the collective bargaining agreement is for the negotiated grievance procedure. The Board, on the other hand, must resolve the issue on the basis of applicable law and regulation. It should be noted in this regard, that while the collective bargaining agreement appears to limit “personnel records” to what is made available to the employee and placed in an employee’s personnel file, the County Personnel Regulations provide in Section 4-1 (b), “Personnel records may include applicant files, examination records” (emphasis supplied). Section 4-3 *Employee records*, subsection (a) *Official personnel file*, lists what this file is limited to, and there is no mention of anything related to promotion examination materials. Accordingly, the Board concludes that the assessors’ notes are part of the examination record, and, therefore, pursuant to Section 4-1 (b) of the Personnel Regulations, are personnel records that can be withheld from the Appellant under the provisions of the MPIA.

While we have concluded that the disputed materials may be legally withheld by the County, we further view them as not meeting a “relevant and necessary” test. The Appellant’s theory is that the examination was flawed by virtue of Appellant having to role play with someone with whom Appellant had some sort of relationship. The Board does not believe that the merits issue, discussed below, turns on the assessors’ judgment of Appellant’s performance in the role playing exercise, or the exercise that followed.

2. The essence of the Appellant’s contention is that the promotion examination was flawed, at least as to Appellant’s participation, in that, albeit inadvertently, Appellant had to perform an examination exercise with a role player whom Appellant knew, and, through Appellant’s spouse, knew Appellant. The Appellant contends that the presence of this person, Blank, caused Appellant significant discomfort, and negatively affected Appellant’s performance on two exercises. Accordingly, Appellant was denied a fair opportunity to compete.

Without question, a promotion examination must be “fair” both as to its content, and its administration. The Board and the courts have, over the years, considered many allegations of defects in a promotion examination procedure, most involving an intended act by those administering the examination. Regardless of motivation, the Board will be no less diligent in assuring fairness. For example in *Robert Tobin and Montgomery County Government*, Case No. 03-05 (Dec. 12, 2002), the Board found to be a procedural

error the County's allowing some candidates to submit for grading more than two writing samples when the instructions called for the submission of two, and a remedy was ordered. However, in the Board's view, the facts in the instant case do not rise to the level of a procedural error.

In reading its conclusion, the Board first notes that while the Role Player Disclosure Form had as its purpose to avoid a role player from working with a candidate that Blank knew, and the OHR Representative acknowledges that had the OHR Representative known that Blank was a friend of the Appellant's spouse, the OHR Representative would have made a switch, nothing in the examination material indicated a requirement that the role players be total strangers. In this regard, even if the OHR Representative made an oral statement that role players would be strangers, a contention the OHR Representative denies, this was only an accurate statement of intention, not requirement. Second, unlike in the above cited *Robert Tobin* case, the examination administrators did not, either by omission or commission, cause a variance with intended procedure. In this regard, as Blank did not realize that Blank knew that the Appellant was the spouse of a friend, Blank took no steps to advise the test administrators of a potential conflict of interest. Similarly, the only person present who could have changed what was about to happen was the Appellant, who took no steps to raise concerns about Blank being Appellant's role player at a time when it could have been corrected.

A third consideration for the Board's decision is the nature of the alleged flaw. While a goal is to develop and administer an examination that is in all respects fair to all candidates, a degree of reasonableness is required. Many uncontrollable circumstances could place a candidate at a disadvantage, e.g., a candidate not feeling well on the day of the examination, or being distracted by some extraneous event. In the instant case, the Board sees no basis for finding an examination flawed just because the Appellant was discomforted by a tenuous connection to the role player. Accordingly, the Board rejects the allegation that the Appellant was denied required "fair and appropriate consideration for higher position" because of the relationship Appellant had with the person who served as role player while Appellant performed an examination exercise.

ORDER

On the basis of the foregoing, the Board denies Appellant's appeal from the CAO denial of Appellant's grievance over the 1998 promotion process used by the Department in the selection of Department Sergeants, specifically, over the fact that Appellant had to perform an examination exercise with a role player whom Appellant knew, and, through Appellant's spouse, knew Appellant.

Case No. 00-03

SECOND SUPPLEMENTAL DECISION AND ORDER

This is a second supplemental decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal following the Opinion of the Court of Special Appeals of Maryland's (Court) remanding case 00-03.

PRIOR BOARD AND COURT DECISIONS

In its original Decision in this case, the Board denied Appellant's appeal of the Chief Administrative Officer's (CAO) denial of consolidated grievances over Appellant's non-selection for promotion to the rank of Master Police Officer (MPO) in the Montgomery County Police Department (Department). As relevant herein, the Appellant was not promoted to MPO solely because of a medical limitation, being restricted to administrative duties. The Board's decision was appealed to the Circuit Court for Montgomery County, which remanded the case to the Board to determine the Appellant's status at the time Appellant was denied promotion to MPO, particularly to make a finding as to whether the Appellant was on "restricted duty" status at the time Appellant was denied the promotion.

In its Supplemental Decision following the remand from the Circuit Court, the Board noted,

It is undisputed that, at least in 1995, there was a specific status category called "restricted duty," and assignments to a "Restricted Duty Unit," and that in August 1995, Appellant was placed in that category and given such assignments. In the Board's view, while after August 1996, Appellant's status lacked the form of Appellant's prior designation and assignments, substantively Appellant was still in a restricted duty status, which was handled by different procedures than had previously been used. As set out in the Police Chief's August 29, 1996 memorandum to the Appellant, because of changes in the payroll system, instead of Appellant being assigned to the Restricted Duty Unit, Appellant's status was to be identified by the manner in which Appellant entered Appellant's time, but clearly, Appellant's duties were still to be restricted/ limited because of Appellant's medical condition.

The Board concluded that Appellant, at the time Appellant was denied promotion to MPO was on "restricted duty" status, and affirmed its earlier denial of the appeal. The Circuit Court thereafter affirmed the decision of the Board, which affirmation was appealed to the Court.

In its Opinion, the Court noted Appellant's argument "that the Board's decision did not take into account Headquarter's Memorandum (HM) 93-03, which established assignments to the RDU (Restricted Duty Unit) as the mechanism for identifying an officer in restricted duty status." With respect to the "interplay between HM 93-03 and (Function Code) FC 380," which created the "Restricted Duty/Disability Unit" (RDU), and its relevance to the Board's ultimate decision that the (Appellant) was on restricted duty status," the Court stated, in pertinent part,

Without the Board's findings of fact and conclusions of law on this question, we cannot determine whether its ultimate finding - that appellant was on restricted duty status - was supported by substantial evidence and

neither arbitrary nor capricious. More specifically, we have no way of discerning from the Board's supplemental decision: (1) the extent to which, if at all, HM 93-03 bears on FC 380; (2) whether the Chief of Police can, by a subsequent memorandum, supersede HM 93-03; and (3) if so, whether the Police Chief's August 1996 memorandum to appellant did supercede HM 93-03.

The Court concluded,

. . . it is necessary that the case be remanded to the Board for it to decide the role, if any, that HM 93-03 plays in the determination of Appellant's duty status at the time of Appellant's promotion opportunity. This decision requires the Board to decide as a preliminary matter whether the Chief of police can supercede an earlier headquarters memorandum and, if so, whether

the Police Chief's August 1996 memorandum to appellant in fact superceded HM 93-03.

In all other respects, the Court affirmed the Circuit Court's judgment.

Following the remand, the Board ordered the parties to submit briefs on the issues identified by the Court.

FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

1. The extent to which, if at all, HM 93-03 bears on FC 380?

Findings of Fact

HM 93-03, issued on February 19, 1993, by the then Chief of Police, is entitled "Creation of Restricted Duty/Disability Unit." It provided as to its purpose and format, "In order to provide the department with a true picture of the number of full-duty personnel actually assigned to each unit, the (RDU) is being created within the Personnel Section" The HM 93-03 provided, in pertinent part,

All members of this department . . . who are in a disability or restricted duty status . . . for a period of 60 days or greater will be assigned to the "Restricted Duty Unit." The employee and his/her position number will be transferred from their unit of assignment to the Personnel Section.

HM 93-03 describes for review of function and responsibility of the RDU, assignments to employees in the RDU, charging of wage costs, and medical determinations. HM 93-03, concludes,

This policy will be reviewed within the ensuing months and revised, if necessary, to incorporate any recommendations for revision of the Disability Policy, FC 380.

It is undisputed that in August 1995, the Appellant was assigned to the RDU, and being limited to administrative duties.

FC 380 is the Department's "Disability Policy," the applicable version being effective August 15, 1991. As relevant, FC 380 provides for relieving from normal duty requirements officers subject to physical or mental impairment, and provides as a "Fitness Category," "Restricted Duty," defined as "Officer is not able to fully perform all duties or meet all responsibilities required of a sworn officer." FC 380 states as a condition within the fitness category of restricted duty, ". . . an officer will be in either a limited or light duty status." Procedures for "Limited" and "Light" duty are described, and each refer to assignment of duties consistent with that designation. There is no provision in FC 380 for the RDU.

Position of the Parties

The Appellant contends that FC 380 is the "predicate for restricted duty status," and that HM 93-03 is a "formal part of FC 380." Appellant further contends that as cancellation of HM 93-03 is limited by Function Code 120, HM 93-03 was still the procedure developed for placing employees in a restricted duty status at the time the Appellant was denied promotion to MPO.

The County contends that FC 380 does not specifically provide for any general assignment of all employees who are in a status other than full duty, and that HM 93-03 was issued to implement procedural change regarding the Department's Disability Policy. It is contended in this regard, ". . . (HM) 93-03 implemented an interim policy and procedural change to Function Code 380 . . . by adding the element of the (RDU) to the framework of (FC) 380."

Analysis and Conclusions

With respect to the specific question posed in the Court's remand, there is no actual dispute between the parties. That is, neither party disputes that FC 380 establishes the disability policy and the concept of restricted duty, and HM 93-03 provided a mechanism for how the assignment of officers on restricted duty would be handled. The dispute, discussed below, is whether HM 93-03 had any bearing on the status of the Appellant at the time Appellant was denied promotion to MPO. Accordingly, in response to the Court's first question, the Board concludes that HM 93-03 bears on FC 380 in that it provided a mechanism of how the assignment of officers on restricted duty, as provided for by FC 380, would be handled.

