

Merit System Protection Board Annual Report FY 2004

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Mary A. Lamary, *Vice Chairman*
Harold D. Kessler, *Associate Member*

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2004
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 2004 were:

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

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 35, Merit System Protection Board Appeals, Hearings, and Investigations of the Montgomery County Personnel Regulations, 2001.

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."

Article II, Section 33-7. County Executive and Merit System Protection Board Responsibilities, 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 35-20, MSPB, Audits, Investigations and Inquiries, of the Montgomery County Personnel Regulations, 2001 states:

- (a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County laws and these Regulations.
- (b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate corrective action, or report the matter to:
 - (1) the MSPB, if the individual involved in the alleged illegal or improper action is a merit system employee; or
 - (2) the Ethics Commission, if the individual involved in the alleged illegal or improper action is not a merit system employee or is an appointed or elevated official or a volunteer.

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 days notice given in all other cases. Upon completion of the pre-hearing, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision.

The second method for processing appeals requires the development of a written record. Upon receipt of the notice of appeal and supplemental information, the County is notified and has fifteen work days to respond. The Board then provides the Appellant an additional fifteen work days 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.

DISCIPLINE

Case No. 04-03

DECISION AND ORDER

BACKGROUND

The Kensington Volunteer Fire Department (KVFD) and Appellant filed an appeal of the Fire and Rescue Commission's (FRC) Order denying their motion to lift the stay of Appellant's appeal of a discipline imposed by the Montgomery County Fire Administrator (Administrator), and to reinstate the stay of the discipline.

Appellant is a volunteer firefighter with the Montgomery County Fire and Rescue Service (FRS). On August 13, 2002, the Administrator issued Appellant a Notice of Disciplinary Action discharging Appellant from the FRS, and permanently removing Appellant from the Integrated Emergency Command Structure. On September 16, 2002, Appellant appealed the disciplinary action to the FRC. Montgomery County Code, Section 21-7(b) provides as to the affect of such an appeal, "Unless the Commission orders otherwise, the filing of an appeal stays the action appealed from." Accordingly, by operation of Code Section 21-7(b) Appellant's appeal to the FRC automatically stayed the imposed discipline.

By letter dated October 22, 2002, Appellants' asked the FRC to stay the appeal pending the outcome of what they contended was a "controlling" case pending the Montgomery County Circuit Court. On November 13, 2002, the Administrator responded by asking the FRC to vacate the automatic stay of Appellant's discipline because Appellant "has committed a serious violation of the Code of Ethics and On-Duty Personnel Conduct Regulations...." By Order dated November 25, 2002, the FRC vacated the automatic stay, and stayed the processing of the Appeal pending the outcome of the Circuit Court case. On the same date, the Appellant sent a letter to the FRC requesting that they reinstate the automatic stay of the disciplinary action. The Fire Administrator responded by letter dated February 6, 2003, opposing the request. The record before the Board does not contain or refer to any FRC action to Appellant's request.

On May 5, 2003, Appellants filed a Motion requesting the FRC, to lift the stay of the processing of Appellant's appeal, set a hearing date, and issue a pre-hearing scheduling order; and to reinstate the stay of the Appellant's discipline pending a hearing on the merits. By Order dated June 16, 2003, the FRC denied Appellants' Motion, without explanation. On June 30, 2003, Appellants filed with the FRC a Motion to Reconsider its denial of their earlier Motion, requesting that the FRC lift the stay of the case and set a trial date, and reimpose the stay of Appellant's discipline pointing out the Appellant is in a situation where Appellant's discipline continues in perpetuity, and Appellant has no opportunity to be heard in an appeal. Noting that, "Clearly, the Commission does not wish to do both," Appellants contended, "However, it must

do one or the other.” The Motion to Reconsider was denied by the FRC on July 8, 2003, again without explanation.

POSITION OF THE PARTIES

Appellants

In their appeal to the Board, Appellants contend that “The situation represents one ripe for appeal,” citing Code 21-7(g)

Appeals of Commission Decision. Any employee of or volunteer at a local fire and rescue department or any other aggrieved person may appeal a decision of the Commission involving a specific personnel action, or the failure to take such action....(Emphasis supplied)

Appellants contend, “The Commission has refused to act on the appeal of the Administrator’s discipline.” Appellant thus ask this Board to hear the merits of the appeal.

Administrator

In response to the appeal, the Administrator has filed a Motion to Dismiss, contending that since the FRC has not entered a final order on the appeal, the Board lacks jurisdiction to consider what they allege is an interlocutory appeal. The Administrator contends that the Appellants have not demonstrated that Appellant will suffer irreparable harm, a sole exception to the bar on considering interlocutory appeals. As to Appellants’ contention that it is a “failure to act,” the Administrator contends that Code Section 21-7(g) refers to the subject matter of an FRC appeal to the Board, and “fails to grant explicit authorization for an interlocutory appeal as required under Maryland law.”

As to the stay of the discipline, the Administrator contends that code Section 21-7(b) grants the FRC discretion to act or not act without meeting specific criteria, and the County Council chose to enact a statutory scheme that did not provide a mechanism for the Board to act before a final order is issued by the FRC.

ANALYSIS AND CONCLUSIONS

The Board concurs that to the extent that Appellants’ appeal of FRC’s Order requests that the Board hear the merits of Appellant’s appeal of Appellant’s discipline, it is interlocutory, and, therefore, not appropriate for resolution by the Board until the FRC has issued a final decision. However, the Board does not view as interlocutory Appellants’ collateral appeal of the FRC’s action of vacating the otherwise automatic stay of Appellant’s discipline, coupled with an indefinite stay on the processing of Appellant’s appeal. In the Board’s view, these actions of the FRC constitute a “final order” on procedural issues, which places Appellant in an untenable position – Appellant’s removal continues indefinitely while the FRC awaits the outcome of a case pending in the Circuit Court. There is no way to determine when the Circuit Court will

rule, and even when it does, either party would have a right of appeal to the Maryland Court of Special Appeals, and a further right to petition to the Maryland Court of Appeals for review. Appellant's discipline could easily continue for years before Appellant's appeal is resolved. This, in the Board's view, is unacceptable.

The Board acknowledges that the FRC has the right to stay the processing of an appeal for the purpose of litigation efficiency, e.g., to await the result of a potentially precedential court decision. The Board further acknowledges that County Code, Section 21-7(b) grants the FRC discretion to revoke the automatic stay of a discipline. As discussed above, the defect in the instant circumstances is to do both with no end date in sight, thereby, denying Appellant an opportunity to serve as a firefighter, and also, an opportunity to contest his discipline. Rather, as requested by the Appellants in their Motion to Reconsider, the FRC should either lift its stay on the processing of the appeal, or reinstate the stay of the discipline. Should the FRC chose to do only the former, processing of the appeal should commence with all due haste.

ORDER

On the basis of the above, the Fire and Rescue Service is hereby ORDERED to either lift the stay of the processing of the appeal of Appellant, and proceed with the processing of the appeal with all due haste, or, reinstate the stay of the discipline pending the resolution of Appellant's appeal of Appellant's discipline.

DISMISSAL

Case No. 04-09

DECISION AND ORDER

This is a final Decision and Order of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from dismissal from the position of Montgomery County Ride On bus operator.

FINDINGS OF FACT

Dismissal

The Appellant, who began employment as a Ride On bus operator on March 14, 1999, was dismissed from this position, effective March 12, 2004. The February 24, 2004, Notice of Disciplinary Action - Dismissal, references the collective bargaining agreement that covers the Appellant; Personnel Regulations Section 33-5(c), and 33-5(e); and the Department of Public Works and Transportation Administrative Procedure, "Accident Review Procedures for Bus Operators Only," The Notice provides as the basis for the action, the following:

- On September 30, 2003, you were involved in an accident while driving a County vehicle, for which you were assessed four penalty points. You had a previous total of 22 penalty points, leaving you with a balance of 26 penalty points.

- This latest accident was your thirteenth bus accident, and your second preventable accident in 2003.

- In 2002, you were involved in four Ride On bus accidents, one of which was ruled preventable by the review committee. In 2001, you were reassigned to non-driving duties seven months for unprofessional behavior and conduct, and during the remaining five months of the year, you were involved in one preventable accident. In 2000, you were again reassigned four months for unprofessional behavior and conduct, and had four bus accidents in an eight month period, two of which were ruled preventable. In 1999, you had two bus accidents, one while in training, and another four months later, after your release from training. Records also indicate that you received a written reprimand, a one-day suspension, and a three-day suspension for Ride On accidents. You were also assigned to the Safety and Training Manager, for refresher bus training in 2000, 2001, and 2002.

- In June, 2003, you served a five-day suspension for failing to disclose a traffic citation you received, for which you received one point on your Maryland Commercial Driver's License (CDL). Both the Maryland Motor Vehicle Administration, and County Administrative Procedure

require you to immediately inform your employer of any citations, convictions, and points, or any matter that involves or is associated with your CDL.

- In April 2002, County police issued you a citation for driving your Ride On bus through a red light, for which you received a one-day suspension.

- You received a ten-day suspension for your April 2001, involvement in a physical altercation with one passenger on your bus. The passenger asked you a question, which led to a verbal exchange, and you slapping the passenger's face. At that time, you also entered into a last chance settlement agreement regarding this suspension. You had previously received a three-day suspension for an April 2000 incident when you left your bus and engaged in a physical altercation with a passenger who had just exited the bus.

- You have received numerous disciplinary actions, including suspensions, to correct your unsafe performance. You have received repeated safety training and other corrective measures to improve your safety record. You continue to exercise poor judgment when it comes to the safe operation of your bus and following the laws regarding your CDL. Your performance continues to place the County in an extremely serious liability position. Your negligence and total disregard for the safety of yourself and your passengers and your inability to follow basic laws and regulations will not be tolerated and are grounds for your dismissal.

The Appellant does not dispute any of the contents of the above-described Dismissal Notice, and did not attempt to refute the events described and referenced in the Notice.

Accident Review Procedures

The County Department of Transportation Departmental Procedure, "Accident Review Procedure for Bus Operators Only," establishes an "Accident Review Committee" (Committee), to review all bus accidents, and based on the review, "assess points using the 'Penalty Point System'," which is an attachment to the Regulation. The System provides as to the assessment of points, in pertinent part,

<u>TOS POINTS</u>	<u>DESCRIPTION</u>
0	Bus operator was not at fault
4	Accident resulted in mirror damage only.
4 to 8	Both drivers could have prevented the accident through use of defensive driving principles.
5 to 8	Passenger injury - Bus operator at fault.

8 to 15

Bus operator at fault - Bus Operator failed to do everything reasonable to prevent and/or avoid a motor vehicle accident or a passenger or pedestrian injury.

There are also point ranges for such offenses as accidents occurring while backing, 10-15; involving a pedestrian which could have been avoided by proper driver's judgment, 12-15; and ranges of points between 4 and 28 for drivers not paying full time and attention. Not relevant to the instant case, is a provision for "quality points" for every twelve months of preventable accident-free driving.

The Regulations, then provides as follows:

II. Penalty Points - These points are assessed by determination of the Accident Review Committee. Points will remain on an employee's record for a period of two years. After a two-year period, points are erased; however, accidents or incidents remain a matter of record. Suspensions do not erase the record to date.

III. Guidelines for Disciplinary Action - Recommendations will be based on the number of penalty points accumulated, or the number of preventable accidents within a twelve month period, which ever results in greater disciplinary action.

Oral admonishment	4 to 9 accumulated penalty points
Written Reprimand	10 to 18 accumulated penalty points or two preventable accidents in twelve months.
One to three-day suspension	19 to 35 accumulated penalty points or three preventable accidents in twelve months.
Dismissal	36 or more accumulated penalty points or five preventable accidents in twelve months.

Any operator having a preventable accident and not receiving any of the above disciplinary actions shall receive refresher instructions, training, or counseling.

In any case subsequent disciplinary action will be progressive based upon prior disciplinary actions given employee, whether it is the result of points or frequency.