2. Whether the Chief of Police can, by a subsequent memorandum, supercede HM 93-03?

Findings of Fact

Function Code 120, the applicable version being effective August 15, 1991, is the

Department's "Written Directive System." FC 120 lists and describes seven "Types of Written Directives," one of which is,

C. Headquarters Memoranda - These memoranda provide a means of relaying information of an informal nature Department wide and may be utilized for interim implementation of policy and procedural changes. Headquarters memoranda will remain in effect until incorporated into a Departmental directive or canceled via another memorandum. If related to a Departmental directive, they will be filed with that directive; if not, they should be maintained in chronological issue order in a separate binder or folder.

FC 120 does not contain any language/example, as to what a "Headquarters Memoranda" will look like, although the actual "Headquarters Memoranda" in evidence in the instant case look the same. Across the top is the title "Headquarters Memorandum," followed by an issuance number, e.g., 93-03. The Department seal is to the left of the title, and to the right are filing instructions, distribution, and date. A specific title is above the text, and at the conclusion is the actual name and signature of the Chief of Police.

Position of the Parties

The parties do not dispute that, by the specific language of FC 120, a Headquarters Memoranda, including HM 93-03, can, by a subsequent memorandum, be superceded. Appellant contends that the language and intent of FC 120 requires that a Headquarters Memoranda be superceded only by another Headquarters Memoranda, and nothing less. The County contends, in essence, that a Headquarters Memorandum can be canceled/modified, at least in part, by another memoranda that is not necessarily in the form of existing Headquarters Memoranda. The County argues, "Under . . . Function Code 120, all it takes to cancel all or part of a previously issued Headquarters Memorandum is another memorandum."

Analysis and Conclusions

By the specific language of FC 120, "Headquarters Memoranda" are intended to relay information of an informal nature Department wide, and may be utilized for interim implementation of policy and procedural changes. Further, by the provisions of FC 120, Headquarters Memoranda can be canceled by "another memorandum." Accordingly, the simple answer to the question posed by the Court is, yes, the Chief of Police can, by another memorandum, supercede HM 93-03. However, that does not answer the question of whether FC 120 requires that such a memorandum be the same format as the Headquarters Memoranda being superceded. The Board concludes that it does not.

Turning first to the literal language of FC 120. First, while existing Headquarters Memoranda have a common format, nothing in FC 120 specifies that particular format. While the text of FC 120 capitalizes the first letters in Headquarters Memoranda, and of all other types of listed "Written Directives," as if possibly identifying a specific format,

in the text, “memoranda” and “memorandum” are not capitalized. This, in the Board’s view, implies that a memorandum that is not a “Headquarters Memoranda” can be utilized to cancel an existing “Headquarters Memoranda.” Apart from the literal language, in the Board’s view there is no indication that it is the intent of FC 120 to specify what type of memoranda can be used to cancel a Headquarters Memoranda. The intent of FC 120 is to identify and describe types of written directives, not to so limit the Chief of Police by specifying a particular format.

Based on the above, the Board concludes, as to the Court’s question, that the Chief of Police can, by a subsequent memorandum, supercede HM 93-03, and that this can be done by a memorandum that is other than a specified Headquarters Memoranda.

3. If the Chief of Police can, by a subsequent memorandum, supercede HM 93-03, did the Chief of Police’s August 1996 memorandum to the Appellant do so?

Findings of Fact

On August 29, 1996, the Chief of Police sent to the Appellant a “MEMORANDUM,” subjected “Transfer,” which provided, in pertinent part,

Due to the implementation of the County’s new payroll system, the necessity to modify our procedure for tracking employees in the Restricted Duty Unit must change.

Instead of transferring your position as a means of monitoring your status, we will track by project code on your timesheet. . . .

We will continue to carry you in a restricted duty capacity until you return to full duty. This action will allow us to more accurately monitor first responder capability and track you(r) progress toward recuperation or alternatives to full duty.

You will continue to report to your current supervisor, and perform the same duties in the same location with the same hours, if you are currently in a restricted duty capacity.

This is to advise you that effective Sunday, September 1, 1996, your position will be transferred from the Police Personnel Section, Restricted Duty/Disability Unit to the Germantown District.

Identical memorandum were sent to each of the officers who were assigned to the RDU. As discussed in the Board’s original Decision and Supplemental Decision, it is undisputed that the Appellant had been working on restricted duty assignments, for medical reasons, since August 1995, both during the existence of the RDU. After the August 29, 1996 memorandum from the Chief of Police, Appellant continued to perform

the same duties, and the same location, and under the same supervision, and recorded Appellant's time as instructed in the August 29 memorandum.

Position of the Parties

The Appellant contends that the Chief of Police's August 29, 1996 memorandum did not supercede HM 93-03, because it could not do that. That is, as discussed above, only a Headquarters Memorandum the form of HM 93-03 could supercede HM 93-03. Accordingly, as argued by the Appellant, what the August 29 memorandum did was transfer Appellant out of the RDU that still existed pursuant to HM 93-03, and then, thereafter, Appellant was not classified in restricted duty status.

The County contends that Chief of Police's memorandum was just such a memorandum that can cancel a part of a Headquarters Memoranda, and that the form memorandum sent to the Appellant, and other officers in restricted duty status, was intended to cancel that part of HM 93-03 that required the positions of employees on restricted duty to be officially assigned to the RDU. "The Chief of Police's memorandum of August 29, 1996, had the effect of canceling that part of Headquarters Memorandum 93-03."

Analysis and Conclusions

HM 93-03's creation of the RDU was, consistent with what FC 120 says Headquarters Memoranda were to be used for, intended to be temporary, and was subject to be reviewed within the ensuing months, ultimately to lead to incorporation in FC 380, the disability policy. Because of a new County payroll system, it was necessary to supercede an aspect of HM 93-03, specifically to change the matter of assignment of employees who, because of disability limitation, had limited duties. The Board has concluded above that a memoranda that was in a form other than a Headquarters Memoranda could supercede an existing Headquarters Memoranda. This the Chief of Police did, by sending identical memorandum to each of the affected employees. There was no need for the Chief of Police to raise the level of communication to a formal Headquarters Memoranda. Rather, the Chief of Police chose a method that accomplished the task of advising those affected of the paper change as to the matter in which they recorded their hours, without changing the nature of their assignments. As to the latter, recipients were specifically told that they were to perform the same duties in the same location with the same hours.

Accordingly, the Board concludes that Chief of Police's August 29, 1996 memorandum to the Appellant did supercede HM 93-03.

CONCLUSIONS AND ORDER

As detailed above in responding to the questions posed by the Court remand, the Board rejects the Appellant's theory that Appellant could not be disqualified for promotion on the basis of a medically caused restricted duty status, because still

controlling HM 93-03 required that officers on restricted duty be assigned to the RDU, and Appellant was removed from the RDU on August 29, 1996. Moreover, the Board affirms its conclusion in its Supplemental Decision that at the time Appellant was determined to be disqualified for promotion, Appellant was in “restricted duty” status.

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

Case No. 00-09

SECOND SUPPLEMENTAL DECISION AND ORDER

This is the second supplemental decision of the Montgomery County Merit System Protection Board (Board) on Appellant’s appeal from the denial of Appellant’s grievance over not being selected for promotion to the rank of Captain.

PRIOR BOARD AND COURT DECISIONS

In its original Decision, the Board denied Appellant’s appeal from the Chief Administrative Officer’s (CAO) denial of Appellant’s grievances related to Appellant’s non-selection to the rank of Captain in the Montgomery County Police Department (Department). Upon review, the Court did not address the facts of the instant case, but concluded that the relevant facts underlying the Board’s opinion in this case were indistinguishable from those in Deirdre Walker, Civil No. 206006, where the Court had found that a Department promotional process for selection to the rank of Captain had been procedurally flawed. The Court then reversed the decision of the Board, and remanded the case for the fashioning of an appropriate remedy, stating, in pertinent part,

. . . 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.

Following the remand, the Board provided an opportunity to the parties to brief the issue of appropriate remedy. In its Supplemental Decision and Order, the Board concluded, in pertinent part,

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.

In the Court's review of the Board's Supplemental Decision and Order, it found that there were no "Findings of Fact" that justifies the decision to award "priority consideration." The Court noted that, "In reaching its conclusions, the Merit Board limited the scope of its authority pursuant to the . . . Court Decision and Order: ' . . . there is no finding by the Circuit Court that but for the procedural errors, the Appellant would have been selected.'" Finding that the Board did not offer fact-finding in support of its conclusion that the Petitioner is entitled to "priority consideration," the Court stated that "Without such findings, the Court lacks the requisite facts to determine whether or not the Merit Board's Supplemental Decision and Order was 'arbitrary and capricious.'" The Board concluded,

Therefore, the Court must remand the case back to the Merit Board so that the Merit Board may provide a statement of the evidence it relied upon in reaching its decision to award the Petitioner "priority consideration." Specifically, this Court requests that the Merit Board provide a Statement of Facts relied upon in reaching its decision to grant the Petitioner "priority consideration."

Finally, the Court noted that the "Statement of Facts" contained in the Petitioner's Memorandum of Law was issued after-the-fact, and cannot serve as a factual predicate for the Court to issue an opinion on the Board's Supplemental Decision and Order.

ANALYSIS AND CONCLUSIONS

The Board has consistently held that in fashioning a remedy in circumstances where it finds that there are procedural flaws in a promotion process, it will order retroactive promotion to an appellant only where the record supports a finding that the appellant "**would** have been appointed to the position had the proper merit selection method been followed." *Andre v. Montgomery County*, 37 Md. App. 48, 61, 375 A.2d 1149, 1156 (1977) (emphasis in original). In the absence of such a finding, the usual remedy is an order that cures the procedural flaws found and seeks to place the appellant in a favorable position in a future promotional process that is not flawed - priority consideration for future vacancies. In *Andre* this policy received the imprimatur of the Court of Special Appeals of Maryland, which stated, in pertinent part,

The potential for promotion is what was wronged; not a right to promotion. The appellants' actual promotions are at best tenuous because, as we have seen, there were other applicants for the same positions, and those applicants also had their potential for appointment or promotion eradicated by the action of the Department.

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The relief sought from the Board, by the appellants [retroactive promotion and back pay], was not in the best interest of the County service. Patently the Board could not order the promotion of the appellants over the other persons who were on the eligibility lists. It could not create a similar promotion for each person in the eligibility list. The persons appointed to the vacancies were seemingly eligible therefore and, in any event, were not parties to the proceeding. We believe that the Board did everything that could reasonably be expected of it when it directed the Chief Administrative Officer to . . . ‘to adhere to and abide by the Personnel Regulations.’ The Board action constitutes a remedy which is necessary, appropriate, and in the best interest of the County service.