Appellant's Accident Assessment Points

Each of the accidents referred to in Appellant's dismissal notice were reviewed by the Accident Review Committee, with seven being determined to be "preventable." The dates of the accidents deemed preventable, the resulting point assessment, and disciplinary action are as follows,

<u>Date</u>	<u>Points</u>	<u>Disciplinary Action</u>
5/13/99	0	None
3/22/00	10	Oral Admonishment
9/18/00	8	None
10/2/01	8	One day suspension
5/17/02	8	Three day suspension
4/26/03	6	None
9/30/03	4	Dismissal

It is contended by the Appellant, and not disputed by the County, that by application of the above-quoted provision of the Regulation that provides for the erasing of penalty points after a two-year period, at the time of Appellant's September 30, 2003 accident, after which Appellant was notified of Appellant's proposed dismissal, Appellant would have had 26 points, and four preventable accidents, two of which were in the twelve month period. As quoted above, the "Guidelines for Disciplinary Action" specifies for "Dismissal," "36 or more accumulated penalty points or five preventable accidents in twelve months."

POSITION OF THE PARTIES

County

The County contends, in essence, that the Appellant's performance as a bus operator over the length of Appellant's employment, as detailed in the Notice of Dismissal, warrant the action taken. As stated in the Notice of Dismissal,

Your performance continues to place the County in an extremely serious liability position. Your negligence and total disregard for the safety of yourself and your passengers and your inability to follow basic laws and regulations will not be tolerated and are grounds for your dismissal.

As for the relationship and application of the Department of Transportation's Accident Review Procedures, the County contends that they serve as guidelines to supervision in assessing bus operators accidents, and in determining what discipline might be appropriate, but that the Regulations does not operate as a constraint on the County's ability to take disciplinary action, including dismissal, pursuant to the provisions of the County Personnel Regulations.

Appellant

The Appellant contends, in essence, that the Accident Review Procedures are, specifically, the regulatory basis for taking disciplinary action against a bus operator for accidents, and it is accidents that make up much of the basis for the dismissal. The Appellant contends that under the clear provisions of the Accident Review Procedure, at the time of Appellant's dismissal, Appellant had 26 points, rather than the 36 required for dismissal.

Appellant also contends that other matters cited in the Notice should not be relied upon, noting that the assaults occurred in 2000 and 2001, and there has been no similar conduct since then; and that some of the traffic citations were not duty-related.

ISSUES

1. Does the Department of Transportation regulatory Accident Review Procedures provide the exclusive procedure for disciplining a bus operator on the basis of accidents?
2. Under the totality of the facts and circumstances present, is dismissal of the Appellant consistent with law and regulation, and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

1. It is clear on its face, that the regulatory Accident Review Procedures provides a mechanism for reviewing the facts of an accident; assessing driver culpability, i.e., was the accident “preventable” by the driver; and, initiating discipline pursuant to established “guidelines.” The Board, however, rejects the argument put forward by the Appellant that the accident review procedure is the sole procedure for assessing a discipline for reasons that include accidents, as in the instant case. The Board notes in this regard that the “Penalty Points” portion of the regulation specifies that while accident related points are erased after a two-year period, “. . . accidents or incidents remain a matter of record.” In the Board’s view, this language specifically envisions and permits accident records to be considered in assessing a discipline that may not be provided for by the application of the Accident Review Procedure’s “Guidelines for Disciplinary Action.”

Moreover, the regulatory identification of a discipline associated with a given number of points are “guidelines,” which can be the basis of “recommendations” for a disciplinary action based on accidents. To hold that the County is foreclosed from considering a driving record amongst other causes for disciplinary action is, in the Board’s view, illogical, and not in the interest of the County.

Accordingly, the Board concludes that the Accident Review Procedures are not the exclusive procedure for disciplining a bus operator on the basis of accidents. Therefore, the fact that the Appellant’s point total was less than that which would justify dismissal, is not a basis for finding Appellant’s dismissal violative of law or regulation.

2. In determining whether the discipline of dismissal is consistent with law and regulation, and otherwise appropriate in the instant case, it must be judged against the particular content of the Appellant’s position, a bus driver. This is a position where service to the user public is direct, and one in which a concern for the public’s safety is paramount.

Personnel Regulations Section 33, *Disciplinary Actions*, specifies in sub-section 33-2, that a department director must apply discipline progressively by increasing the severity of discipline. In the instant case, the Appellant’s record is replete with lesser disciplines, including

suspensions, both in response to accidents and such non-accident incidents as confrontations with passengers, receipt of traffic citations, and failure to report traffic citations. Except for “demotion,” which is not relevant in the instant case, dismissal is right after suspension in the order of severity.

Sub-section 33-5, *Causes for disciplinary action*, provides, as relevant,

- (c) violates an established policy or procedure;
- (e) fails to perform duties in a competent or acceptable manner;
- (h) is negligent or careless in performing duties;
- (n) damages or destroys County property or damages or destroys private property of another while on duty or in a County vehicle;
- (t) engages in a physical altercation or assaults another while on duty, or County government property, or in a County vehicle.

In the Board’s view, the Appellant’s employment record provides ample justification for applying the above-listed causes for discipline. In this regard, there is uncontested evidence that the Appellant engaged in conduct that would fall within the scope of each of the listed permissible causes for discipline

As to the appropriateness of dismissal, the oft-referenced “capital punishment” of the work place, the Board views it as clearly justified. The record shows that the County not only gave the Appellant progressive discipline, but was diligent in making sure that remedial training was constantly provided. Notwithstanding these activities, the Appellant did not demonstrate improvement. Rather, an unsatisfactory driving record persisted. It is immaterial that some of the incidents relied upon to support the dismissal were a few years before and not repeated, or that some of the accidents were relatively minor, arguments raised by the Appellant. The County must be confident that it is not putting out on the street in a bus someone with the proven potential to endanger its citizens, and, for that matter, the employee them self. In the Board’s view, the Appellant’s record justified dismissal.

ORDER

Based in the above, the Board denies the Appellant’s appeal of dismissal from the position of County Ride On bus driver.

PROMOTIONAL PROCESS

Case No. 04-02

DECISION AND ORDER

This is a Decision and Order of the Montgomery County Merit System Protection Board (Board) on Appellant from the decision of Chief Administrative Officer denying Appellant's consolidated grievances related to the County Police Department's (Department) 2001 selections for promotion to the rank of Lieutenant.

REQUEST FOR A HEARING

Appellant filed the subject grievances on February 20, 2001, and May 14, 2001. Both grievances were denied by Appellant's immediate supervisor at the first step, and at the second step by then Chief of Police, who rendered the "Department/Agency Head Response." The CAO's designee to conduct the third step grievance process was a Human Resources Specialist, County Office of Human Resources (OHR). The grievances were heard by the Designee on August 6, 7, and 8, September 24, November 5, and 6, 2001, and January 30, and July 2, 2002, with the record to remain open an additional thirty days. On November 27, 2002, the OHR Labor/Employee Relations Manager, (LERM) transmitted to the Appellant and the Department a proposed Findings of Fact document. On December 16, 2002, Appellant responded with modifications to the proposed Findings of Fact. On June 12, 2002, OHR transmitted to the parties the CAO's June 5 decision, which relied upon the included final Findings of Fact, developed by the Designee, and reviewed/modified by the parties. In the Appellant's appeal to the Board, there are no allegations of errors of either omission or commission in the Findings of Fact.

In the CAO's Conclusions, the CAO notes that the Grievant objected to the participation of the Designee, raising the issue of "command influence" due to the fact that the LERM is the Designee's supervisor, and the LERM was involved in the selection process, and the decision not to provide the Department with examination scores. The CAO rejected this objection, noting that while OHR had ultimate responsibility for the decision not to release candidates's examination scores, there was no evidence that the LERM made the decision. Further, the CAO noted an earlier grievance decision where the CAO determined that OHR was not involved in the selection process. The CAO concluded, "Accordingly, there is no reason for the CAO's designee to recuse them self from conducting the grievance meetings or administering the grievance process in the instant case."

In Appellant's appeal to the Board of the CAO's decision, it is requested that the Board conduct a hearing, contending that the CAO's failure to appoint an outside fact finder to conduct

the Step III grievance meeting denied Appellant fair treatment. In this regard, Appellant notes that OHR issued the personnel bulletin which stated that the examination scores would not be released to the Department. In support of Appellant's contention that the Step III process used in the instant case was inherently unfair, reliance is placed on the decision of the Maryland Court of Special Appeals in the matter of *Daniel C. Mayer v. Montgomery County, Maryland*, 143 Md. App. 261, wherein it was concluded, in pertinent part, that it was improper for the CAO to designate a Step III hearing officer who was a subordinate of the Step II responder. (See also Court of Special Appeals decision in *Montgomery County, Maryland v. Nancy A Hudson*, No. 216, September Term 2000)

It must be noted at the outset that the facts of the instant case are distinguishable from *Mayer* and *Hudson*, where the Court specifically was dealing with a circumstance where the OHR fact finder was a subordinate of the Step II responder, who was the OHR Director. In the instant case, the Designee was not a subordinate of the Step II responder, which was the Department Chief. Notwithstanding this distinction, the Board recognizes the principle in *Mayer* and *Hudson* that the Step III process must be free from "command influence," and that the Designee was subordinate to OHR managers who had a role in determining that examination scores would not be released. However, in the Board's view, in the instant case, there is not a basis for either remanding the case for the conduct of a new Step III process by someone who is not a subordinate to OHR managers, or the conducting of a hearing by the Board. In support of its request for a hearing, Appellant references only the issue of the decision not to release the candidates examination scores to the Department, a fact that the Appellant relies upon for contending that the examination process was defective. There is no issue of fact about the contention that the examination scores were not released, only an issue of law as to whether this rendered the examination flawed. In the absence of any material issues of fact, the Board rejects Appellant's request for a hearing.

It should also be noted that in the instant case, the fact finding process involved, at a minimum, eight days of "hearing," and extended over almost one year. Both parties had an opportunity to review and modify the findings of fact document, and Appellant makes no contentions as to the accuracy of the final product. In the Board's view, to engage in any further fact finding effort in this matter would not contribute to effective and efficient processing, noting particularly that the Board's view of the record is *de novo*.¹

¹ Following the *Mayer* and *Hudson* decisions referenced above, and the Board's remands of cases for new Step III processes by persons not subordinate to the Step II responder, the County adopted the practice of using persons who are not County employees to conduct the Step III fact finding process.

BACKGROUND

On June 23, 1999, OHR issued a Personnel Bulletin (Bulletin) for a “1999 Promotional Examination for the Rank of Police Lieutenant.” As a result of the examination process, OHR certified an eligibility list with 17 “Well Qualified” and six “Qualified” promotional candidates. The Appellant was in the “Well Qualified” category, with an examination score of 87. Not at issue in the instant case were the selection from the list of five candidates in February 2000, and three in July 2000, which left ten Well Qualified on the eligibility list in going into 2001. In February of that year, the Chief of Police promoted three candidates, and in May, the Chief of Police promoted one additional candidate to Lieutenant. Two of the 2001 promoted candidates had lower examination scores than the Appellant, one with an 86 and one with an 85. The Appellant’s grievances, and the allegations contained in the instant appeal, were responsive to Appellant’s non-selection in the 2001 selections.

Relevant Prior Case

On January 9, 2002, the Board issued a decision in the matter of *Blank and Montgomery County Government*, Case No. 02-04. *Blank* concerned allegations directed at the same 1999 Lieutenant’s examination that the instant appeal is directed at, and some of Appellant’s allegations rely on the Board’s findings in *Blank* of flaws in that examination process.

ALLEGED DEFECTS IN THE PROMOTIONAL PROCESS

Set forth below are the findings of fact, positions of the parties, and the Board’s analysis and conclusions as to each of the Appellant’s allegations raised in the appeal to the Board.

1. The rating committee (Committee) considered documents that should have been removed from the Appellant’s file, specifically, a 1994 disciplinary action.

Included in the examination/rating process was the appointment by the Department Chief of a Committee composed of seven Department majors and lieutenants who would review and consider the candidates rated Well Qualified from the examination, and submit to the Chief names of those candidates recommended for promotion to Lieutenant. As a part of their review, the Committee reviewed the personnel and internal affairs files of the candidates. It is undisputed that Appellant’s internal affairs summary contained reference to a 1994 disciplinary action, and that, pursuant to the Personnel Regulations, the memorandum containing this reference should have been purged from the Appellant’s file after five years.

Appellant contends that in addition to the fact that having this material in Appellant’s file violates the Personnel Regulations, it also permitted the Committee to consider charges which were ultimately not sustained, which were highly prejudicial to Appellant. While acknowledging that this information should have been purged from Appellant’s personnel file, the County contends that the Committee would have learned about the disciplinary action through a review of internal affairs summaries. “Accordingly, the Appellant was not harmed by the error.” The County also references the fact that under the Law Enforcement Officers’ Bill of

Rights (LEOBR), unsustained findings are purged from Internal Affairs files after three years, and contends, “Since the charge was sustained, the Department had no obligation to remove it from Appellant’s Office of Internal Affairs Summary.”

The Board dealt with an identical issue in *Blank*, wherein we stated, “If the Department is to have a promotion procedure where great weight is given to personnel files, it is incumbent on the Department to assure that the files are essentially consistent with applicable regulations.” Accordingly, in the Board’s view, permitting the Committee’s consideration of the disciplinary action was violative of regulations, and improper.

2. The Committee’s review of candidates internal affairs records violates the LEOBR.

It is undisputed that the Committee review of candidates included review of internal affairs summaries. Appellant cites *FOP, Montgomery County Lodge No. 35 v. Mehrling*, 343 MD. 155, 181, 650 A.2d 1052 (1996), where the Court stated,

To be sure . . . (LEOBR) limits access to the internal investigation files to the affected officers, and then only to exculpatory information, and does not expressly provide for access by anyone else. It is also true that this section requires execution of a confidentiality agreement, restricting disclosure to purposes of defending the officer These provisions deal only with the rights of the officer and serve as protection for them.

Appellant contends that there are no Maryland court decisions which authorize disclosure of internal affairs records to members of a selection committee.

The County contends that the Appellant failed to raise the review of internal affairs summaries at the time of the Step III meeting, a contention that the Appellant disputes. On the merits as to this allegation, the County contends that the Personnel Bulletin announcing the examination disclosed to the Appellant that internal affairs summaries and disciplinary records would be reviewed in the promotional process, accordingly, “Appellant implicitly consented to the disclosure of Appellant’s disciplinary records and Office of Internal Affairs summaries by electing to apply for promotion.”

The Board rejects the County’s contention that this matter was not raised in the Step III process, noting that on p. 26 of the CAO decision, under “Grievant’s Position,” the last line of the fifth bullet, states, “Disclosure of the memorandum violates (LEOBR), in that OIA files are confidential.” As to the merits of Appellant’s allegation concerning the LEOBR, the Board rejects the interpretation that it bars Department management from having access to and considering internal affairs records in deciding who will be promoted to management positions. Relied upon are portions of the LEOBR that describe procedures to be followed in the investigation or interrogation of an officer, including the officer’s right to the investigative file. It stretches credulity to conclude that the statement of such rights and procedure stands for the principle argued, that Department management cannot review and consider material in the internal affairs file in determining whether someone should be promoted.

Based on the above, the Board rejects this contention of the Appellant.

3. The Committee's review of candidates internal affairs records violates the Maryland Public Information Act.

As stated above, it is undisputed that the Committee review of candidates included review of personnel files and internal affairs summaries. Appellant cites provisions of the Maryland Public Information Act that specify who shall be permitted to inspect personnel records, and contends that it is limited to persons who supervise the work of the individual, which would exclude all but one member of the Committee.

The County contends that personnel records are available on a "need to know basis" to the appointing authority, and the Chief, who was clearly the appointing authority, constituted the Committee to be part of the appointing process.

The cited portion of the Maryland Public Information Act provides that the custodian of personnel records shall permit inspection by, "an elected or appointed official who supervises the work of the individual." The Appellant would have the scope of the grant very literally construed, that is, limited to persons who very directly supervise, presumably day-to-day, the person in interest. The Board rejects this interpretation. The Chief supervises the whole Department, including the work of all officers, and the Chief appointed the Committee members, each of whom is a Department manager, to perform tasks related to the Chief's responsibility to promote selected persons to the rank of Lieutenant. In the Board's view, these circumstances arm the Committee with the authority to review candidates' personnel records.

Based on the above, the Board rejects this contention of the Appellant.

4. The County Personnel Regulations limit access to personnel records to the Chief.

The Appellant notes that the Personnel Regulations states that personnel records are confidential and available on a "need to know basis," and specifies to whom they may be disclosed: (1) the employee's supervisor; (2) the CAO or a designee; (3) the Personnel Director or a designee; (4) a member of the Board or a designee; (5) Personnel Office staff; and (6) appointing authorities considering the employee or applicant for appointment, transfer or promotion. Appellant contends, "It does not authorize disclosure to the appointing authority's designee." The County contends that "Appointing authority" is not specifically defined, and that the Chief, who was the appointing authority, constituted the Committee to be part of the appointing process.

The Board dealt with this identical issue in *Blank*, where we stated,

The Appellant is correct that a strict literal reading of the Personnel

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

In *Blank*, the Board also noted that the Maryland Court of Special Appeals in *Montgomery County, Maryland v. Joseph R. Anastasi, at al*, 77 Md.App. 126, 549 A.2d 733 (Anastasi I); *Joseph Anastasi v. Montgomery County*, 123 Md.App.472,719 A.2d 980d (Anastasi II); and *Montgomery County, Maryland v. Edward A. Clarke*, reviewed without challenge to their ability to do so, promotion process where committees of high ranking officers reviewed personnel records.

Based on the above, the Board rejects this contention of the Appellant.

5. Consideration of only five of the seven managerial dimensions was improper.

It is undisputed that the Committee members considered only five of the seven "managerial dimensions" that were listed in the Personnel Bulletin announcing the selection process for Lieutenants. The Appellant relies on the Board's findings in *Blank* as to this variance, where it was concluded,

The Bulletin describes the process by which candidates will be selected for promotion Candidates were clearly informed of seven dimensions, and the subsequent unexplained decision to reduce the dimensions to be considered to five, was contrary to the stated design of the selection process.

Accordingly, as was the finding in *Blank*, the Board concludes that the Committee's consideration of only five of the seven announced managerial dimensions was violative of regulations, and improper.

6. The fact that a Committee members assisted a candidate with preparing for the examination created an appearance of unfairness and bias.

This allegation relies on the Board's finding in *Blank* that it was undisputed that prior to their appointment to the Committee, two members had provided training assistance to some of the candidates. The Board concluded,

. . . the Board is of the view that utilizing persons who had performed this training clearly created a situation where, at a minimum, the appearance of bias existed. These two committee members were being asked to rate all candidates with the

same degree of fairness, when they had at least a “vested interest” in the success of those they trained. There are inherent, but acceptable problems created by the fact that Committee members knew and had supervised some candidates, but this is unavoidable. An avoidable problem was using the two members who had recently given special attention to certain candidates.

Accordingly, as was the finding in *Blank*, the Board concludes that the use as Committee members officers who had recently provided training and assistance to certain candidates was improper.

7. Appellant was not given equal and fair consideration during the selection process.

In support of this allegation, Appellant contends that Appellant was prejudiced by the fact that one Committee member used notes that Appellant had made for the January and April 2000 selection process for the April 2001 process, resulting in a failure to consider Appellant’s November 2000 performance evaluation, where Appellant was rated excellent and received many complimentary comments; and that the same Committee member failed to consider positive information about the Appellant that were reflected in earlier notes. Appellant further contends that the implementation of the selection process was flawed by:

- Committee members consideration of information that was not in the documents they reviewed;

- One-on-one conversations between one of the Committee members and other members regarding the selection process;

- The Department Chief’s use of six of the seven managerial dimensions for the first and second selections from the 1999-2001 eligibility list, while considering only five of the dimensions for the third and fourth selections;

- Variances in what Committee members considered in deciding what candidates to recommend for promotion. Specifically, the Chief did not consider education, date of hire or time in rank, while some Committee members considered each of these factors;

- Committee members considering material in personnel files that should have been purged because of it was more than five years old;

- The failure of one Committee member to retain notes for several candidates.

The County does not dispute the accuracy of the allegations made by the Appellant, contending that the Committee was given extensive training concerning the process to be followed, and were required to use the same criteria to evaluate all candidates. The County further contends that identified mistakes of some members were harmless errors, and there is no evidence that the Appellant was impacted more than any other candidate, or that the errors

resulted in the Appellant not being selected.

In *Blank*, the Board dealt with an allegation that the selection process lacked guidelines and standards, as evidenced by the same sort of “mistakes” reflected in the extensive collection of notes made by the Committee members. The County’s response in the instant case focuses on efforts made to assure that the Committee members were well prepared for their task. However, the Appellant’s contention in the instant case does not go to the lack of guidelines, but to evidence reflected in the notes of Committee members of occasions when they were not in strict compliance with the letter and spirit of the instructions.

The Board recognizes that assuring “zero defects” in such a multifaceted selection process as the one at issue in the instant case is exceedingly difficult, and, possibly, impossible. Seven Committee members were reviewing extensive material on 17 candidates. While they were given training and provided with numerous tools to assist them, it is not surprising that a post-event review of all of the notes taken would disclose questions as to whether there was strict compliance with all of the requirements. The Board does not believe, nor have the courts indicated, that a promotion process is to be deemed flawed just on the basis of relatively minor/few variances from “perfection.” In *James P. Hennessy and Montgomery County Government*, Case No. 02-15 (Sept. 26, 2002), the Appellant made allegations analogous to what is found here, and placed reliance on the above-referenced Court of Special Appeals *Anastasi I* decision. The Board said in *Hennessy*,

In these cited cases, the contentions primarily went to the format of the process utilized by the County to provide recommendations to the selecting official, e.g., the failure to consider examination scores. As set forth in Appellant’s filing with the Board, Appellant’s contentions in the instant case do not dispute the process outlined in the Bulletin, but go to whether the Committee members sufficiently adhered to that process to satisfy a standard of fairness.

The question then is whether the variances in the instant case are of such a quantity/quality to have denied the Appellant such required fairness.

Most of the above listed allegations concern the Committee members review of the personnel records, or, more accurately, what was considered in that review. In the Board’s view, if personnel records are to be reviewed as part of an examination process, it is incumbent on the County to assure that the files have been purged of material that should not be there, and that included are all material that should be there. It is undisputed that the record in this case reflects an assortment of variances from this requirement, which the Board finds improper. This would

also go to one Committee member relying on outdated notes rather than doing an updated review of personnel records.

The Board has separately dealt with the considering of only five of the seven managerial dimensions. The alleged one-on-one conversations between one of the Committee members and

other members, and the failure of one Committee member to retain notes appeal to be too inconsequential to find improper. As to the variances between Committee members on whether they considered education, date of hire or time in rank, the Board spoke to this same allegation in *Hennessy*, and found no basis for finding this improper, concluding, “. . . these are, in the Board’s view, understandable and permissible individual approaches to the common task of determining by use of the dimensions the managerial capabilities of the candidates.”

Accordingly, the Board concludes that the failure to assure that the review of materials in personnel records was consistent with applicable rules and regulations was improper.

8. The failure to consider the candidates examination scores violated the merit law.

As described above, the examination scores are used to determine who is in the “Well Qualified,” and “Qualified” groupings. The examination scores are, however, not provided to the Committee, and, therefore, not considered in making recommendations to the Chief. Further, the examination scores are not made available to the Chief, and, therefore, not considered in the determination as to who would be promoted.

The Appellant notes that applicable law and regulation requires that personnel decisions be made on “demonstrated merit and fitness,” and “. . . on the basis of . . . abilities, knowledge and skills,” and that qualified employees have an opportunity to receive fair and appropriate consideration. Appellant acknowledges that while the Department is not required to follow rank order in selecting candidates for promotion, use of an alphabetical listing of all candidates who scored between 80 and 100 does not meet the mandates of law and regulations. Appellant contends that examination scores were the only objective data that actually measured managerial dimensions, and argues, “Because the Chief and the selection Committee members did not know the examination scores, their evaluations of the candidates were not based upon any consistent assessment of their relative abilities, knowledge and skills.” Accordingly, “Their decision making was not fair, rational or informed.”