See also *Prince George’s County v. O’Berry*, 133 Md. App. 549, 758 A.2d 632 (2000). This precedent is also consistent with the “but for” test employed by the Federal government under the provisions of the Back Pay Act 5 U.S.C. § 5596 (see, for example, Federal Labor Relations Authority decision *Federal Energy Regulatory Commission and AFGE Local 421*, 58 FLRA 596.).

In the instant case, the finding of fact which the Board relied on was the undisputed fact that there were a total of seven candidates who were considered for the promotion, and the Appellant was one of the six not selected. There were no facts before the Board, nor was it even alleged, that but for the procedural errors identified by the Court in the *Deirdre Walker* decision, the Appellant would have been the selectee. In this regard, the Appellant argues only that Appellant was one of three candidates highly regarded by members of the rating panel. The Board referenced that “. . . there is no finding by the Circuit Court that but for the procedural errors, the Appellant would have been selected,” because it was the Court, in overruling the Board’s initial decision, that made the finding that there were procedural errors in the promotion process.

Therefore, the evidence relied upon by the Board in reaching its decision to grant the Appellant priority consideration was that this was the appropriate remedy where there is no showing that but for the procedural errors in the promotion process, the Appellant would have been selected, which is not demonstrated in a circumstance where the Appellant was one of six candidates that were not selected.

Accordingly, the Board affirms its conclusion and Order in its Supplemental Decision and Order.

Case No. 03-05

This is a final decision of the Montgomery County Merit System Protection Board (Board) on the appeal of the Appellant from the decision of County Chief Administrative Officer, (CAO), dismissing Appellant’s grievance over aspects of the grading and ranking of candidates used for a promotional examination for Fire/Rescue Captain.

FINDING OF FACT

Promotional Examination Bulletin and Instructions

On July 25, 2001, a Personnel Bulletin issued announcing a promotional examination for the rank of Captain in the Fire and Rescue Service. Pursuant to the Bulletin, candidates were to receive consensus scores for eight listed “managerial dimensions.” Managerial dimension No. 8 was,

Written Communications - Ability to express ideas and assemble facts in written form in order to relay information accurately, clearly, concisely and in an organized manner. This includes using correct grammar, spelling and punctuation.

The final standing of candidates were to be determined as follows:

80 and above - Well Qualified
70-79 - Qualified
Below 70 - Not Eligible for promotion

The Appellant timely applied to take the promotional examination. Subsequent to the closing of the application period, each candidate received a letter which informed them of what the examination process would consist of, which included, “a written exercise.” An attachment to the letter set out “General Guidelines For The Promotion Process,” with the second bullet being,

Follow the Exercise Instructions: Exercise instructions are usually very specific and should be followed precisely. Failure to do so may be interpreted as a deficiency in problem analysis. Also, you should work within the constraints of each exercise. Do not make up information that is not included in the exercise. Creating information changes the behavior that the exercise is intended to evaluate. This may cause you to fail to show certain critical behavior to the raters, thereby resulting in a lower score.

The Examination and Appellant’s ranking

At the examination, the candidates were provided with the “Information Sheet For The Written Exercise,” which described a circumstance for a newly promoted Captain arriving at a new assignment and reviewing the in-box. Stated in bold,

“You will need to prepare a written response to Mrs. Blank.”

“The District Chief would like you to provide all information regarding this issue to him in a memorandum.”

Attached material provided information that could be used in the two writing assignments. The last two pages of the package, entitled “Written Exercise Guidelines,” has two headings, “Letter - candidate should,” and “Memorandum - candidate should.” Under each heading are a series of bullets detailing what the candidate should do in each written exercise. The first bullet under the letter is “Write a properly formatted business letter to Mrs. Blank.” The first bullet under the memorandum is “Write in proper memo form and in a logical order that is easy to follow.”

The Appellant prepared the required letter to Mrs. Blank and the memorandum to the Chief. Appellant contends that subsequent to the examination, it came to Appellant’s attention that other candidates had prepared more than the two required writings. During the processing of the grievance, it was determined that of the 22 candidates, 9 submitted more than the two required writings.

On November 15, 2001, Appellant was advised that Appellant’s final score was below the 70 that was required by the Bulletin to be rated “Qualified.” (Appellant contends that Appellant’s “converted score” was 67.) Attached to the letter was Appellant’s “Score Report,” which showed as to Appellant’s “Written Communication,”

<u>Your Consensus Score</u>	<u>Average Score</u>	<u>High Score</u>	<u>Low Score</u>
4.5	5.07	7.0	2.0

Also attached was Appellant’s “Feedback Sheet,” which, as to “Written Communication, Areas to Improve,” had checks by, “work on spelling, grammar, and/or punctuation errors,” and “try to be persuasive”

The findings from the grievance proceeding reflect the following as to the numbers of candidates in each rating level, and the number within that level who submitted extra writings:

Well Qualified	- 13, four of which submitted extra writings
Qualified	- 3, two of which submitted extra writings
Not Qualified	- 6, three of which submitted extra writings

The findings also contain uncontroverted testimony that:

- Raters were given no instructions on the number of writings that could be submitted.
- Raters did not discuss the issue of additional writings during the rating process.
- Raters did not give extra credit for additional writings.

The Grievance and Request for Information

By letter dated November 29, Appellant advised the Office of Human Resources Director, that it had come to Appellant's attention that other candidates had prepared more than the required two writings, while Appellant had followed the instruction and prepared the two that were required. Appellant also requested that Appellant be provided with information with respect to the matters raised in Appellant's letter, "I request that I be provided with information as to whether there was additional credit provided to applicants with respect to this question and what the impact of that circumstance was with respect to my particular score."

On December 7, Office of Human Resources, Director responded by saying that candidates may decide to write additional documents as part of a written exercise, but "the simple fact of doing this does not add 'additional credit' to a candidates score." As to the candidate, the OHR Director stated, "Having submitted the two required pieces of correspondence, you completed the documents expected in response to the written exercise."

On December 17, the Appellant filed the subject grievance.

Immediately prior to the Step 3 grievance meeting, Counsel for the Appellant requested of the Office of the County Attorney witnesses who had knowledge of specified aspects of the examination process. Additionally, it was requested that the County,

. . . produce the examination under review, including the questions relating to the written exercise, as well as my clients answers to that examination. I would also request the County produce the answers provided by all persons taking the exam.

As to the latter, Appellant's Counsel stated that if the person conducting the meeting does not require the County to produce them, "I will ask, at a minimum, that they be presented for that person's review on an in-camera basis."

By letter dated May 29, the County Attorney's office notified Appellant's Counsel of what was being provided, but stated,

Regarding your request for all of the other candidates' answers to the examination, the County has only candidates' responses to the written exercise. The County declines to provide other candidates' responses to the written exercise as this is confidential information that we are not required to release under the Maryland Public Information Act, Maryland Code Annotated, State Government Article, (sec.) 10-618(c). Further, given that the examination was rated on eight management dimensions reflected by performance on the three examination components, candidates' responses to the written component, including (Appellant) are irrelevant.

POSITION OF THE PARTIES

APPELLANT

The Appellant contends, in essence, that the grading and resulting ranking of candidates is flawed by permitting and considering writing samples beyond the two that were specified by the examination instructions. In this regard, it is contended that the ability to follow directions is a critical criteria for evaluating candidates and, therefore, any candidate that submitted more than the two writings did not respond properly to the exercise and should not receive any credit. The Appellant contends that, on the basis of the data provided, it is impossible to determine if anyone who submitted additional writings received extra credit, and because the examination was graded on a curve, it is possible that someone who got extra credit kept Appellant from getting a higher score.

In the original grievance, the Appellant sought as a remedy that the examination be regraded, with individuals who provided more than two writings not receiving credit for the written exercise, and that, on the basis of the regrading, a new eligibility list issue. Further, Appellant contends that there be no promotion actions taken based on the existing eligibility list. Appellant also contends that absent such a remedy, that the Board hold a hearing and require the County to produce the requested information. Appellant also requests an award of attorney fees.

COUNTY

The Step III grievance meeting was conducted by an independent reviewer contracted by OHR, who, as a part of their function, made findings and recommendations for the CAO. Relying on the facts of where persons who submitted more than two writings were rated, the reviewer concluded that it did not support the premise that extra writings may have given a candidate an unfair advantage. The reviewer also concluded that, “. . . the fact that . . . candidates did not feel limited to two letters is a clear indication that there was no stated or implied limit.” The reviewer also concluded,

The job simulation exercise was designed to evaluate the eight managerial dimensions. This allows a candidate to use any creative means in his or her response to the exercise, including additional writings.

The County notes that the reviewer concluded that the promotional examination did not give any candidate an unfair advantage, and that these findings, which were adopted by the CAO, are reasonable and supported by the findings of fact.

ISSUES

1. Is the County required to provide the Appellant/Board with the examinations of the other candidates?

2. Was allowing additional writings to be submitted a procedural error?
3. If allowing additional writings to be submitted was a procedural error, what, if any, remedy is appropriate?
4. Are there material facts at issue necessitating the holding of an evidentiary hearing?
5. If there was a procedural error, is there an entitlement to attorney fees?

ANALYSIS AND CONCLUSIONS

1. The requested information not provided to the Appellant are the examinations of the other candidates. It is undisputed that cited applicable law and regulation on privacy preclude the County from making this information available to the Appellant. As to the Appellant's proposed alternative that these materials be made available to the Board for *in camera* inspection, the Board could and would do this if it determined that this information was necessary to a resolution of the issues before it. However, in the Board's view, a review of the actual examinations would not assist in the resolution of the issues in the instant case, noting particularly that the essential issue is the allowing of additional writings to be considered, which does not require that we review all candidates examinations. Further, the undisputed record tells us how many in each rating group submitted additional writings. Accordingly, the County is not required to provide the examinations of the other candidates.

2. The Appellant's original concern voiced to OHR and in Appellant's grievance was whether candidates were given "extra credit" for submitting more than the required two writings. As the Board understands the contention, it is that candidates may have received points "extra" to the score they could have gotten on the basis of just the two required writings. The uncontroverted finding is that the raters did not give this type extra credit for additional writings. However, in the Board's view, this does not end the necessary analysis, because it is clear that in determining a candidate's score on the written exercise, the raters considered whatever a candidate submitted. Hence, a candidate could have scored higher because of the raters reaction to a submission that included additional writings. The question then is whether permitting the submission of additional writings renders the examination flawed in some way.