The Appellant notes that in *Blank* and *David J. Falcinelli*, Case No. 02-06, the Board rejected the same contention made in the instant case, relying on the above-cited decision of the Maryland Court of Special Appeals in *Edward A. Clarke*, but contends that such reliance was misplaced because that decision is unreported, and therefore not precedential, and because in that decision, the Court recognized the importance of rank order when it stated, “rank order is entitled to careful consideration, but it is to be considered along with all of the other criteria applicable to the position being considered.”

The County contends that the procedure used was consistent with that described in the Bulletin, and notes the Board’s prior reliance on *Clarke* to endorse the procedure followed, i.e., withholding of the examination scores from the Committee and the selecting official.

As noted by the Appellant, in *Cage* and *Falcinelli*, the Board relied upon *Clarke* to find that withholding the examination scores from the Committee and selecting official do not render

the promotional process flawed. In those cases, the Board noted that test scores are a significant aspect of the selection process, specifically that they were the determinant of selecting candidates to be rated Well Qualified. “Once the Well Qualified candidates were identified by test scores, the Committee’s role was to bring to the rating process other criteria for promotion.” Applying *Clarke*, the Board noted that the Court specifically noted with approval systems where the selecting official can make a selection on a basis other than examination scores. Nothing argued by the Appellant in the instant case indicates that the existing precedent is incorrect.

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

9. Retroactive promotion with back pay is the appropriate remedy for the violations of Appellant’s merit system rights.

Appellant contends that retroactive promotion with back pay is the only appropriate remedy in this case, and such a remedy is consistent with Board precedent and court decisions. Appellant notes the Board’s reliance on *Andre v. Montgomery County Personnel Board*, 37 Md. App. 48, 375 A.2d 1149 (1977) for applying a “but for” test, granting retroactive promotion only where the evidence shows that but for the conduct at issue, the person would have been selected. Appellant contends that *Andre* is distinguishable from the instant case, because in *Andre*, the three grievants had applied for only three of the nine positions, and had rated only “qualified,” while the selectees were found to rated either “outstanding” or “well-qualified.” Further, the Appellant contends that the Personnel Board in *Andre* had only vague and undefined remedial authority, while the Board has expressed authority to order the remedy sought.

The Appellant further contends that a remedy of prior consideration in the next selection would not provide relief, noting that the CAO did not render his decision until more than two years after the filing of the grievance, and that since the filing of the grievance, there have been fifteen promotions to the rank of lieutenant from subsequent eligibility lists. Finally, the Appellant argues that retroactive promotion would not give Appellant an unfair advantage over any other candidate, as those candidates who did not grieve waived their rights to object to the selection process; and that denying retroactive promotion with back pay disregards the Board’s obligation to protect the merit system, and invites future violations of the system.

The Appellant is correct that the Board’s practice, which is consistent with the Federal Merit System Protection Board, is to grant retroactive selections only where the evidence shows that but for the conduct at issue, the person would have been selected. As noted in *Blank*, the Court of Appeals in the *Clarke* decision affirmed this policy, stating,

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

It must first be noted that at the time of the selections which the Appellant complains about, there were ten Well Qualified candidates, including the Appellant. Three candidates were promoted in the first of the two selections, and one at the second selection, leaving six candidates, including the Appellant, not selected. The question then is whether the facts support a contention that but for the violations found, the Appellant would have been a selectee, rather than the four promoted.

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

1. Permitting the Committee to consider a disciplinary action which should have been removed from Appellant's file;
5. Considering only five of the seven managerial dimensions set forth in the promotion bulletin;
6. Use as Committee members officers who had recently provided training and assistance to certain candidates;
7. Failing to assure that review of materials in personnel records was consistent with applicable rules and regulations.

Of these four items, 5, 6, and 7, were systemic, having no identifiable effect on the Appellant more than the other candidates. Item 1, permitting the consideration of a disciplinary action that should have been removed from the file, had application only to the Appellant, but there is no showing that but for this transgression, the Appellant would have been selected. It should be noted in this regard that some Committee members did include the Appellant among those recommended for promotion, but Appellant was not selected by the selecting official, the Chief. Accordingly, the Board rejects the Appellant's contention that retroactive promotion is the appropriate remedy for the violations found.

As for other remedies specific to the Appellant, as Appellant could have been disadvantaged to some degree by the content of Appellant's personnel file, the Board finds appropriate that Appellant be granted priority consideration to the next available Lieutenant position, should Appellant participate in a promotion selection process. In such a circumstance, it is incumbent on the Department to assure that the content of the Appellant's personnel file is complete and consistent with all applicable rules and regulations.

With respect to the above-identified systemic flaws, in the *Blank* decision, the Board ordered that the Department take necessary steps to assure that promotion bulletins accurately reflect procedures to be followed and that procedures utilized are consistent with the bulletin; and to take necessary steps to assure that no one serves on rating committees that have had involvement in any candidates attempts to be promoted. The Board renews those instructions in the Order in the instant case.

ORDER

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

Case No. 04-05

DECISION AND ORDER

This is a Decision and Order of the Montgomery County Maryland Merit System Protection Board (Board) on Appellant from the decision of the Chief Administrative Officer, (CAO) denying Appellant's grievance concerning non-selection for promotion to the rank of Captain in the Montgomery County Department of Police (Department).

BACKGROUND

Pursuant to a Personnel Bulletin (Bulletin) issued on February 7, 2001, a promotional examination was conducted for the rank of Police Captain. The Bulletin provided that the results of the examination would be in effect for one year. The Appellant, then a Police Lieutenant, took the examination, receiving a total score of 85 percent, which ranked fifth among the eight candidates who, by virtue of examination score, were rated "Well Qualified."

The Bulletin provided as to the procedure for making promotional selection decisions, for a "Recommendation Committee" (Committee) designated by the Chief of Police, which would: interview the top five scoring candidates; evaluate the candidates' resumes, personnel files, OIA (Office of Internal Affairs) summary sheets, selection interviews and advocate comments; and make recommendations to the Chief regarding the best candidate(s) for promotion. As to the referenced "advocate comments," the Bulletin provided, in pertinent part,

3. The candidate must have a non-departmental community advocate and a departmental advocate, who are familiar with the candidate's work performance, present information in person, on the candidate's behalf.

As for the Chief's selection process, the Bulletin provided, as relevant,

7. The Chief of Police will review resumes, personnel files, OIA summary sheets, documentation from selection interviews and advocate comments for all

candidates considered by the Recommendation Committee. In making promotional decisions the Chief of Police will take into account the Department's commitment to a diverse workforce and equal opportunity principles, the extent to which the decisions will be consistent with these principles, as well as the candidate's ability to contribute to the organization and the community.

8. If six months or more have elapsed since a candidate's interview, he/she will be scheduled for a new interview.

One candidate, who was first on the eligibility list with a test score of 100 percent, was promoted to Captain in April 2001. Six remaining Well Qualified candidates were referred to the Committee for consideration for two Captain vacancies in March 2002.

The record reflects that the Appellant was promoted to Captain on September 8, 2002, but contends that this promotion should be retroactive to March 24, 2002, and that Appellant should be reimbursed all salary and other benefits due as a result of the revised date.

ISSUE

Was the selection process at issue in the instant case consistent with law and regulations, and otherwise proper?

ALLEGED DEFECTS IN THE PROMOTIONAL PROCESS

Set forth below are the findings of fact, positions of the parties, and the Board's analysis and conclusions as to each of the Appellant's allegations raised in the appeal to the Board.

1. The Appellant was prejudiced by the Chief's consideration of the Appellant's interviews and Advocate presentations from April 2001.

The Appellant contends that the Chief's notes and the Chief's testimony during the grievance fact finding process indicate that in reaching the Chief's decision on the March 24 selections, the Chief considered information resulting from the April 2001 presentation of Appellant's community advocate, and the Chief's negative reaction to that presentation. The Appellant contends that the Bulletin provision, "If six months or more have elapsed since a

candidate's interview, he/she will be scheduled for a new interview," indicates that only the second interview was to be considered during the March 2002 selection process. As argued by the Appellant, "New" means "something other than the former or old," "different from one of the same category that existed previously."

The County contends that the findings of fact do not support the allegation that the Chief relied on statements made by the Appellant's community advocate during the April 2001 selection process in connection with the 2002 selections, and, moreover, there is no support for

the contention that the Chief was prohibited from doing so.

The Board rejects the interpretation and application that the Bulletin requirement for a new interview if six months had elapsed since a candidate's interview precludes the Chief from considering information gleaned from an interview that took place more than six months ago. There is nothing in the Bulletin that indicates more than its specific wording, that is, that a candidate will get a new interview if six months or more have elapsed since the previous one. Presumably, such a required re-interview would provide an opportunity for the Committee and Chief to have the benefit of updated information. Not accepted by the Board is an additional intent of having the selecting official purge from his mind information gleaned from the initial interview.

Based on the above, the Board rejects this contention of the Appellant.²

2. The Chief's selection decision was based in part on erroneous information.

It is undisputed that during the grievance fact finding process, the Chief testified that one of the reasons the Chief did not select the Appellant was the belief that Appellant had no direct supervisory responsibility, nor experience in filling out performance evaluations. Appellant contends that the Chief's belief was not accurate, in that while assigned to a position at the Police Academy, Appellant supervised three lieutenants, and filled out performance evaluations.

The County contends that the evidence indicates that the Chief based the Chief's selection on test scores, and was not required to abide by the consensus recommendations of the Committee. The County argues, "The fact that (the Chief) may have been mistaken in the belief that the Appellant had no direct supervisory experience and no familiarity with filling out evaluation rating forms in Appellant's position at the Training Academy does not render the process unfair."

2. Having rejected the contention that the Chief was barred from considering information from the initial interview process, the Board denies the Appellant's request for a hearing, which was based on the existence of an alleged factual dispute as to whether the Chief made a statement that the Chief's dissatisfaction with Appellant's community advocate in the 2001 selection was a reason for not selecting Appellant in 2002.

While the Chief did select the two candidates with the highest scores, the fact finding process discloses that the Chief believed and considered that the Appellant lacked supervisory experience and responsibilities in Appellant's assignment at the Academy, which was not, in fact, correct. Certainly, a promotion process should be constructed so as to provide the selecting official with accurate information on the experience and qualities of candidates. In the Board's view, the process in the instant case was clearly so constructed. There was first a comprehensive examination, followed by reviews of all recorded information, and interviews of candidates and their internal and community advocates. There is no allegation of any systemic flaws in the procedure. While the goal should be a full and accurate account of a candidate's experience, it is unrealistic to require that the selecting officials information be totally free of errors of either omission or commission. In the instant case, in the Board's view, the fact that the Chief was incorrect on this one aspect of the Appellant's experience does not render the procedure flawed, and does not provide a basis for finding merit to the Appellant's grievance.

Based on the above, the Board rejects this contention of the Appellant.

3. In making the Chief's selection, the Chief did not take into account that officers holding the same rank may have different duties and responsibilities.

Appellant notes that the Department Personnel System for Police Officer Class Positions states, ". . . the Police Personnel Plan recognizes that police officers holding the same rank may have differing duties and responsibilities." However, the Chief stated as a reason for not promoting the Appellant that Appellant did not have the problem solving experience in the field that other candidates did, because Appellant was assigned to the Academy. In support of the alleged significance of this, Appellant notes that after the March 24 promotions, the Chief transferred the Appellant to a district to give Appellant problem solving experience and improve Appellant's chance for promotion, and five months later, the Chief promoted the Appellant to Captain.

The County contends that it was the Chief's general assessment that Appellant's experience at the Academy was not as valuable in the context of the managerial dimensions for the rank of Captain as that of other candidates who worked in the field.

In the Board's view, an internal policy that recognizes that police officers holding the same rank may have differing duties and responsibilities does not preclude a selecting official from considering the actual experience of competing candidates in making a selection. Rather, as the wording states, a selecting official must recognize the existence of differing duties and responsibilities, but is not compelled to ignore the relevant differing experience of candidates.

Based on the above, the Board rejects this contention of the Appellant.

4. The March 24, 2002, promotions were illegal because the eligibility list had expired.

The Appellant contends that County Personnel Regulations require selection of an individual for promotion from an eligibility list, and that the eligibility list in the instant case

expired on March 21, 2002, three days prior to when the disputed promotions took effect. It is undisputed that the promotion list expired on March 21. The evidence is also clear that the Committee transmitted its recommendations to the Chief on March 18, that the Chief made the selection on the same day, and that the promotions resulting from those selection were effective on March 24.

As to this contention, the County raises as a procedural bar to its consideration that it was not raised during the grievance process before the CAO. As to the merits of the contention, the County contends that “The fact that the promotions did not become effective until March 24 does not render the promotions illegal.” “The Appellant was not prejudiced because the promotions became effective March 24 and it does not provide a basis for any of the relief sought by the Appellant.”

A review of the record substantiates the County’s contention that this allegation was not raised during the grievance process, and the Board ordinarily will not consider such a matter. However, as the allegation goes to compliance with the terms of the Bulletin, we will address it. The Bulletin specifies as to the “Use of Eligibility List,” that it will be in effect for one year. With respect to the selections at issue, all aspects of the list’s use, including the Chief’s selection, were completed within one year. The fact that the effective date of the promotions was three days later does not constitute a violation of the terms of the Bulletin.

Based on the above, the Board rejects this contention of the Appellant.

5. The Department failed to use the personnel rating categories mandated by the County Personnel Regulations.

The Appellant notes that while the County Personnel Regulations effective October 7, 2001, require that employees be rated using four rating categories (exceptional performance, highly successful, successful, and does not meet expectations) and that they be given an overall rating, all of the performance evaluations reviewed during the selection process at issue rated candidates according to three categories (exceeds requirements, meets requirements, and does not meet requirements), and they did not receive an overall rating.

The County does not dispute the accuracy of this contention by the Appellant, but sets forth the circumstances to support the contention that the failure to prepare performance evaluations using the new evaluation form provides no basis for finding the selection process defective. In this regard, the County notes that on August 6, 2001, the Office of Human Resources issued a memorandum instructing departments that if an employee was in the middle of a rating period, the department should complete the remainder of the employee’s evaluation period under the old evaluation system, and then develop a new plan for the next review period in compliance with the new Personnel Regulations. “On October 7, 2001, the effective date of the Personnel Regulations, the (Appellant) was mid-year in his evaluation cycle and was not due to be evaluated until March 2002.” “Therefore, the Department maintains that it properly used the old evaluation procedure in accordance with the OHR directive.” The County further contends that as the performance evaluations that the Department prepared for promotional candidates after October 7, 2001, all used the old performance evaluation forms, the Appellant

was treated the same as the other candidates.

The process of considering the record of the candidates included a review of their personnel files, which would, of course, include their most recent performance evaluation. There was no requirement that each candidate have a new evaluation consistent with the recently revised Personnel Regulations. Moreover, OHR, which issued the revised Personnel Regulations, effectively temporarily modified those regulations by instructing departments to complete the remainder of the employee's evaluation under the old evaluation system. Finally, as argued by the County, there is no demonstrated impact on the Appellant by virtue of the fact that Appellant, and other candidates, were considered for promotion on the basis of a four rather than three level rating system.

Based on the above, the Board rejects this contention of the Appellant.

ORDER

On the basis of the above, the Board denies Appellant's appeal of the decision of the Chief Administrative Officer denying Appellant's grievance over Appellant's March 24, 2002, non-selection for promotion to the rank of Captain in the Montgomery County Department of Police, and denies Appellant's request for a hearing.

Case No. 04-10

DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant from the decision of Montgomery County, Maryland, Chief Administrative Officer (CAO), denying Appellant's grievance over the 2002 promotion process used by the Montgomery County Fire and Rescue Service (MCFRS) in the selection Fire/Rescue District Chief.

FINDINGS OF FACT

Background

In June 2002, MCFRS issued a vacancy announcement for the position of Fire/Rescue District Chief for Strategic Planning and Research. The vacancy announcement was to have closed on July 11, 2002. Sometime between the period of issuance and closing of the vacancy announcement, MCFRS revised the vacancy announcement. The revision to the announcement was related to the deletion of the position classification as a "field" position and extended the closing date to July 18, 2002. All applications submitted in response to both announcements were to be considered by the promotion board, and Appellant's application was submitted timely on July 17, 2002. The vacancy announcement made no reference to the requirement of a college degree. The classification specification for Fire/Rescue District Chief position states the

completion of 60 hours at an accredited college is a minimum qualification for the position.

The promotion board is a four-person standing committee chaired by the Deputy Department Chief. Two members of the promotion board are appointed every six months on a rotating schedule from the ranks of Assistant Chief and District Chief. The promotion board met on July 22, 2002, to review all applications from the *Well Qualified* category on the eligibility list. There were twelve such applications.

Selection Process

The promotion board did not sort the twelve applications by those who had and those who did not have college degrees. However, for those applicants who had college degrees, the promotion board gave consideration to, among other things, the nature, type, and level of degree the applicant possessed. There were four such applicants. Upon completion of its review of the applications, the promotion board referred the names of three applicants to the hiring official, the Department Director, for consideration. All three were from among the four applicants who had college degrees.

The Department Director upon receiving a list of applicants, all of whom possessed college degrees, then requested the names of all other applicants who possessed college degrees. This resulted in a fourth application being forwarded to the Department Director. A candidate was ultimately selected from among the three candidates originally referred.

On September 9, 2002, Appellant wrote to the Acting Director, Office of Human Resources for the County (the Acting Director) expressing concern that the referral and selection process may have been conducted in a manner not consistent with the County's Merit System, the County's Code, Personnel Regulations, and appropriate administrative procedures. Specifically, Appellant advised the Acting Director that Appellant had become aware of the fact that only those applicants with college degrees had been referred. On October 11, 2002, the Acting Director responded to Appellant's letter confirming the candidates referred and advised Appellant that the Department Director had acted appropriately.

Grievance

On October 30, 2002, Appellant filed a grievance regarding the filling of the advertised position of Fire/Rescue District Chief. In a decision dated February 20, 2004 (signature is dated February 19, 2004), the CAO denied Appellant's grievance. On March 4, 2004, the Appellant filed an appeal from the CAO decision dated February 19, 2004, denying Appellant's October 30, 2002, grievance related to the promotion process for the position of MCFRS Fire/Rescue District Chief.

ISSUE

Did the County unfairly impose an educational requirement of a college degree for the position of Fire/Rescue District Chief?

POSITION OF THE PARTIES

Appellant

Appellant contends that the hiring official, Department Director unfairly imposed an educational requirement beyond that specified by the classification specification, i.e. that of a college degree, for the position of Fire/Rescue District Chief. Appellant bases this contention on the fact that only applicants for the position who held college degrees were referred by the promotion board to the hiring official for consideration. Upon receipt of the list of candidates referred by the promotion board, the hiring official then requested the names of all applicants who held college degrees. Appellant alleges that the Department Director violated Montgomery County Merit System Principles and Montgomery County Personnel Regulations when the Department Director determined that success in the position would be best served when the skills required for the position had been obtained by college degree.

County

The County contends the MCFRS acted appropriately and in accordance with the County Charter, applicable laws, regulations and procedures. The County further contends that Appellant received full and fair consideration for the Fire/Rescue District Chief position. The County bases its position on Sections 7-2(a) and (b) of the County Personnel Regulations which provide that:

- a) Consistent with equal employment opportunity policies, the department may choose any individual from the highest rated category; and
- b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.

The County asserts that the selecting official exercised appropriate discretion in the use of the authority granted in Section 7-2(a) and that the Department Director was justified in considering only applicants with college degrees based on the Department Director's determination that a candidate with a college degree was more likely to have acquired the skills and abilities necessary to perform the duties of the position.

ANALYSIS AND CONCLUSIONS

Appellant has over sixteen years of service with the MCFRS, and has risen through the ranks beginning as a Firefighter, to Master Firefighter, to Appellant's present position as Captain, through various promotions. Appellant does not possess a college degree. Appellant does, however, meet the class specification requirement of the completion of 60 semester hours at an accredited college. Appellant was certified as among the *Best Qualified* applicants on the eligibility list for the Strategic Planning and Research District Chief position.

The promotion board reviewed all applicants in the *Best Qualified* category and selected three candidates for referral. It is undisputed that all three candidates possessed college degrees; however, there is no indication that the promotion board deliberately selected the three candidates referred on the basis of the possession of college degrees. Additionally, there is no indication that the promotion board considered those applicants who held Bachelor's degrees to be better qualified than those who did not, only that the three best qualified candidates happened to possess Bachelor's degrees. For example, if the promotion board had been in a position to refer five rather than three candidates, there is no indication that only those possessing Bachelor's degrees would be referred (in this case resulting in only four candidates being referred) or that other candidates would be referred only if there were not a sufficient number of degreed candidates to meet the required number to be referred.

The selecting official who received the names of the three applicants noted all possess college degrees and elected to request the names of all candidates who possessed college degrees. The Department Director did so on the basis of Department Director's personal conclusion that obtaining a four-year degree was a reasonable predictor of success in the Fire/Rescue District Chief position and an indication that the candidate had the discipline needed to perform the duties of the position. There is no indication in the record nor does there appear to be any basis in fact to support or justify this conclusion. Additionally, the vacancy announcement made no reference to any such requirement for the position. Finally, the class specification for the position does not contain such a requirement.

Montgomery County Personnel Regulations, Section 27-2(b) states the County's promotional program must provide:

- (1) general notification of promotional opportunities; and
- (2) full and open consideration of employees for higher level positions.

The County's assertion that selecting officials are free to select from among any of the *Best Qualified* candidates is valid, so long as all the candidates are given fair and equal consideration for the position. While it cannot be determined with absolute certainty that the promotion board, in giving consideration to the college degrees held by some candidates, failed to give fair and equal consideration to all candidates, it is abundantly clear that the selecting official did not do so. By electing to consider only those candidates with college degrees, the selecting official effectively shut out any candidate who lacked a college degree from consideration.

It is the conclusion of this Board that the selecting official failed to provide full and open consideration of employees for higher level positions when selecting official elected to "consider any additional candidates on the list who held a Bachelor's degree", without giving consideration to any other applicants not among the three originally referred candidates.

The Board finds a critical factor for its decision of the CAO's own decision on

Appellant's grievance. The decision states that the Appellant had the opportunity to emphasize Appellant's qualifications. Specifically, the last paragraph of Section 3., states (in pertinent part) "A candidate whose **experience, education, or training was especially relevant to the particular position** would be expected to indicate that on the [*Request for Promotion*] form." (emphasis added) By requesting only those candidates who had college degrees, the selecting official denied the Appellant, among others, that opportunity because Appellant's application was not forwarded solely because Appellant did not have a college degree.

This is clearly an unfair imposition of an educational requirement not necessary to the position. In fact, the County made no effort to impose positive education requirements at the time the position was announced, and the Board cannot find a justification for applying such a requirement to the evaluation of the candidates' applications.

The Board considered Appellant's request for a hearing and determined, having found for the Appellant and there being no material issues of fact, the Board denies the Appellant's request.

DECISION AND ORDER

On the basis of the foregoing, the Board grants Appellant's appeal from the decision of Montgomery County, Maryland, Chief Administrative Officer (CAO), denying Appellant's grievance over the 2002 promotion process used by the Montgomery County Fire and Rescue Service (MCFRS) in the selection Fire/Rescue District Chief. Accordingly, the Board denies Appellant's request for a hearing as not required and finds as follows:

- (a) Appellant was disadvantaged by the selecting official's decision to consider only those individuals who possess college degrees when that educational requirement is not mandatory for either the class specification or the position because it is an improper promotion practice in violation of Montgomery County Personnel Regulations, Section 27(b)(2) regarding fair and open consideration of employees for promotion;
- (b) In as much as there has not been a determination of wrongdoing or flaw in the process employed by the promotion board; and since the selection was made from among the three candidates originally referred by the promotion board, the Board finds there is no basis for rescinding the promotion selection.