The wording used throughout the instructional material clearly implies a requirement for two writings, the letter to Ms. Blank and the memorandum to the Chief. The Information Sheet for the Exercise says, "You need to prepare a written response to Ms. Blank," and "the Chief would like you to provide all information . . . in a memorandum" (emphasis supplied). The Written Exercise Guidelines discusses "Letter - candidate should," and "Memorandum - candidate should." Governing all examination activities is the "General Guidelines" statement about "Exercise instructions . . . should be followed precisely," and "Failure to do so may be interpreted as a deficiency in problem analysis." In the Board's view, it is entirely reasonable to assume that the

message conveyed is for the candidate to do a single letter and a single memorandum. In this regard, the Board rejects the County's contention that because nine of the 22 candidates submitted additional writings, it "is a clear indication that there was no stated or implied limit." While it can only be speculated as to why almost half of the candidates felt it appropriate to submit additional writings, what is clear is that the message of the instructions was to the contrary. Notwithstanding what the instructions convey, instead, candidates were permitted to submit additional writings and to have their score determined on their total submission. While there is no way to ascertain the subjective mind of the raters, it is certainly arguable that some candidates benefited by submitting additional writings, and some candidates suffered by following precisely the instructions and not submitting additional writings.

Among the most basic requirements of a promotional examination process is that the instructions accurately describe the requirements, and that the grading process be consistent with the announced instructions. In the Board's view, these requirements were not met with respect to the permitting and considering of additional writings. Therefore, the examination was procedurally flawed in this regard.

3. With respect to the appropriate remedy for the above described flaw in the examination process, the Appellant would undo the grading results from the examination and penalize those who submitted additional writings by denying them any credit for the written examination. In the Board's view, the particular flaw found does not support such a remedy. To invalidate the results of the examination, there would have to be compelling evidence that the procedural flaw significantly impacted on the examination results. However, there is no demonstrated correlation between the submitting of additional writings and ultimate rank, noting particularly, that only four of the 13 Well Qualified candidates submitted additional writings, while three of the six Not Qualified candidates submitted additional writings. The Board also rejects the proposed penalizing of those candidates who submitted additional writings. The flaw was a systemic one created by the County using a procedure that was inconsistent with the language of the instruction. There is no equity in punishing candidates who sought to enhance their score by submitting additional writings.

In the Board's view, the appropriate remedy is a prospective one, and one limited to the flaw found. The County must ensure that in all future promotion examinations, instructions like the one at issue in this case, and, for that matter, all instructions, clearly communicate requirements and that the grading process be consistent with the instructions. For example, if more than one writing can be submitted, it should be so stated. If the instruction calls for "a" particular writing, only "a" writing should be considered. The Board will so order.

4. In the Board's view, there are no material facts at issue that necessitate the holding of a hearing. As described above, the Appellant's request for a hearing is based on the unavailability to Appellant of the test examinations of the other candidates, material that the Board has concluded need not be disclosed, pursuant to applicable law

and regulation. Additionally, having found that permitting additional writings was a procedural error, the examination scores of the other candidates is irrelevant.

5. With respect to 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 prevailed in Appellant's appeal to the extent that the Board has concluded that the examination was flawed by the fact that candidates were allowed to submit additional writings, contrary to the explicit language in the instructions, 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 appeal of the CAO's denial of Appellant's grievance over aspects of the grading and ranking of the promotional examination at issue is granted. Appellant's requested remedy of the invalidation of the examination results and granting no credit for the written exercise to candidates who submitted additional writings is denied. The County is directed to take the necessary steps to ensure that in future promotion examinations, instructions governing written exercises are precise as to requirements and grading procedures, and that actual practice is consistent with instructions. The Appellant is authorized to request attorney fees, pursuant to the above described procedures.

SUSPENSION

Case No. 03-07

DECISION AND ORDER

This is the final decision of the Montgomery County Maryland, Merit System Protection Board (Board) on Appellant's appeal from the decision of the Director, Department of Corrections and Rehabilitation (Department), dated November 20, 2002, suspending Appellant without pay from the position of Unit Supervisor, Pre-Release Services Division, effective December 2, 2002 through December 6, 2002. A hearing was held on April 28, 2003, before the Board.

FINDINGS OF FACT

The Appellant drafted and distributed a memorandum that purported to be written by a Department budget specialist. The Memorandum stated that the budget specialists was investigating a complaint of sexual harassment filed by a male employee against three named female employees at the Department's Pre-Release Center. The Memorandum stated that the budget specialist was conducting the investigation, as a "Special Assistant", to the Director of the Department. It is undisputed that the material facts stated in the Memorandum of March 20, 2002, were untrue. In fact, no alleged sexual harassment had occurred, no complaint of sexual harassment had been reported, and the budget specialist was not a Special Assistant to the Director.

The Memorandum was typed on the Director's official stationary without the Director's authorization. The Appellant signed the budget specialist's initials to the Memorandum without the budget specialist's knowledge. It is undisputed that the distribution of the Memorandum to staff members in Unit Two at the Pre-Release Center (PRC) caused disruption in the work environment, especially to the staff members identified in the document as being under investigation for participating in sexually harassing conduct.

On the days following the distribution of the Memorandum questions arose as to its origin, and by on or about March 21, the Appellant had acknowledged drafting it, telling employees that it was intended as a joke. On March 21, 2002, Appellant's Supervisor, issued an "Unprofessional Behavior" memorandum regarding the Memorandum. The Supervisor stated that while the Supervisor understood the Memorandum was intended as a "harmless joke," "the writing of this kind of joke is unprofessional and irresponsible." The Appellant was cautioned to never do this kind of joke again, and it was suggested that Appellant contact and apologize to those named in the Memorandum. The Supervisor's memorandum to the Appellant does not present any other documentation that further personnel action was contemplated.

Over the next few days, the Appellant made oral and written apologies to the employees who had been named in the Memorandum, telling them that it had been intended as a joke. In a memorandum dated March 22, one of the employees named in the subject Memorandum advised the Supervisor of the extent of their anger over what the Appellant had done, and that it was intolerable behavior by a Unit Supervisor. This employee asked to be informed on how the matter was being handled. Subsequently, the Director caused there to be an investigation of the incident by a Deputy Warden.

On June 6, 2002, the Appellant acknowledged receipt of the Statement of Charges for a Five-Day Suspension. The Appellant did respond on June 8, 2002, to the Statement of Charges. The Appellant admitted that the Memorandum in question was issued in jest without the intent to cause offense to staff members of PRC. The Appellant further requested that the Director consider reducing the severity of the proposed disciplinary action.

On November 20, 2002, the Director issued a five-day suspension to the Appellant for Appellant's actions involving the Memorandum of March 20, 2002. The effective date of the five-day suspension without pay was December 2, 2002. The date was subsequently, changed to December 3, 2002, for the Appellant to receive five days notice of the action prior to its effective date.

In a November 27, 2002 memorandum to the Board, appealing the five-day suspension, Appellant stated, "that Appellant was surprised to receive the five-days suspension action from the Department since Appellant had responded to the Statement of Charges on June 8, 2002 and Appellant had received a "Successful Performance Evaluation", on June 12, 2002."

POSITION OF THE PARTIES

Appellant

The Appellant does not dispute the nature of the facts relied upon by the County, but disagrees with the level of discipline as being too severe, in view of the facts that:

- Appellant has been a County employee for the last 26 years without any prior disciplinary actions in Appellant's personnel record, such as a suspension.
- Appellant's supervisor, provided Appellant immediate counseling after the incident and recommended that Appellant offer an apology to the parties.
- Appellant conceded that Appellant's conduct was inappropriate and did, in fact, apologize to all parties involved in the incident for Appellant's poor judgment in committing such an act.

- Appellant voluntarily initiated rehabilitative steps to prevent any further conduct of this type by taking a Diversity and Inclusion Class, offered by the Department's Training Academy.
- The Statement of Charges were given to Appellant on June 6, and on June 12, Appellant was given a “*satisfactory*” performance evaluation signed by both the Supervisor and Director.
- When Appellant received a satisfactory performance, with no statements on the document indicating that further disciplinary action would be forthcoming, Appellant assumed that the matter was resolved.
- Under Personnel Regulation Section 33-2(b), the County had a duty to implement any disciplinary action within 30 days after the investigation. The investigation report was dated April 24, 2002, and the Statement of Changes was not issued to the Appellant until June 6, 2002.
- A verbal reprimand by the Director would have been a more appropriate action.

County

The County asserts that:

- The Appellant used extremely poor judgment in Appellant's conduct of drafting the fictitious Memorandum.
- The Appellant composed a letter on County work time, using a County-issued computer, written on official County letterhead under the name of another County employee without the employee's permission and forging the signature on the letter.
- The Appellant is in violation of the County Personnel Regulations, Section 5-1.(d) Harassment; Inappropriate written verbal, or physical conduct, including the dissemination or display of written or graphic material based onsex..... that unreasonably interferes with one's work performance or creates an intimidating, hostile or offensive working environment.
- The Appellant is also in violation of the County Personnel Regulations, Section 33-5(e) violates an established policy or procedure; (e) fails to perform duties....., (g) knowingly makes a false statement.....
- The Appellant is in violation of Departmental Policy and Procedures 3000-7, Section VI, Department Rules for Employees: D. Specific Department Rules: 9. Conduct unbecoming; and 10. Neglect of Duty/Unsatisfactory Performance.....

- Despite the counseling by the Supervisor, and the receipt of satisfactory performance evaluation on June 12, 2002, the Appellant should have known that this did not preclude further disciplinary action.

ISSUE

Was the penalty of a five-day suspension imposed on the Appellant consistent with the laws and regulations and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

Department Policy and Procedure 3000-7, Section VI, Department Rules for Employees, D, Specific Department Rules, 9. Conduct Unbecoming, provides, 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” and 10. Neglect of Duty/Unsatisfactory Performance, provides, “Unsatisfactory performance is demonstrated by... or failure to conform to work standards established for the employee’s rank, grade, or position, the conduct of the Appellant at issue is covered by this prohibition.” In the Board’s view, the Appellant’s conduct in drafting and circulating the fictitious Memorandum constitutes the type of conduct prohibited by these Department rules for employees, and, accordingly, discipline of the Appellant was consistent with applicable law and regulation.