On the basis of the foregoing, the Board orders as follows:

- (a) The County is ordered to give priority placement consideration to Appellant for the next three promotion opportunities. The Board intends "priority placement consideration" to mean the automatic referral of Appellant for the next three promotion opportunities for which the Appellant is among the *Best Qualified* candidates, or Appellant's selection for promotion, whichever comes first.

- (b) With respect to Appellant's request for attorney fees, Section 33-14, *Hearing authority of the Board*, 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." Inasmuch as the Appellant has prevailed to the extent that the Board has concluded that the promotion process used in the selection of District Chief, Office of Strategic Planning and Research, Appellant is authorized to request attorney fees, pursuant to the above described procedures.

Case No. 04-12

DECISION AND ORDER

This is a final decision of the Montgomery County, Maryland, Merit System Protection Board (Board) on Appellant from the decision of the Chief Administrative Officer (CAO), denying Appellant retroactive promotion to Police Captain, and back pay, as a remedy of Appellant's grievance over Appellant's non-selection for promotion to the rank of Captain.

FINDINGS OF FACT

Examination and Promotion Process

As a result of the examination process for qualifying candidates for promotion to the rank of Police Captain during 2002-2003, the County Office of Human Resources (OHR) ranked eight candidates as "Well Qualified" (scores of 80 and above), and four "Qualified" candidates. The eight Well Qualified candidates had the respective scores of 100, 94, 94, 91, 89, 88, 87, and 82, with the Appellant having the fourth highest score of 91. The four Qualified candidates had scores of 77, 77, 74, and 73.

Pursuant to the provisions of the Personnel Bulletin establishing the examination process, following the examination, a Recommendation Committee (Committee), designated by the Chief of Police, interviewed Well Qualified candidates; and, reviewed personnel files for past performance evaluations, commendations, reprimands, disciplinary actions, and other pertinent information. As a result of this process, the Committee made recommendations to the Chief, who was the selecting official, regarding the best candidate(s) for promotion. On September 8, 2002, three candidates were promoted to Captain. They were the candidates whose test scores were 100 (first), 94 (one of two seconds), and 88 (sixth).

On March 7, 2003, the Committee submitted to the Chief a "Consensus Recommendation," which listed in a ranked numerical order, five candidates from the Well Qualified and Qualified, to fill Captain vacancies. Ranked first was the candidate with a test score of 89, and second, the Appellant, whose test score had been 91. On March 23, the first ranked candidate with a test score of 89 was promoted to Captain.

Defect in the Promotional Process

As noted above, the Committee's evaluation of the candidates included a review of the candidates performance evaluations, and that each candidates five most recent performance evaluations in their Personnel Files were to be available for the Committee's review. It is undisputed that the most recent Appellant's evaluation in Appellant's file was dated February 9, 2002, although Appellant had received an evaluation on January 29, 2003, that was not placed in Appellant's Personnel File. It is also conceded by the CAO, that the selectee's 2002 evaluation, which was completed in June of that year, was not in Appellant's Personnel File until March 7, 2003, the same date as the Committee submitted its Consensus Recommendation to the Chief. The CAO's conclusion as to this circumstance, which the Appellant does not contest, was,

I conclude that the Department violated its own process by waiting to complete (the selectee's) 2002 performance evaluation until (the selectee's) selection in March, 2003. . . . The Department did not immediately move to remedy this omission and instead waited until the very last minute to bring (the selectee's) file into compliance with the Bulletin. By doing so, the Department gave (the selectee) an advantage over the (Appellant) because the Committee did not review the (Appellant's) most recent evaluation that was completed prior to (the selectee's) March 2003 evaluation. Thus, the (Appellant) was not permitted to present the Committee with information concurrent with that of (the selectee) and Appellant was disadvantaged by not having Appellant's most recent performance evaluation available for the Recommendation Committee's consideration in March, 2003.

The CAO, in summary, stated,

The defect in the process is the Department's handling of (the selectee's) 2002 evaluation. Once it became aware that Appellant's evaluation was not properly in the file, the Department should have moved quickly to have it placed there, as it did with (another candidate's) performance evaluation. Instead, it delayed three months, during which time the (Appellant's) performance evaluation for the period February, 2002 - January, 2003 was completed, but not made available to the Committee members for their consideration. Thus, the Committee's review of (the selectee's) most recent performance evaluation created an inequity that disadvantaged the (Appellant).

Remedy

The CAO stated as the remedy for the defect found,

Based on the facts and conclusions discussed above, I reject the remedy sought by the (Appellant). To be retroactively promoted, the (Appellant) is required to show that but for the defect in the promotion process, Appellant would have been selected for promotion. This is, however, a basis for concluding that

Appellant was disadvantaged by the above described defect. Accordingly, I find it appropriate that Appellant be granted priority consideration for the next available Captain position should Appellant participate in a promotional selection process.

Subsequent Events

On March 23, 2003, the Appellant was temporarily promoted to the rank of acting commander, which is a Captain position, and held that position until the end of January, 2004. The Appellant retired from the Department, effective April 1, 2004.

Processing of the Grievance

The chronology of the processing of the Appellant's grievance over Appellant's non-selection in March, 2003, is as follows:

- | | |
|--------------------|---|
| April 1, 2003 | - Grievance filed. |
| September 24, 2003 | - The Step III meeting/hearing was completed. |
| October 17, 2003 | - OHR sent proposed findings of fact to the parties. |
| October 28, 2003 | - Appellant provides comments on the proposed findings of fact. |
| March 31, 2004 | - CAO issues his decision. |

The CAO's decision was issued five months after the Appellant responded to the proposed findings of fact, and one day prior to the effective date of the Appellant's retirement.

POSITION OF THE PARTIES

Appellant

- The appropriate remedy for the failure of the Department to adhere to established guidelines and procedures, despite the Board's repeated admonitions, warrants as a remedy retroactive promotion to Captain, and back pay.

- Priority consideration in the next promotional process is a meaningless remedy for the violations of the Appellant's merit system rights, because Appellant retired on April 1, 2004, the day after the CAO issued the grievance decision.

- The CAO's flagrant violations of the regulatory time limits for processing a grievance compounded the effects of the Department's violations of the Appellant's merit system rights, especially in grievances involving selection processes for high rank such as Captains, when many candidates are eligible or will soon be eligible for retirement.

- Once Appellant's detail to a Captain position ended in January 2004, Appellant had to retire or risk financial reduction in Appellant's retirement benefits. The delay in the CAO's issuing decision until the day before Appellant's retirement, knowledge of which was well known in the Department, denied the Appellant an opportunity to make an informed decision about whether to retire.

County

- The Appellant was not adversely impacted by the CAO's failure to comply with the regulatory time limits because no promotional selection process for the position of Captain took place while the case was pending, nor (as of the date of the County's response in the instant matter) has a promotional selection process for the position of Captain been scheduled. Appellant would have had to continue to remain employed for an undetermined length of time in order to benefit from the CAO's order of priority consideration.

- Board and court precedent is that to obtain a retroactive promotion and back pay, a candidate passed over in a flawed promotional process must establish that, but for the flawed process, the candidate would have been promoted. In this case, the Appellant voluntarily chose to retire during the grievance process, and has not shown that, but for the defect in the promotional process, Appellant would have been the candidate promoted. Therefore, retroactive pay and promotion is not an appropriate remedy.

ISSUES

1. What is the appropriate remedy for the flawed conduct in the promotional process?
2. What is the appropriate remedy for the failure to process Appellant's grievance in a manner consistent with applicable regulations?

ANALYSIS AND CONCLUSIONS

1. The Board agrees with the undisputed facts that there were defects in the Recommendation Committee's Promotional Process, as it relates to the Appellant. The Committee's evaluation of the candidates required a review of the candidates performance evaluations, as outlined in the Personnel Bulletin establishing the examination process. The Committee made the decision to have each candidates five (5) most recent performance evaluations, in their personnel files, as a part of their consideration in selecting the best qualified candidate. The Appellant's most recent evaluation was not reviewed by the Committee because Appellant's personnel file included only an evaluation dated February 9, 2002, despite the fact, Appellant received an evaluation on January 29, 2003. The Appellant's most recent evaluation was not included in Appellant's personnel file until March 7, 2003, after the Committee's selection process.

It is the Board's opinion that the Appellant was disadvantaged by not having the Recommendation Committee consider Appellant's recent performance evaluation. However, the Board concurs with the Chief Administrative Officer's remedy to give the Appellant priority consideration for the next available Captain position, if Appellant participated in a promotional

selection process to be a reasonable remedy for the defects in the Promotional Process.

The Board has long held, with judicial approval, that retroactive promotion as a remedy for defects in a promotional process is only appropriate where it is shown that, “but for” the defect(s), the grievant/appellant would have been the selectee. (See for example, James P. Hennessy and Montgomery County Government, Case No. 02-15; and Court of Special Appeals decisions in James P. Hennessy v. Montgomery County, and Montgomery County v. Edward A. Clarke, (unreported)). The Appellant makes no reference to the application of the Board’s “but for” test, instead asserting that priority consideration in the next promotional process is a meaningless remedy because Appellant retired on April 1, 2004, the day after the CAO issued the grievance decision.

In the Board’s view, the facts of the instant case do not support a finding that “but for” the flaws in the promotion process, the Appellant would have been the selectee. In this regard, while the Appellant had a higher test score than the eventual selectee, test score was not the basis of selection, but the basis for determining the well qualified group. Thereafter, the Recommendation Committee relied upon such considerations as a review of everything in the personnel files, interviews of candidates, and advocate comments. While we have found that the Appellant was disadvantaged by the failure to have Appellant’s last evaluation considered, there is no basis for concluding that “but for” that failure, Appellant would have been selected.

As for the Appellant’s contention that priority consideration was a meaningless remedy because of Appellant’s pending retirement, in the Board’s view, that is was not viewed as a persuasive. It was the Appellant’s decision to retire. The Appellant was not forced to leave Appellant’s position. In fact, the Appellant could have exercised the option of retrieving Appellant’s retirement documents on March 31, 2004, the day when Appellant received the grievance decision. The Appellant did have an opportunity to make an informed decision the day before Appellant retired.

Based on the above, the Board concludes that priority consideration was an appropriate remedy in the instant case, notwithstanding the Appellant’s decision to retire.

REDUCTION-IN-FORCE

Case No. 03-10

DECISION AND ORDER

This is the decision of the Montgomery County, Maryland, Merit System Protection Board (Board) on Appellant's appeal (Appellant) removing Appellant from a position due to a Reduction-in-Force

FINDINGS OF FACT

Background

In Fiscal Year 2004 budget cycle, 3 out of 18 Management Leadership Service II (Manager II) positions in the Department of Health and Human Services were identified for abolishment. Pursuant to Montgomery County Personnel Regulations 2001, ("MCPR"), Section 30-5(d), all incumbents of the Manager II class, including the Appellant, were issued a notice of intent to abolish the three positions, and provided with a priority placement consideration form for vacant positions at or below their current grade for which they met the minimum qualifications.

One employee, took a discontinued service retirement ("DSR"), and another employee took a regular retirement. No other Manager II's decided to take a DSR, or regular retirement, or exercised their priority placement consideration rights. As a result, it left one abolished but filled Manager II position, which meant that one Manager II incumbent had to be removed.

The Information Systems Manager, hired on June 17, 2002 was least senior; the Behavioral Health Operations Manager, (BHOM) hired on March 25, 2002, was second least senior, and Appellant hired on December 9, 1991, was third least senior.

Service Need Request

According to the testimony of Chief, Adult Mental Health and Substance Abuse became aware of the potential loss of the BHOM, the Chief went to the Director, Department of Health and Human Services, to express concerns about such a loss, and that there was no one on the Manager II list who had the level of experience needed. It was determined by the Director that a service need exception would be sought permitting the retention of the BHOM, notwithstanding that BHOM had less seniority than the Appellant. The Chief did the analysis for the request, considering the duties of the position and the qualifications necessary to perform them, and the qualifications of other employees. As to the latter, the Chief relied upon eight years of

employment within the Department, and some discussion with other senior leadership. The

Appellant never worked for the Chief.

On May 7, 2003, the Director requested in writing service need exceptions for the positions of Information Systems Manager,³ and the Behavioral Health Operations Manager position. The request had a brief description of the duties of the position, a description of the Chief's education and experience, and then states,

“The County’s public mental health service delivery system has been in crisis for several years. It has recently begun to stabilize as a result of additional County resources and consistent leadership for the past two years. It is vitally important that this consistency continue.

I believe that a service need exception is warranted based on the fact that the position . . . requires unique knowledge, skills and abilities that are not required for other Manager II positions in the class and based on the fact that it is essential to continue the progress the Department has made in stabilizing the public mental health system by maintaining the current leadership team.

We have conducted an analysis of the current Manager II’s in the Department and their qualifications and have determined that these skills cannot be acquired by other employees in the class within six months.”

On May 19, 2003, the Director, Office of Human Resources (OHR) approved the service need exception for the Information Systems Manager, but requested additional information regarding the Behavioral Health Operations Manager position. On May 22, the Director responded with a memorandum, prepared by the Chief, that contained an expanded discussion of the situation facing mental health, and the responsibilities facing the position. The memorandum noted the recent history in the troubles faced by the mental health and addiction treatment system, and the search for a Behavioral Health Operations Manager,” who was required to have “7 years of progressively responsible professional experience in the adult health and substance abuse area, 3 years of which were in a supervisory or executive capacity.” The request included the statement,

“In order to carry out the mission of these Steering Committees it is essential that the Department of Health and Human Services have someone who is knowledgeable in the mental health and addiction arena, has extensive experience in both areas, is recognized for their expertise and abilities in these areas, and is a capable, respected leader in the field of mental health and addiction.”

The memorandum then describes the BHOM’s experience and reputation in mental health and substance abuse, and the perceived critical need for maintaining strong and consistent leadership.

³ The Appellant does not contend that Appellant could have performed the duties of the Information Systems Manager.

By memorandum dated May 27, 2003, the OHR Director approved the service need exception for the Behavioral Health Operations Manager. The OHR's memorandum references contentions made in the DHHS Director's May 7 and 22 requests, and discusses at length two questions: 1. Has DHHS met its burden of proof that this position differs from others in the class and department; and, 2. Has DHHS provided evidence to substantiate the service need for the position. The OHR Director then addresses each of the two questions, and concludes,

“Based on the representations made by the Director of DHHS, a review of the KSA's required for the Behavior Health Operations Manager; a review of the class specifications for the MLS II Manager series; the need to maintain operational efficiency; and the need to maintain stability in the County's mental health system, I find that the Department's request is valid and meets the criteria set forth in the above-cited regulations.”

Termination

The Appellant received a letter on May 31, 2003, dated May 30, 2003, from the OHR Director, with formal notification that Appellant's employment with Montgomery County would terminate at the close of business on June 30, 2003. The OHR Director indicated that OHR would continue to work closely with the Appellant to seek an alternative to Appellant's termination.

Prior to Appellant's termination, Montgomery County found a position for the Appellant as a Manager III, in Public Health Services as the Administrator, Women's Health Programs. While constituting a demotion from Appellant's previous Manager II position, Appellant's status included retention of salary; and, priority consideration for announced position vacancies where Appellant met minimum qualifications for two years, or until Appellant had been successfully placed 3 times, whichever comes first.

APPLICABLE REGULATIONS

Personnel Regulations Section 30-2, Policy on RIF and furlough, subsection (a)(2), provides,

If RIF is necessary, a department director must base the transfer, demotion, or termination of an employee on one or more of the following:

- (A) service needs;
- (B) seniority; or
- (C) performance.

Personnel Regulations Section 30-7, Service needs exception, provides,

(a) A department director may request an exception to the use of inverse seniority to displace employees in order to maintain the employment of employees in certain positions within a class that require unique knowledge, skills, and abilities that are

not required for every position in the class and which cannot be acquired by other employees in 6 months or less.

(b) To request a service need exception, the department director must;

- (1) submit a written request for an exception to the OHR Director;
- (2) provide documentation that shows how the position differs from others in the class and department; and
- (3) substantiate the service need for the position.

(c) The OHR Director must approve or deny the request for service need exception after conducting a careful analysis of:

- (1) the tasks performed by the employees in the positions that are the subject of the request;
- (2) the required qualifications for the positions; and
- (3) the qualifications of the other employees.

POSITION OF THE PARTIES

Appellant

1. Pursuant to the provisions of PR Section 30-2, subsection (a)(2), seniority should have governed the determination as to who should be terminated, and, therefore, the Appellant should have been retained.

2. The approval of the service need exception leading to the retention of an employee in the position of Behavior Health Operations Manager, and the termination of the Appellant is inconsistent with applicable regulations, in that:

- In the absence of a job description, reliance was based on a job announcement, which may not have accurately reflected the duties of the position;

- The analysis supporting the service need request lacked required impartiality as it was performed by the Chief, and the OHR Director relied upon what was provided by the Department, rather than an OHR analysis:

- The Appellant, who had substantial seniority, was not given appropriate consideration.

- Appellant was not given an opportunity to discuss Appellant's qualifications for the position that was being retained, and the OHR Director relied upon an old resume of the Appellant that did not reflect Appellant's qualifications for the retained position.

- The service needs request and approval, focused on the qualifications of the incumbent, rather than on the retention of the position. It is not whether the BHOM was better qualified for the position, but whether there was a service need for the position and, if so, could the Appellant perform the duties of the position within six months.

3. Manager II is a generic management position, and the Appellant possessed experience which provides a basis for concluding that Appellant could have acquired the knowledge, skills, and abilities to perform the tasks of the position to be retained in six months or less.

County

1. The termination occurred as part of a legitimate reduction in force and service needs exception.

2. The analysis supporting the service need exception was done by the people who knew best the need to retain the Behavioral Health Operations Manager position, the duties of the position, and the qualifications of others.

3. Any lack of formality in the analysis process does not render the process inconsistent with applicable regulations.

4. The service need exception for the Behavioral Health Operations Manager position was necessary because the County's public mental health service delivery system had been in crisis, and a change in leadership would have been detrimental to the County's interest. The position required unique knowledge, skills and abilities that are not required for other Manager II positions in the class, and it was essential to continue the progress the Department had made in stabilizing the public mental health system by maintaining the current leadership team. An analysis of the current Manager II's in the Department and their qualifications led to a determination that these skills could not be acquired by other employees in the class within six months.

ISSUE

Was the procedure followed for conducting the service needs evaluation, and the granting of the service needs request, consistent with applicable regulations, and otherwise proper?

ANALYSIS AND CONCLUSIONS

The County concedes that while Personnel Regulations Section 30-2 lists three bases to be used in identifying employees to be affected by a RIF as if they were equal choices, seniority is to be followed, unless service needs, or performance consideration, are demonstrated to be controlling. In this regard, Personnel Regulations Section 30-7 clearly provides that service needs is an "exception" to the use of seniority. The Appellant does not dispute that in the circumstance of the subject RIF, the County could determine to retain the Behavioral Health Operations Manager position, and eliminate the position occupied by the Appellant; nor does the Appellant dispute that service needs can be a basis for the retention of a less senior employee. Appellant

alleges that the process followed in the instant case was procedurally flawed in specified ways. For the reasons discussed below, the Board rejects Appellant's contentions.

It is undisputed that as no position description could be found to conduct the service needs evaluation, the County used instead the vacancy announcement used to recruit the incumbent. Certainly, to conduct a service needs evaluation it is necessary to have some documentation of the content of the position in order to determine that the position had to be retained, and who was qualified to perform it. While a position description would ordinarily be the most complete such documentation, the Board does not find the use of the applicable vacancy announcement to constitute a flaw in the procedure. In this regard, there is nothing in the record which would indicate that the vacancy announcement failed to capture the essence of the position.

It is undisputed that the incumbent's supervisor gathered the content of the service needs request, which was relied upon by the OHR Director to grant the request. There is nothing in Section 30-7 which indicates a requirement that the content of the request be the product of someone neutral as to the outcome. What is required is that the OHR Director make the decision. The analysis supporting the service needs exception was performed by the people who had the best knowledge of the duties of the position, and the qualifications of the incumbent and the Appellant. The testimony reflects that the OHR Director gave serious thought to the request, requiring the Department to come forward with additional information. In the Board's view, OHR did the analysis mandated by the Regulations.

While the Appellant was not specifically offered an opportunity to discuss Appellant's qualifications for the position being retained, and outdated material in Appellant's file was used by the OHR Director to determine Appellant's qualifications for the position, again, the evaluation was done by people who had detailed knowledge of the content of the position, and of the type of work the Appellant had been performing. Further, the original notice sent to the Appellant of the abolishment of three positions and of the availability of placement opportunities gave Appellant not only the opportunity to bring to the attention of management the totality of Appellant's work experience, but the obligation to do so. However, there is no evidence in the record that Appellant took any steps to assure that Appellant's personnel file was up to date, or to advise management of Appellant's qualifications for the position being retained.

The Board also rejects the Appellant's contention that the evaluation process was improperly focused. Personnel Regulation Section 30-7 provides an exception to the use of inverse seniority ". . . to maintain the employment of employees in certain positions that require unique knowledge, skills, and abilities that are not required for every position in the class and which cannot be acquired by other employees in 6 months or less." The department director must both document the unique nature of the position, and the "service need," which is the person whose employment is

sought to be retained. The OHR Director's decision must reflect an analysis of the tasks of the position, required qualifications, and the qualifications of other employees. It is not, as argued by the Appellant, just a service need for the position, but a focus on both the position and the less senior person who is sought to be retained.

In reference to the facts in the instant case, while the initial service needs request was lacking in detail, it did address the need for the retention of the position and the unique knowledge, skills, and abilities of incumbent for meeting those requirements, along with the conclusion, “We have conducted an analysis of the current Manager II’s in the Department and their qualifications and have determined that these skills cannot be acquired by other employees in the class within six months.” The OHR Director requested additional support for the request, and was provided a compelling description of the importance of the position and for the retention of the incumbent. On the basis of this information, the OHR Director responded to the two questions mandated by the Regulations, how the position differs from other positions, and the service need, the retention of the incumbent. In the Board’s view, the focus of this analysis is exactly what is mandated by the Personnel Regulations.

Finally, as to the contention related to the ability to perform the retained position within six months or less, the Appellant provided testimony on education and past experience related to the field of mental health. There is no way to conclude with certainty as to whether the Appellant could, within six months, adequately perform the duties of the position to be retained. The question before the Board is whether the County has demonstrated that the conclusion that Appellant could not was based on a reasonable assessment of the facts, and was not arbitrary or capricious. The Board concludes that the County met that test, noting in particular that at issue was not being a mental health practitioner, but the responsibility for directing the whole County mental health and substance abuse program. In this regard, it must be noted that clearly the Appellant would not have been qualified to meet the requirements stated in the position’s vacancy announcement, “7 years of progressively responsible professional experience in the adult mental health and substance abuse area, 3 years of which were in a supervisory or executive capacity.”

ORDER

Accordingly, on the basis of the above, the Board concludes that the procedure followed for conducting the service needs evaluation, and the granting of the service needs request, was consistent with applicable regulations, and otherwise proper. In consideration of the reasons stated above, and based on the evidence in the record, the Board denies the appeal.

SUSPENSION

Case No. 04-07

DECISION AND ORDER

This is the decision of the Montgomery County Maryland, Merit System Protection Board (Board) on Appellant's appeal from a five (5) day suspension. The hearing was held on May 3, 2004, before the Board.

FINDING OF FACT

The Department is responsible for the enforcement of Montgomery County building code regulations. The Manager of the Department has oversight for the issuance of residential permits and residential inspections. When permits are issued, the residential inspectors check for compliance with the applicable requirements, including the content of the permit.

The disciplinary action at issue evolved from the Department's actions to assure that the construction of a homeowner's garage was in compliance with the permit and applicable regulations. The homeowner acquired an initial permit for the construction of a detached garage made of wood. There were a series of stop-work orders issued by the Department to cease construction. The Department received numerous complaints from the community that work continued despite the stop-work orders. On September 9, 2003, a Department Permitting Services Inspector other than the Appellant issued the first stop-work order on permit #305414, after investigation of the residence. On September 10, 2003, the same inspector returned to the residence and spoke with the homeowner as to the reasons for the stop-work order. A stop-work order placed on a property by the Department requires the homeowner to cease all construction activities on the job site until given further notification to proceed.