While the Board views the Appellant’s conduct as a serious act and totally inappropriate for a Manager III, and concludes that discipline was appropriate, the Board sees a basis for mitigating circumstances. The Appellant is a long service employee with no prior discipline. Appellant recognized that Appellant’s conduct was inappropriate, and took remedial steps of apologizing to the parties involved in the incident, and by taking diversity training.

The Board further views the Department’s handling of the disciplinary procedure as supporting mitigation of the penalty. The Department received the investigative report in late April, but did not issue the Statement of Charges until June 6, for an incident which occurred on March 20, 2002. During the interim, the Department issued the Appellant a “satisfactory performance evaluation” on June 12, 2002, without any indication on the document that disciplinary action may be forthcoming. The notice of disciplinary action did not issue until November 20, eight months after the incident took place, and six months after the completion of the investigative report. By way of explanation, the Director testified that “The Director had never taken so long on a case in Director’s life,” attributing the delay to considering a more severe discipline, including discharge. The Board does not view such consideration as a basis for the delays in the instant case.

In view of the above mentioned mitigating circumstances, the Board concludes that the five-day suspension is inappropriate, and that the disciplinary action should be a written reprimand containing a statement about the specific act of misconduct, which should be included in the Appellant's official personnel file. The Appellant should be made whole for the five days of pay resulting from the disciplinary suspension.

ORDER

The Appellant's five-day suspension without pay is to be rescinded, and replaced by a written reprimand containing a statement of the specific acts of misconduct, and the Appellant is to be made whole for the five days pay resulting from the disciplinary suspension.

TERMINATION

Case No. 01-08

On August 29, 2002, the Montgomery County Merit System Protection Board (Board) issued a Supplemental Decision and Order in the above entitled matter, the remedial order providing,

...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.

Following the issuance of the Supplemental Decision and Order, the parties have raised issues regarding the ordered remedy, which are discussed below.

REINSTATEMENT

Facts

At the time of the events leading to Appellant's termination, Appellant's position was as an Alternative Community Services (ACS) Work Crew Supervisor. On October 3, 2002, Department of Corrections and Rehabilitation (Department) Director met with the Appellant to discuss Appellant's reinstatement. Appellant was advised by the Director that the County did not intend to reinstate Appellant to Appellant's previous position because of "performance problems" while working in that position. It is undisputed that in support of the contention of "performance problems," the County relies on the Appellant's June 19, 2000 "Interim Work Evaluation," the October 2, 2000 "90-Day Performance Evaluation," the October 13, 2000 "Statement of Charges," and the January 4, 2001 "Notice of Disciplinary Action – Dismissal."

At the October 3 meeting, the Director informed the Appellant that Appellant had Appellant's choice of three temporary positions, all of which were at the Department's Pre-Release Center (PRC). The first position was answering telephone calls at the front desk, a position which the Director described as "demeaning," but would be daytime hours. The other two positions were shift work assignments as a Residential Supervisor. At the meeting, the Appellant declined to make a selection from among positions other than Appellant's previous position, as had been ordered by the Board. Subsequently, Appellant was assigned to one of the Residential Supervisor positions, being placed in a weekday, day shift assignment, effective October 14.

Positions of the Parties

Appellant

Appellant contends that Appellant should be returned to Appellant's "previous position," as provided for by the Board's decision, and that the County cannot rely on documents that the Circuit Court decision precluded the Board from considering as "discipline" to support their claim of performance problems. In this regard, Appellant also questions whether the County can raise this issue at this point when it was not raised when the Board provided the parties an opportunity to brief the issue of appropriate discipline. Appellant further contends that even if the County can reinstate Appellant to a position other than Appellant's previous position, such position must be one that is comparable, and the three position tendered do not meet that test. In this regard, the Appellant notes that the Director acknowledged that the phone answering position is demeaning, and that the temporary positions as a residential supervisor is not comparable in either status or responsibility. Appellant also notes that the shift work positions create childcare problems which were not present in Appellant's previous position. Finally, the Appellant contests the County's offer of temporary positions, rather than offering a permanent position.

County

The County contends that it is not compelled to reinstate the Appellant to Appellant's previous position because of the documented performance problems, but can, alternatively, reinstate Appellant to a comparable position. The County does not contend that any of the three positions offered to the Appellant on October 3 are comparable to Appellant's previous position, but that they are temporary positions Appellant can fill until a permanent position is identified. The County offers, "If, during Appellant's temporary....assignment at the PRC, (Appellant) becomes aware of any (Master Correctional Officer) or comparable positions which are vacant or will be in the near future, the Department will, if Appellant brings it to the attention of (management), consider a transfer." However, it is specified, "This obviously does not include the Work Crew Supervisor position, for reasons stated."

Analysis and Conclusions

It was obviously the intent of the Board that the Appellant be reinstated to Appellant's position as ACS Work Crew Supervisor, the position from which Appellant was terminated. However, Montgomery County Code Section 33-14(c), from where the Board derives its decisional authority, provides,

(4) Order reinstatement with or without back pay, although the Chief Administrative Officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility. (Emphasis supplied)

In the Board's view, this Code language unequivocally grants the County the unilateral discretion to reinstate the Appellant to a position other than Appellant's previous one, as long as the position selected is one that is a "comparable position of equal pay, status and responsibility." It is therefore, in the Board's view, irrelevant whether the County previously raised the issue of performance problems, or what it relies on to justify those problems.

As to the issue of "comparable," as noted above, the County does not contend that any of the three positions offered meets the Code test, and almost by definition, a "temporary" position while the incumbent is on another assignment, would not be comparable. Accordingly, in the Board's view, the County is currently in non-compliance with our Order. However, the Board recognizes that our reinstatement Order may present some legitimate administrative problems, and is disposed to give the County a reasonable opportunity to identify a position that meets the Code test of comparability. It should be emphasized however, that there are limits to reasonable, and the Board expects that a position be identified quickly. Further, while consultation with the Appellant is encouraged, the responsibility to achieve compliance with the Board Order is the County's, not the Appellant.

BACKPAY

As quoted above, the Board's Supplemental Decision and Order, ordered the County to reimburse the Appellant back pay consistent with its Order. On September 13, the County filed a Request for Clarification and Reconsideration, requesting that the amount of pay payable to the Appellant be reduced by the amount of outside earnings received from any employment from the date of Appellant's dismissal until the date of Appellant's return to work. In this regard, the County references "received information" of earnings activity by the Appellant. The County further requested that in order to determine the appropriate amount to be paid the Appellant, that Appellant be required to provide to the County documentation of interim earnings, and a notarized affidavit that Appellant has fully and accurately reported all income.

The County notes that Montgomery County Code Section 33-12(d), which gives the Board authority to award back pay, is silent on the issue of offset of interim earnings, but offers in support of its position the fact that Code Section 27-8(a)(3) provides that in employment discrimination cases, the County Office of Human Rights "may award lost wages minus income from alternate employment." The County also notes that the County Personnel Regulations explicitly provides for an offset of outside earnings to back pay in the context of Suspension Pending Investigation (Section 28-3 in the Personnel Regulations in effect at the time of Appellant's discharge, and Section 33-3(f)(2)(C)(ii) in the current Personnel Regulations). Finally, the County references the Federal Back Pay Act, which mandates that any back pay be "...less any amounts earned by the employee through other employment during that period..."

In Appellant's opposition to the County's request, Appellant contends:

- As Appellant is not a Federal employee, the Federal Back Pay Act is inapplicable;
- There is no reference in the County Personnel Regulations which permits any offset in the event of dismissal. Moreover, it is significant that the County Council provided for offset in a suspension situation, but chose not to in the "Dismissal" portion of the Personnel Regulations;
- An argument that offset is implied in the Personnel Regulations should be rejected because of plain and unambiguous meaning to the contrary;
- As there is no regulation prohibiting the Appellant from working for an employer other than the County, it would be inappropriate to find that because Appellant worked during the time Appellant was not employed by the County, the income earned constitutes offset income;
- As the County did not raise the issue of offset at the time it briefed the issue of penalty, it has waived the argument and should not be allowed to raise it at this time;
- Even if the Board provides for offset, it should not apply to the 90 day penalty period provided by the Board order.

According to the parties submissions, the County was prepared to reinstate the Appellant to one of the offered temporary positions on or about the October 3 date of Appellant's meeting with the Director, but at Appellant's request, the actual beginning of employment was delayed until October 14. According to the County, the Director agreed to this, but informed the Appellant that Appellant would be on leave without pay from October 3 until October 14. Appellant does not contest being in such status, but contends that Appellant should be paid for the time spent in the required meeting with the Director.

Analysis and Conclusions

First, the Board rejects the Appellant's procedural contention that the County has, in effect, waived its right to raise the issue of interim earnings offsetting back pay because it failed to raise it when briefing the issue of appropriate penalty. In this regard, at that time, the issue was appropriate penalty and the County contended that the Board should sustain the Appellant's discharge. The Board sees no basis for concluding that it was incumbent on the County to raise the impact of an alternative penalty to protect its right to seek clarification of an aspect of that penalty.

As to the merits of the issue of off setting interim earnings from the ordered back pay, Montgomery County Code Section 33(c) *Decisions*, provides, in pertinent part,

“The Board shall have remedial authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

(4) Order reinstatement with or without back pay....

This language specifically gives the Board statutory discretion to determine the appropriateness of awarding back pay in conjunction with an order of reinstatement. While the Code is silent on the issue of interim earnings affecting an award of back pay, in the Board’s view, the discretion granted by the Code, “with or without back pay,” includes the discretion to determine whether interim earnings should be deducted, and, if so ordered, which such interim earnings are appropriate for deduction. In the Board’s view, the absence of any reference in the Personnel Regulations to the Board deducting interim earnings from a back pay order does not mean either of the competing interpretations of the parties, but means that the Board has the discretion provided by the Code. Accordingly, the Board concludes that it has the legal authority to either order an interim earnings offset, or to decline to do so.

With respect to practices in other forums, the Board is of course not bound by the provisions of the Federal Back Pay Act; the practices of the Federal Merit System Protection Board, the County Office of Human Rights, which has a different statutory charter; or of any other agency which adjudicates employee disputes. However, in determining an appropriate policy, the Board does view it as significant that offsetting interim earnings from back pay awards appears to be the common practice in such agencies.

In the Board’s view, in the circumstance of a remedial reinstatement and back pay, the goal is to put the employee in essentially the same position as they would have been but for the discipline being set aside. If an employee was to receive back pay without an off set for interim earnings, it would result in unjustified enrichment. Accordingly, the Board concludes that except in extraordinary circumstances, back pay should be off set by interim earnings, and that such off set is appropriate in the facts of this case. It will be so ordered. In this case, the Board previously reduced a termination to a 90 day suspension, which runs from the date of the original termination. In agreement with the Appellant, the Board finds that the off set should not apply to interim earnings during that 90 day suspension period, a period for which Appellant is not receiving back pay.

With respect to the closing date of the back pay obligation, under the circumstances presented, the Board does not view it as appropriate to use October 3, the date when Appellant was offered reinstatement to positions other than Appellant’s previous one, and positions which were defined as temporary. Accordingly, the back pay obligation will conclude with Appellant’s October 14 actual reinstatement to a position. This conclusion moots the issue of whether the Appellant is entitled to back pay for the period spent in the October 3 meeting with the Director.

As noted above, the County requested that the Appellant be required to provide documentation on interim earnings and a notarized affidavit that Appellant has fully and accurately reported all income. As the only source of such information, the Board agrees that it is incumbent on the Appellant to cooperate in good faith with the County's efforts to compute the amount of back pay due, and to provide to the County all necessary information related to Appellants interim earnings between the conclusion of the suspension period and Appellant's reinstatement. The Board sees no basis for requiring a notarized affidavit, absent evidence that Appellant has not accurately reported interim earnings.

ORDER

On the basis of the above, it is ordered that the Board's Supplemental Decision and Order in the above entitle case be clarified and amended as follows:

-That the Appellant be reinstated to Appellant's previous position, or to a comparable position of equal pay, status and responsibility. Further, it is ordered that with all due haste, the County identify and reinstate the Appellant to a permanent position that is comparable, within the provisions of County Code Section 33-14(c)(4). In this regard, the Board encourages good faith consultation with the Appellant.

-That the Appellant be reimbursed back pay for the period between the end of Appellant's 90 day suspension and October 14, 2002, with the following adjustments,

-A 10 percent reduction in the pay for a six month period starting with the conclusion of the suspension period;

-A reduction in the amount of the Appellant's interim earnings between the end of the suspension period and October 14, 2002.

It is further ordered that the Appellant cooperate in good faith with the County's efforts to compute the amount of back pay due and to provide to the County all necessary information related to Appellant's interim earnings.

Case No. 01-08

SUPPLEMENTAL DECISION AND ORDER

In an Order dated March 6, 2003, the Board ordered that Appellant provide the County information concerning Appellant's dates and hours of work, and rate of pay, while Appellant was employed by Appellant's counsel in the instant case. Affidavits

filed by the Appellant provided that Appellant had been paid a total of \$XXXX by Appellant's counsel. In its Order, the Board specifically rejected the County's request that the Appellant be required to provide tax information for 2001 and 2002. The County was ordered that upon receipt of the information on pay by Appellant's counsel, to immediately comply with the back pay provisions of the Board's Supplemental Decision and Order on Remedial Issues in this case. The Order provided that "Absent overriding exigencies, the Board expects that Appellant's back pay be transmitted within 14 days of receipt of the information from Appellant's counsel."

By letter dated March 20, Appellant's counsel advised the County that Appellant began work in counsel's office at a rate ". . . I believe, of \$XX.XX per hour," and "Appellant was eventually given an increase to \$XX.XX per hour." Counsel stated that counsel's office retained no records of the hours/days worked by the Appellant. The County indicates that they were unaware of receipt of this letter because it had been faxed with another letter. By letter dated April 7, the County's attorney advised Appellant's counsel that they had not yet received the accounting of the dates and hours provided for in the Board's Order. By letter/fax dated April 9, Appellant's counsel sent the County another copy of the above-described March 20 letter.

In a letter dated April 14, the County noted Appellant's counsel statement "I believe" as to Appellant's rate of pay, and non-compliance with the Board's Order that dates and hours of work, and rate of pay be provided, and requested that the Appellant be ordered to provide Internal Revenue Service form W-2 for Appellant's 2001 and 2002 earnings from Appellant's counsel. The County contends that absent such forms being provided, the Board vacates its order for back pay. In a response dated April 15, Appellant's counsel states that Appellant was paid as an independent contractor, not as an employee, and, therefore, there was no W-2 given to the Appellant.

When the Board ordered that the Appellant provide the County with the dates and hours worked, and rate of pay while working for counsel, it was viewed as a reasonable request, and that compliance with the request would expedite the payment of back pay. The information was not deemed as essential to the determination of the amount of back pay due, noting particularly that the record contained affidavits as to the total amount of pay received by the Appellant from Appellant's counsel, and that there was no evidence proffered by the County that this figure was inaccurate. Appellant's counsel now states that all available records have been provided, and there is nothing in the record to indicate that this is not the case. Appellant counsel's office record keeping procedure is not, in the view of the Board, a basis for vacating the back pay order in this case. Accordingly, the Board concludes that the Appellant has adequately complied with our Order, and will order herein that the County comply with the Supplemental Decision and Order on Remedial Issues within 10 calendar days of the date of this decision.

In the above-described filings with the Board, an issue was raised as to whether Appellant should be reimbursed for one-half hour per day, which County corrections employees had been paid as a result of a lawsuit. The County contends that the court decision referenced established an entitlement for pay for a half hour lunch break because

they were not completely relieved of duty during that break, and, as Appellant was not in a work status during the time Appellant was dismissed, Appellant is “therefore not entitled to additional back pay for a lunch period Appellant was not present to take.” Appellant responds that the extra half hour represents an economic back pay loss, and, like back pay itself, as Appellant would have earned that income if Appellant worked, it should be calculated as part of the back pay.

The Board agrees with the Appellant’s contention. The concept of a back pay remedy is to put the recipient in the same stead they would be in if they had worked. Had Appellant worked during the period covered by the back pay order, Appellant would have received the court ordered one-half hour per day. Accordingly, the County is to include such payment in the back pay paid to the Appellant.

In its Supplemental Decision and Order On Remedial Issues, the Board additionally addressed issues related to attorney fees due the Appellant, and the above-referenced filings make reference to progress on compliance with the attorney fees order, but that it had not yet been paid. The Board seeks immediate compliance with its Order, and has included in the instant order that the attorney fees portion of the remedy also be complied with within 10 calendar days of the date of this Order.

ORDER

The County is ordered to comply with the provisions of the Supplemental Decision and Order On Remedial Issues in this case within 10 calendar days from the date of this Order, and to include in the back pay paid the Appellant one-half hour pay for each day covered by the back pay order.

Case No. 03-04

DECISION AND ORDER

This is a decision on the appeal of Appellant from the decision of the Director, Department of Correction and Rehabilitation, terminating Appellant from the position of Correctional Officer, with the Department of Corrections and Rehabilitation, effective August 11, 2002. A hearing was held before the Merit System Protection Board (Board) on May 6, 2003 and May 14, 2003, during which the County and Appellant, respectively presented testimony, documentary evidence, and closing statements.

FINDINGS OF FACT

Background

Appellant entered service as a correctional officer with the County on February 6, 1995, as a Private First Class and rose to the rank of Corporal. Appellant’s duty station was the County Detention Center, on Seven Locks Road in Rockville Maryland (MCDC Facility). When Appellant first entered service, correctional officers were not assigned to

permanent shifts. Instead, correctional officers rotated on three shifts, the day (7:00 a.m. to 3:00 p.m.) (or two) shift; the midnight (11:00 p.m. to 7:00 a.m.) (or one) shift, and the 3:00 p.m. to 11:00 p.m. (or three) shift. Beginning in September 2000, correctional officers were assigned to permanent shifts, and Appellant was assigned to the midnight/one shift. Correctional officers were not assigned to permanent posts inside the MCDC Facility, but rather rotated posts within the facility.

Appellant provided copies of Appellant's performance evaluations for the years 1996 to 1997, 1997 to 1998, and 1999 to 2000. Appellant generally received a rating of "Met Requirements" in the majority of requirements, with some "Exceeds" ratings on each of the three evaluations. However, the 1999-2000 performance evaluation indicated that Appellant had used 208 hours of sick leave, and given a rating of "Marginal" for meeting attendance requirements. Appellant was cautioned on the excessive use of sick leave, and advised that Appellant would be monitored for sick leave usage for six months. The evaluation also noted that Appellant grieved the issue of sick leave abuse, but does not record an outcome. The evaluation was signed by Appellant and Appellant's supervisor on April 1, 2000, and reviewed by another manager on April 15, 2000.

Appellant offered testimony regarding a fourth performance evaluation for the years 2000 to 2001, however no documentary evidence was provided. Appellant testified that Appellant received a "Met Requirements" rating in all categories except attendance, for which Appellant received a rating of "Marginal."

Appellant was still permanently assigned to the midnight/one shift in January of 2001, when Appellant developed sensitivity to a floor cleaning chemical called "spray buff." Appellant defined Appellant's sensitivity as "my eyes would start burning; my nose would itch; and I would get a tightness, just a very slight tightness across my chest, but then it would cause congestion later." Appellant testified that Appellant spoke to Appellant's supervisor, about Appellant's symptoms, who suggested Appellant "just had to deal with it." Appellant also sought medical advice from Appellant's physician, who prescribed over the counter medications for the congestion and said "to see where the problem led."

Appellant took independent steps to address the problem by replacing the use of "spray buff" with a floor wax. Appellant indicated Appellant had no symptoms during this period. Appellant testified that in April or May of 2001, Appellant's Supervisor became aware of the use of floor wax in place of the "spray buff," and directed Appellant to return to the "spray buff." Appellant testified Appellant again began using the "spray buff" and again began experiencing symptoms.

At the end of July 2001, Appellant suffered a severe attack of symptoms and sought treatment at the medical facility on the work premises and subsequently returned to Appellant's personal physician. At this visit on August 8, 2001, the physician prescribed Zyrtec and Albuterol for Appellant's symptoms. Appellant visited the County's Occupational Medical Services office on August 9, 2001, where Appellant was

seen by the County Medical Examiner. Documents presented at the hearing and entered as Appellant's Exhibit 8, indicate Appellant advised the County Medical Examiner that the medications prescribed by Appellant's physician one day earlier "have not helped [Appellant's] problem." As a result of this episode, Appellant missed seven days of work, and was placed on a restricted duty (sometimes referred to as "light duty") until August 29, 2001, requiring no exposure to chemicals until further notice.