On September 29, 2003, the Department Services Manager with the Building Construction, Division of the Department of Permitting Services, requested the Appellant to investigate another complaint about the homeowner's continued construction on the property. The Appellant went to the residence and placed the second stop-work order on September 29, 2003.

The homeowner requested a revision of permit #305414. In the revision, the homeowner demonstrated the construction of the wall, the detached garage, and its masonry with some wood construction on top. Permit #31941 was issued on September 29, 2003, to the homeowner of the residence. Subsequently, on October 1, 2003, there were further community complaints because the homeowner was constructing landscaping involving a series of retaining wall which required permits. The Manager

went out to the property on October 1, 2003 and informed the property owner that a permit was needed to reflect the actual construction of the garage. On October 3, 2003, the Manager discussed with the Appellant concerns about the property. It was agreed, if the homeowner did not violate the stop-work order and was working towards obtaining the new permit, no further enforcement action was required.

On October 6, 2003, and October 20, 2003, the Manager received further community complaints that the homeowner continued construction despite the stop-work orders. The Appellant was instructed to inspect the project every second day to see if construction persist. On October 12, 2003, the Department Services Manager received a telephone complaint from a community member that the homeowner was violating the stop-work order by installing soffit panels. The Manager thoroughly questioned the caller comparing what was being told with personal knowledge from inspecting the site personally on October 1, 2003.

On October 13, 2003, the Department Services Manager met with the Appellant to discuss the complaint received on October 12, 2003. At the meeting, the Manager instructed the Appellant to issue a citation at the property. A citation involves a potential \$500.00 fine against the property owner. It was the Manager's opinion that a citation would be more effective than the previous stop-work orders issued at the residence. However, the Appellant refused to issue the citation. It was the Manager's testimony that the Appellant argued the "merits of the case." The Appellant stated that Appellant did not feel it was necessary to issue a citation because the homeowner had recently obtained a new permit which may have placed him in compliance.

The Department Services Manager indicated that the Appellant further stated, "I will not do it" in the Department Services Manager's presence, and that of the Appellant's immediate supervisor. In a meeting held with the Building Construction Division Chief, the immediate supervisor of the Appellant and the Department Services Manager, the Division Chief requested the Appellant to explain Appellant's defiance. The Appellant was reported, as stating, I will not issue a citation even if all three supervisors or "God" ask me to do so. The Appellant denied making such a statement. The Appellant indicated that Appellant stated that with the information Appellant had, Appellant could not issue a citation. The three managers indicated that at the meeting, the Appellant further asserted that Appellant would issue a citation only when it was appropriate to do so. The Appellant testified, without contradiction, that during this meeting, Appellant offered to conduct an inspection on Appellant's own, but this request was refused.

On October 17, 2003, both Managers went to the property and one Manager issued a signed citation to the homeowner. The garage and retaining wall also were posted unsafe. Then, the homeowners and a professional engineer met with the Department managers to clarify how to comply with the previous orders.

POSITION OF THE PARTIES

County

That the Appellant was given specific instructions to issue a citation after a series of stop-work orders, but refused a direct order from the supervisor.

Therefore the following applies in this case:

1. Under Section 33-5(e), the Appellant failed to perform duties in a competent or acceptable manner
2. Under Section 33-5(f), the Appellant behaved insubordinately, or failed to obey a lawful direction from a supervisor
3. Appellant's failure to comply to Sections 33-5(e) and (f) required the Department to take disciplinary action

Appellant

The issuer of a citation must sign the form under a statement, which provides, in pertinent part,

I solemnly affirm under the penalties of perjury, and based upon personal knowledge or the attached affidavit, that the contents of this citation are true and that I am competent to testify on these matters.

and appear in court to testify in support of the citation. As the Appellant had not, and could not, personally observe whether the homeowner was in non-compliance with the newly issued revised building permit, Appellant could not meet the requirements for issuing a citation.

The Appellant further asserts that the disciplinary action against the Appellant involving a five (5) day suspension was unwarranted and not consistent with the personnel laws and regulations.

ISSUES

Is the discipline accorded the Appellant consistent with law, regulations, and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

It is undisputed that the Appellant refused to comply with a direct order from Appellant's supervisor and Department managers, conduct which would ordinarily justify disciplinary action. However, in the Board's view, the particular facts of the instant case mitigate against the discipline. The instruction that the Appellant refused to comply with was that Appellant issue the homeowner a citation, a somewhat unique action that, by its terms, required that Appellant "solemnly affirm under the penalties of perjury, and based upon personal knowledge, that the contents...are true and that I am competent to testify on these matters." (Emphasis added) Appellant, understandably, without such personal knowledge, Appellant was given an order Appellant could not lawfully carry out, and was understandably reluctant to obey, particularly in light of knowing that the homeowner had just received a new permit. The Appellant demonstrated good faith by offering to conduct an inspection of Appellant's own, an offer that was refused.

Two additional background facts are relevant to judging the appropriateness of the discipline at issue. The Appellant has been a County employee for 22 years, nine of those as an inspector, and was the recipient of consistently good performance appraisals. Moreover, Appellant had demonstrated that Appellant had no reluctance to issue citations when deemed appropriate, having issued 79 percent of the citations issued in the 2002-2003 period. Appellant's reluctance to issue the citation leading to the discipline at issue was because Appellant could not satisfy the requirement without personal knowledge.

Under the totality of the circumstances, the Board concludes that the five day suspension at issue was inappropriate, and should be revoked, with the Appellant be made whole for lost wages and benefits.

Should the Department have concerns over an inspector's proper course of action in circumstances such as those present in the instant case, the Board suggests that the issuance of an instruction might serve to provide clarity.

ORDER

On the basis of the above, the Board sustains the appeal, and orders that the County revoke the five (5) day suspension, and make the Appellant whole for lost wages and benefits. In as much as the Appellant prevailed, the Board authorizes a request for attorney fees. 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).

TIMELINESS

Case No. 04-06

DECISION AND ORDER

This is the decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Director of the Office of Human Resources (OHR) that Appellant's grievance was not filed timely

FINDINGS OF FACT

On August 28, 2003, the Appellant filed a grievance alleging Harassment, and attached a document entitled "Harassment Issues." The document describes, among other things, a series of events related to the relocation of Appellant's office "around November of 2002", requests for training supported by an attached email dated February 25, 2003, and an interim evaluation administered "by the end of May 2003."

On September 10, 2003, the County's Labor/Employee Relations Manager (LERM) acknowledged receipt of, and issued a preliminary decision on, Appellant's two separate grievances dated August 22, 2003, related to Appellant's interim performance evaluation, and August 28, 2003, related to Appellant's claims of harassment. The preliminary decision found that Appellant's grievances were not filed timely and advised Appellant any additional supporting arguments or information to be submitted in support of the grievances must be received no later than September 26, 2003.

On September 24, 2003, Appellant submitted a two-page letter in support of Appellant's August 22, 2003, and August 28, 2003 grievances.

On October 10, 2003, the LERM issued a final decision acknowledging receipt of Appellant's September 24, 2003 response, and advising Appellant that Appellant's grievance filed on August 28, 2003 was not timely filed. The Appellant was advised the final decision could be appealed to the Board within 10 working days of the date on which the final decision was received by the Appellant. The final decision makes no reference to the August 22, 2003 grievance that is referenced in its September 10, 2003 preliminary decision, and in Appellant's September 24, 2003 response.

On October 27, 2003, Appellant filed an appeal petition with the Board with a supporting document attached. Neither document makes reference to a specific grievance or grievances, nor does either document make reference to either the August 22, 2003, or the August 28, 2003 date.

POSITION OF THE PARTIES

Appellant

With respect to Appellant's August 22, 2003 grievance, Appellant contends that although Appellant signed Appellant's Interim Evaluation on June 5, 2003, Appellant was waiting until Appellant received an "approval" of the rating before filing Appellant's grievance. Appellant further states that Appellant was not made aware that the Reviewing Officer did not agree with the evaluation completed by Appellant's supervisor until three days prior to the date Appellant filed Appellant's grievance.

With respect to Appellant's August 28, 2003 grievance, Appellant contends Appellant filed the grievance (in accordance with applicable County Personnel regulations) within twenty days of the date Appellant knew or should have known "the activities which occurred from November 2002" constituted harassment.

Appellant contends the appropriate remedy is \$50,000 in compensation for harassment, and all attorney's fees and expenses incurred related to the prosecution of this claim.

County

The County contends that the Appellant's grievance filed August 28, 2003 was not filed timely in that County Personnel Regulations require, in relevant part, grievances be filed within 20 calendar days of the date the employee knew or should have known of the actions on which the grievance is based.

The County contends the appropriate remedy is the denial of the appeal on the basis of untimeliness.

ISSUE

Has the Appellant filed a timely grievance or grievances in accordance with County Personnel Regulations?

ANALYSIS AND CONCLUSIONS

It must be stated at the outset, the only matter before the Board is the timeliness of the grievance or grievances filed by Appellant, there having been no consideration or determination by the Chief Administrative Officer on the merits of Appellant's complaints. In addition, while there is some inconsistency in the references contained in the documents, it is clear the parties considered both the August 22, 2003 and the August

28, 2003 grievances to be under review. Accordingly, the Board considered both grievances in making its determination.

With regard to the August 22, 2003 grievance, Appellant cites section 11-7(f)(1), which requires the second level supervisor's review of the employee's performance evaluation and the absence thereof as the reason for delay in submitting Appellant's grievance. However, a review of the section cited reveals section 11-7(f)(1) applies to an employee's "performance evaluation" and Appellant's grievance is related to Appellant's "interim evaluation." "Interim Evaluation" is defined in section 11-1(d) as a performance evaluation conducted by a supervisor at a time between annual performance evaluations to: (1) monitor a probationary employee; or (2) address a situation where an employee's current job performance is not at an acceptable level of competence." Further, section 11-7(c) states, in pertinent part, "it is appropriate for a supervisor to prepare an interim evaluation for a probationary employee or for an employee with performance problems." (emphasis added)

With regard to the August 28, 2003 grievance, the Appellant cites no specific section of the County Personnel Regulations as the basis for the grievance. Appellant cites certain activities related to the relocation of Appellant's office, and denial of training and alleges harassment. Appellant further states that it was not immediately obvious to Appellant that these actions constituted harassment. Section 5-1(d), in pertinent part, defines harassment as: "Inappropriate written, verbal, or physical conduct, including the dissemination or display of written or graphic material, based on one's race, color, religion, national origin, ancestry, sex, sexual orientation, marital status, age, disability, or genetic status, that unreasonably interferes with one's work performance or creates an intimidating, hostile, or offensive working environment." Additionally, section 34-1(a)(3) states an employee may file a grievance if adversely affected by an alleged "improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, . . . or denial of an opportunity for training." (emphasis added)

According to section 34-1(a), an eligible employee may file a grievance if adversely affected by an alleged (1) violation, misinterpretation, or improper application of an established statute, rule, regulation, procedure, or policy; or (2) improper or unfair act by a supervisor or other employee. Additionally, section 34-4(b) states, in pertinent part, a grievance may be dismissed by the OHR director 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 is based.

The Board finds that Appellant knew or should have known on June 5, 2003, when Appellant signed Appellant's Interim Evaluation, of the actions upon which Appellant bases Appellant's grievance of incomplete or inaccurate performance

evaluation. Accordingly, the grievance was required to be filed no later than June 25, 2003 in order to be timely. Based on the foregoing the Appellant's grievance dated

August 22, 2003 is denied.

The Board finds that Appellant knew or should have known in November 2002, when Appellant was relocated, and in February 2003, when Appellant was allegedly denied training (based upon documents provided by Appellant), of the actions upon which Appellant based Appellant's claim of harassment. Accordingly, the grievance was required to be filed no later than, at the latest, the sometime during the third week of March, 2003, in order to be timely. Based on the foregoing the Appellant's grievance dated August 28, 2003 is denied.

ORDER

Based on the above, the Board denies Appellant's appeal of the CAO's denial of Appellant's grievances as untimely and denies Appellant's request for remedy.