Appellant and the County offered testimony regarding the various steps taken to accommodate the Appellant's symptoms, and to regulate Appellant's exposure to chemicals, specifically the "spray buff." These steps include actions such as assigning Appellant to posts in the MCDC Facility where "spray buff" is not used, for example in carpeted areas such as an inmate housing unit identified as "G4", and attempted to monitor Appellant's movement through the MCDC Facility to limit Appellant's exposure to "spray buff." For example, when Appellant wished to leave Appellant's post to smoke or for meal breaks, Appellant would call or radio ahead to ensure Appellant's path was cleared of the "spray buff."

Despite these efforts, Appellant testified that during the period August 2001 to December 2001, as a result of irregular exposures to chemicals, Appellant missed work approximately once a month. The County presented documents identified as County's Exhibit 13, which are a record of Appellant's leave record for the calendar year 2001, and from January 1 through March 9, 2002. The leave record shows Appellant used sick leave on a number of days following the August 8, 2001 doctor's visit through December 31, 2001, totaling 97 hours or an average of in excess of three days a month.

On or about November 2, 2001, Appellant was placed on notice that, as a result of Appellant's use of sick leave, Appellant was being placed on doctor's certificate requirement for any sick leave used. Appellant received a memorandum documenting this requirement, and a copy of the memorandum was presented and entered as County Exhibit 6. The memorandum states, in pertinent part:

You had 14 incidents of sick leave that totaled 224 hours. Of these, 7 of them have been in conjunction with days off or on the weekend. This use of leave indicates a pattern of sick leave use that is questionable and may be considered abusive. In light of this, effective immediately, you are to provide a doctor's certificate anytime you call in sick. This requirement will be in effect for six (6) months.

The memorandum further states the doctor's certificate must be presented to Appellant's supervisor the first work day following the request and before the end of the pay period. This requirement would be reviewed for continued need on May 4, 2002. Appellant and the County testified that Appellant requested clarification on the requirements of the doctor's certificate and this clarification was provided in an undated memorandum from Appellant's Supervisor to Appellant. Appellant's Supervisor testified the undated memorandum may have been delivered as many as four to five months after

the November 2, 2001 meeting in which the original memorandum had been presented to Appellant.

On or about February 16, 2002, Appellant received a third memorandum notifying Appellant that Appellant was not in compliance with the doctor's certificate requirements for an absence from work on February 8, 2002. As a result of this non-compliance, Appellant was considered AWOL for 8 hours on February 8, 2002. Appellant testified Appellant disagreed with this memorandum because Appellant had been at the MCDC Facility when Appellant became ill and received treatment at the on-site medical facility. Appellant testified that, as a result of this on-site treatment, Appellant believed the County had sufficient documentation of Appellant's illness and therefore, presented no doctor's certificate. No documentation of this medical treatment or doctor's visit was presented at hearing and County Exhibit 13, Appellant's leave record, reflects an entry of 8 hours AWOL for February 8, 2002.

Appellant testified that, although Appellant became ill "quite a few times" following the February 8, 2002, incident, Appellant's next major illness occurred on March 8, 2002. Appellant provided numerous details in Appellant's testimony regarding Appellant's symptoms, but does not provide a reason for them. In fact, Appellant specifically stated "we had already checked the hallways and had already confirmed that I could walk up to the dining room, that the hallways were clear from the spray buff." Despite Appellant's symptoms, Appellant completed Appellant's shift, but then experienced additional symptoms while driving home.

Appellant testified Appellant spoke to Appellant's physician sometime between 7:00 a.m., Friday, March 8, 2002 and 6:30 p.m., Sunday March 11, 2002, and was advised not to return to work and that Appellant had an appointment scheduled with Appellant's physician for Wednesday, March 26, 2002. Appellant testified further that Appellant understood policy required that Appellant call in not less than 4 hours prior to the commencement of Appellant's shift if Appellant were going to be out on sick within the required time period from Sunday March 11, 2002 through Tuesday, March 25, 2002. Under direct examination, Appellant demonstrated that Appellant complied with the call-in policy by calling in every evening Appellant was scheduled to work during this period, and submitted MCDC telephone logs which reflected Appellant's telephone number on the incoming call logs.

Appellant and the County testified Appellant had requested a change to the three (3:00 p.m. to 11:00 p.m.) shift on a number of occasions, but, as a result of the collective bargaining agreement then in place, the change in shift could not occur. Appellant testified that Appellant had sought assistance from the union "trying to get the shift change." Appellant and the County agreed that, since cleaning occurred after this shift, Appellant's exposure to "spray buff" would be limited to rare occasions, such as in the lobby near the front door. Both Appellant and the County testified that, as a result of a bid process, Appellant would begin working the three (3:00 p.m. to 11:00 p.m.) shift effective April 7, 2002.

Appellant testified and presented documentary evidence indicating that, as a result of Appellant's doctor's visit of March 26, 2002, Appellant was to remain off from work until April 7, 2002, and until April 17, 2002, Appellant was to be on light (limited) duty (Appellant Exhibit 15), as certified by the Medical Examiner. The "Health Status Report" signed by the Medical Examiner describes the limitation as, "Please notify in advance if floor cleaning products are to be used with (in) 10 yards of employee." Appellant testified, however, that the Medical Examiner refused to release this document to Appellant until such time as Appellant was seen by ". . . the disability coordinator."

Appellant testified that Appellant met with the disability coordinator on April 1, 2002, and that Appellant and the disability coordinator "thought there would be no problems" with Appellant's return to work after April 7, 2002, and the change of shifts. The Medical Examiner agreed to see Appellant again in three weeks after Appellant had returned to work and "let him know if it was working out for me." The Medical Examiner then revised the document which extended the light duty date to April 19, 2002. Appellant was to return to the Medical Examiner three weeks after Appellant's scheduled return to work date (April 8, 2002), meaning the week of April 28, 2002, to evaluate Appellant's condition.

Appellant testified that when Appellant delivered these documents to the MCDC Facility, the Lt. Col. indicated that Lt. Col. was uncertain if Lt. Col. would be able to meet the requirements of Appellant's light duty requirements, specifically "notification if it was being used in my area," and that the (Lt. Col.) would have to check with Lt. Col.'s superiors and get back to Appellant. Appellant also stated the Lt. Col. called Appellant's at home later that day and confirmed that Lt. Col. would be unable to accommodate the requirements prescribed by the Medical Examiner. Appellant further stated Appellant asked the Lt. Col. what to do next and the Medical Examiner responded "I don't know. . . I don't know what to tell you." Appellant never attempted to return to work, either after the April 7, 2002 – no work period, or the April 19, 2002 – restricted duty period.

In response to questions by Appellant's own counsel, Appellant testified that Appellant understood Appellant's light duty restrictions (the notification requirement) were being imposed only until April 19, 2002, and that Appellant was taking medications that, hopefully, would build up Appellant's system and allow Appellant to be near the problem chemicals without incident. Finally, Appellant testified that sometime during the first week of April, 2002, Appellant was telephonically advised by another Lt. Col. that Appellant's leave had expired. Appellant testified that, between April 1, 2002 and April 22, 2002, Appellant could recall no telephone conversations with the MCDC Facility other than when the Lt. Col. ("three or four times") and that the other Lt. Col. ("two times") called Appellant. Appellant contends Appellant spoke with a Lt. Col. "at least once a week . . . until the week that I got the notification that I had been fired, . . . that was like April 22nd." The Lt. Col. testified that the Lt. Col. recalls speaking with Appellant twice during this period. One occasion when the Lt. Col. contacted Appellant to inform Appellant that Appellant's insurance was scheduled to expire since Appellant had no leave; and one occasion when the Lt. Col. participated in an unemployment hearing by conference call originating from Baltimore.

Notice of Intent to Terminate County Employment

Appellant testified Appellant received the County's Notice of Intent to Terminate County Employment (Appellant Exhibit 18 and County Exhibit 3) (the "Notice of Intent") on or about April 23, 2002. The Notice of Intent set forth the following bases upon which the County may file for termination:

Montgomery County Government Collective Bargaining Agreement, 2001, Article 26 "Termination" and Montgomery County Personnel Regulations, 2001, Section 29 "Termination."

The Notice of Intent stated,

You are in violation of *Montgomery County Personnel Regulations, 2001*, **SECTION 29, TERMINATION, 29-2 Reasons for termination** "(a) A department director may terminate the employment of an employee: (2) who has abandoned the employee's position by failing to report for work on 3 or more consecutive workdays without having approval for the absence; and (7) who has not returned to work within 30 calendar days after exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal problem."

The Notice of Intent further provided,

You are also in violation of Department Policy and Procedure 3000-24, Use of Sick Leave Section III, PROCEDURES, A. General Sick Leave, 2. "The employee is required to call his/her immediate supervisor during the first hour of the supervisor's normal working hours to discuss the need for sick leave and to pass on any necessary information." Although this requirement has been modified, a call is still required to be made if you plan to be absent.

The Notice of Intent then describes a chronology of events concerning Appellant's absences, and concludes,

On April 1, you spoke to the first Lt. Col. and gave a doctor's certification that stated you would need to be out of work from April 1 through April 7, 2002. A review of the Health Status Report from OMS recording restrictions indicated that you could not be accommodated and the Lt. Col. asked you to return to OMS and see if you could get the Health Status Report reviewed and revised to allow you to return to work in this type of "security" environment. You have not called or reported in since that time.

Following receipt of the Notice of Intent, Appellant sent the Warden a response dated May 1, 2002, which states in its entirety, "In response to the memorandum dated 22 April 02, much of the information in this document is incorrect. I ask that the entire memorandum be dismissed." (County Exhibit 4) Appellant testified Appellant took no further action regarding the Notice of Intent because Appellant believed Appellant would be given an opportunity to respond to it in person. Appellant further testified that, following receipt of the County's Notice of Intent to Terminate County Employment, Appellant elected not to return to the Medical Examiner for evaluation. Under questioning by the Board, Appellant testified Appellant made no attempt to return to work after receipt of the Notice of Intent, or to contact the County Medical Examiner with respect to the medical issues associated with Appellant's employment.

Notice of Termination

On July 25, 2002, the County issued its Notice of Termination of Employment, effective August 11, 2002. The Notice of Termination is addressed to the Appellant, Montgomery County Detention Center, DOCR, from the Director, Montgomery County Detention Center. The Notice of Termination states that,

[w]e received and reviewed your response to the Notice of Intent to Terminate mailed out to you certified mail on April 23, 2002. Your response was general in nature as to misinformation you believed was incorporated into the Notice of Intent to Terminate, but you failed to be specific. Your request to dismiss the Notice of Intent is denied.

The Notice of Termination references,

Montgomery County Government Collective Bargaining Agreement, 2001, Article 26. "TERMINATION", 26.1, (b) "Excessive absences caused by ongoing medical or personal problems that are not resolved within three (3) calendar months after the date the employee exhausts all paid leave, including any grants of leave received from the sick leave bank."

You are also in violation of Department Policy and Procedure 3000-24, Use of Sick Leave, Section III, PROCEDURES, A. General Sick Leave, 2. "The employee is required to call his/her immediate supervisor during the first hour of the supervisor's normal working hours to discuss the need for sick leave and to pass on any necessary information."

The Notice of Termination references the call in requirements, then states, "The reasons for this action are as follows," then repeating the same chronology of events as had been set forth in the Notice of Intent, and concludes,

On April 1, 2002, you spoke to the first Lt. Col. and gave a doctor's certificate that stated you would need to be out of work from April 1 through April 7, 2002. A review of the Health Status Report from OMS recording restrictions

indicated that you could not be accommodated and the Lt. Col. asked you to return to OMS and see if you could get the Health Status Report reviewed and revised to allow you to return to work in this type of 'security' environment. You have not called or reported in since that time.

ISSUES

1. Did the Notice of Intent to Terminate provide adequate notice to the Appellant of the basis relied upon for Appellant's termination?
2. Was the Appellant's termination on the basis of abandonment of position consistent with law and regulations, and otherwise appropriate?

POSITION OF THE PARTIES

Appellant

The Appellant contends that the termination was procedurally defective because the grounds relied upon were different than those set forth in the Notice of Intent. The Appellant further contends that the County has failed to meet its burden of proof that Appellant did in fact abandon Appellant's position.

County

The County contends that Appellant received adequate notice and was properly advised that Appellant was in violation of the County's Personnel Regulations, the County's Collective Bargaining Agreement, and the Department's Policy and Procedures regarding sick leave and that such violations could serve as the basis for termination. The County further contends that the evidence provided does demonstrate that the Appellant abandoned Appellant's position by failing to return to work after the medically approved date of April 7.

ANALYSIS AND CONCLUSIONS

1. Appropriate and Adequate Notice

At the hearing, the Appellant made a motion that the termination be set aside because the Notice of Termination provided a basis for the action different than that set forth in the Notice of Intent. The Notice of Intent cites Montgomery County *Personnel Regulations*, 2001, Section 29, Termination, which defines termination as:

A nondisciplinary act by a department director to end an employee's County employment for a valid reason.

The Notice of Intent also cites the collective bargaining agreement applicable to the Appellant, because as a member of the bargaining unit, Appellant was being given the

option of responding to the Notice of Intent either directly to the Warden who sent it, or as a member of Appellant's Union. Article 26 "Termination" of the collective bargaining agreement defines termination as:

[A] nondisciplinary act by management to conclude an employee's service with the County.

In the Notice of Intent, Appellant was advised Appellant was in violation of *Montgomery County Personnel Regulations, 2001, Section 29-2, Reasons for termination*. The specific reasons cited for the termination were:

(2) failing to report for work on 3 or more consecutive workdays without having approval for the absence; and

(7) not return[ing] to work within 30 calendar days after exhausting all FMLA leave and paid leave of any type, including leave from a sick leave donor program, because of an on-going medical or personal problem.

Finally the Notice of Intent advised Appellant that Appellant was in violation of Department Policy and Procedure 3000-24., Use of Sick Leave, Section III, PROCEDURES, A. General Sick Leave, 2., which required the Appellant "to call his/her immediate supervisor during the first hour of the supervisor's normal working hours to discuss the need for sick leave. . ." The Notice of Intent concludes by specifically describing Appellant's failure to report to work following the April 7 conclusion of the medically approved absence.

Based on the foregoing, in the Board's view, Appellant, upon receiving the Notice of Intent, knew or should have known the County, relying upon Section 29, Termination; and Department Policy and Procedure 3000-24, intended to terminate Appellant's employment based on Appellant's abandonment of Appellant's position as a result of Appellant's failure to report to work or call in when planning to be absent.

The ultimate Notice of Termination, relies on the same described circumstances and applicable regulatory provisions. The only variance being that the Notice of Termination was obviously delayed until the collective bargaining agreement's more expanded period of absence of three months had passed. Accordingly, the Board rejects the Appellant's motion to dismiss based on the allegation that the Notice of Intent did not provide adequate notice of the basis relied upon for the termination.

2. Abandonment of position

It is undisputed that the Appellant failed to report to work after April 7, the last day of Appellant's medically approved absence. Moreover, while arguably Appellant had a medically approved basis for being absent through April 19, because the County had advised Appellant that they could not comply with County Medical Examiner's requirement about notification of when floor cleaning products were being used, it is

undisputed that Appellant failed to report to work, failed to call in, and failed to see the Medical Examiner again, after that date. Even after receiving the Notice of Intent, Appellant's only response was to request the Notice be dismissed. While the Board makes no finding on the completeness of Appellant's written response, the Board does find that Appellant made no effort to cure the violations alleged by the County, e.g., report to work or obtain further medical approval for Appellant's absence.

It is undisputed that employees seeking to be off work for medical reasons were required to call in not later than four (4) hours prior to the commencement of employee's normal working hours. Accordingly, the Appellant would have been required to call in not later than 7:00 p.m. when Appellant was assigned to the one (11:00 p.m. to 7:00 a.m.) shift and not later than 11:00 a.m. when assigned to the three (3:00 p.m. to 11:00 p.m.) shift. Appellant offered extensive testimony and documentary evidence that Appellant meticulously complied with this requirement up to March 27, 2002, when Appellant received Appellant's doctor's certification excusing Appellant from work until April 7, 2002. However, Appellant never called in after the medically approved absence through April 7.

The Appellant's apparent only explanation for failing to return after April 19 was that the first Lt. Col. had indicated that Lt. Col. could not comply with the restriction set forth by the County Medical Examiner. However, the Lt. Col. testified that Lt. Col. asked Appellant to return to the County's Occupational Medical, as Lt. Col. could not guarantee the restriction could be met. In Appellant's testimony, Appellant confirmed this conversation and testified that when Appellant asked the Lt. Col. what to do next, the Lt. Col. offered Appellant no advice. Appellant testified that both Appellant and the Disability Coordinator believed there would be "no problems" once Appellant began working the three shift. Finally, Appellant testified that Appellant was aware as early as the first week of April, 2002, that Appellant had no leave available to Appellant. Notwithstanding these facts, Appellant took no action to cover Appellant's absence after April 19. Moreover, Appellant knew that Appellant would be returning to work on the shift where the use of the spray buff cleaning solution was infrequent.

During the hearing, testimony and/or documentary evidence was presented that demonstrated Appellant had been cautioned or disciplined on at least four occasions for excessive and/or possible abuse of sick leave. Specifically, Appellant's 1999-2000 performance evaluation and (based on Appellant's own testimony) Appellant's 2000-2001 performance evaluation contained marginal ratings for attendance and cautioned Appellant on the excessive use of sick leave. Additionally, the November 2, 2001 memorandum placing Appellant on doctor's certificate status, and the February 16, 2002 memorandum & Letter of Concern documenting the Absent Without Leave status, as well as numerous conversations between Appellant and the County during the period March 9, 2002 and April 1, 2002 were presented at the hearing. In the Board's view, Appellant knew or should have known that Appellant's attendance and use of sick leave were being closely monitored and, that when not in compliance with the regulations, policies and/or procedures known to Appellant, adverse actions would result.

Following receipt of the County's Notice of Intent to terminate County employment, Appellant responded to it by letter dated May 1, 2002, asserting "much of the information in the document is incorrect" and asked that "the entire memorandum be dismissed." Appellant took no further action to protect Appellant's employment or to cure the policies and/or procedures violations alleged in the Notice of Intent. When questioned at hearing, Appellant testified Appellant believed Appellant would have an opportunity to appear in person to respond to the Notice of Intent. In the Board's view, a demonstration that the Appellant was not abandoning Appellant's position took more than waiting for some undefined action by the County, which had put Appellant on notice that Appellant was viewed as having abandoned Appellant's position.

The parties agreed and documentary evidence produced at hearing confirm that Appellant knew or should have known that Appellant had no further accrued leave after the pay period ending April 6, 2002. Montgomery County Personnel Regulations, 2001, Section 23, Leave Without Pay, 23-6, Placing an employee on LWOP, (b) LWOP for a medical condition states in pertinent part: ". . . a department director may place an employee on LWOP if: (3) the employee has exhausted all other types of leave." Appellant has demonstrated by Appellant's own actions that Appellant was familiar with the requirements of Department Policy and Procedure 3000-24, Use of Sick Leave, Section III, PROCEDURES, A. General Sick Leave, 2, as amended. Having been made aware of the County's position regarding Appellant's employment status by virtue of the reasons set forth in the Notice of Intent, the last sentence of which states: "You have not CALLED OR REPORTED IN since that time" (emphasis added), Appellant should have known Appellant was still required to call in not later than four (4) hours prior to the commencement of Appellant's regularly scheduled work shift. Appellant made no effort to cure the violation of Department Policy and Procedure 3000-24, Use of Sick Leave, Section III, PROCEDURES, A. General Sick Leave, 2. The only action taken by Appellant in response to the Notice of Intent was to file Appellant's response dated May 1, 2002.

CONCLUSION

The Board concludes that the Appellant's termination on the basis of abandonment of position is consistent with law and regulation, and otherwise appropriate, noting particularly, that the Appellant made no effort to return to work after the April 19 conclusion of the period designated by the County Medical Examiner for restricted duty; that Appellant took no action to seek additional medically approved leave, nor to contact the County about Appellant's work situation; that Appellant had exhausted all accrued leave; and that the County had given Appellant adequate notice of Appellant's status, and that Appellant took no action to cure the situation.

ORDER

On the basis of the foregoing, the Board denies Appellant's appeal from termination of employment with the County.