

Merit System Protection Board Annual Report FY 2005

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Harold D. Kessler, *Vice Chairman*
Rodella E. Berry, *Associate Member*

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2005
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (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 2005 were:

Mary A. Lamary	-	Chairman
Harold D. Kessler	-	Vice Chairman
Rodella E. Berry	-	Associate Member

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; Chapter 33, Article II, Merit System, of the Montgomery County Code; and Section 35, Merit System Protection Board Appeals, Hearings, and Investigations of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005).

Section 404, of the Charter, 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 opportunity to present 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."

Montgomery County Code, Article II, Merit System, Section 33-7. County Executive and Merit System Protection Board Responsibilities, 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 the 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 audit findings and recommendations to the County Executive and County Council."

"(d) Personnel Regulation 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 (as amended February 15, 2005) states:

- “(a) The MSPB has the responsibility and authority to conduct audits, investigations or inquires to assure that the administration of the merit system complies with County law 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 elected official or a volunteer.”

APPEALS PROCESS **DISCIPLINARY ACTIONS**

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. To initiate the appeal process, Section 35-4 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005) requires that an employee file a simple notice of intent to appeal a removal, demotion or suspension. In accordance with MCPR Section 35-3, the employee must file the notice of intent to appeal within 10 working days after the employee has received a notice of disciplinary action involving a demotion, suspension or removal.

Once the notice of intent to appeal has been filed, the Board's staff provides the Appellant with an Appeal Petition to be completed within 10 working days. After the Appeal Petition is received, the Board sends a notice to the parties, requiring each side to submit a list of proposed witness and exhibits for the hearing. The Board schedules a pre-hearing conference at which the parties' lists of witnesses and exhibits are discussed. Upon completion of the pre-hearing conference, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision on the appeal.

The following disciplinary cases were decided by the Board during fiscal year 2005.

DEMOTION

Case No. 04-15

DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Fire Chief, to demote Appellant to the position of Firefighter/Rescuer II for a twelve-month period.

BACKGROUND

Appellant has been employed by the Montgomery County Fire and Rescue Service (MCFRS) since August 1999. The MCFRS provides emergency medical services (EMS) to County residents. At all times relevant to the instant appeal, Appellant was a Firefighter/Rescuer III, who served as an advanced life support (ALS) paramedic, also known as an emergency medical technician (EMT)/paramedic. As an ALS paramedic, Appellant could administer more medication and provide a higher level of care than an EMT/basic life support (BLS). Until April 9, 2003, Appellant was assigned to Station A.

The Disciplinary Process

On October 28, 2003, the Fire Chief issued Appellant a Statement of Charges, which proposed Appellant's dismissal, pursuant to Section 30.2 of the collective bargaining agreement between the Montgomery County Government and the Montgomery County Career Firefighters Association, Local 1664 (Union). Appellant was charged with violating various policies, procedures, and regulations.

After receiving an extension of time to reply, Appellant responded to the Statement of Charges on November 18, 2003. Thereafter, Appellant participated in alternative dispute resolution (ADR) on December 11, 2003.

When ADR was unsuccessful, the Fire Chief discussed the discipline with the Union in an attempt to resolve the matter. After settlement discussions broke down, the May 19, 2004 Notice of Disciplinary Action was prepared and issued. The Notice of Disciplinary Action set forth the following allegations:

1. In March 2002, Appellant was counseled for not getting out of bed and responding to an emergency incident within 5 minutes.

2. In April 2002, a plan was developed by management to address Appellant's unacceptable behavior displayed toward patients and for differences Appellant had with Appellant's shift.
3. On April 3, 2003, while responding to an incident, it was reported that Appellant behaved in an inappropriate manner, embarrassing the crew.
4. On April 9, 2003, a complaint was filed about Appellant's behavior on April 6, 2003, including blowing the air horn at citizens, cursing in front of a patient, and disobeying a direct order from the officer in charge to permit another vehicle to leave the station first.
5. Also, it was reported that, on April 6, 2003, Appellant, while responding to an incident, cursed loudly when encountering problems with closing the engine room door. Upon reaching the destination, Appellant, when using the intercom to have the receptionist open the door, reportedly cursed repeatedly at the receptionist, embarrassing Appellant's partner.
6. On May 19, 2003, it was reported that Appellant, upon responding to a call, lost patience. Appellant indicated that "I am tired of this crap," and left the residence, slamming the door.
7. On June 11, 2003, Appellant responded to a doctor's office for an emergency incident involving a child with croup. It was reported that the pediatrician requested the patient be transported to Children's Hospital and Appellant advised that the child could be transported to Holy Cross or Washington Adventist Hospital but not Children's Hospital. Additionally, Appellant was reported as stating that the patient did not require ALS care and directed the ambulance to transport the patient. Subsequently, a determination was made by the MCFRS' Quality Assurance Office that the patient's presenting condition required ALS intervention and transport. Based on this determination, Appellant allegedly committed a violation of the Maryland Medical Protocols.
8. On June 15, 2003, it was reported that, when other medics responded to a patient, the patient asked "that person isn't with you?" The patient, according to one of the medics, was referring to Appellant.

Based on the foregoing charges, Appellant received a 12-month demotion to Firefighter/Rescuer II, effective May 30, 2004.

This appeal followed.

FINDINGS OF FACT

Appellant's Failure to Get Out of Bed and Respond to an Emergency in 5 Minutes

In March 2003,¹ Appellant purportedly failed to respond to a dispatcher call regarding an emergency within the time frame required. There is a three minute scratch time. If a unit responds after that scratch time, it is considered late. Appellant's supervisor requested Appellant submit a written statement explaining why Appellant was late in responding. In a memorandum dated March 16, 2003, Appellant indicated that the failure was not in the actual response time but in Appellant's failure to promptly hit the "enroute" button so as to let the dispatcher know Appellant was responding.

After Appellant was counseled about the incident, Appellant had no subsequent infractions that were similar. No one ever talked to Appellant about this incident after the Fire Chief took over in May of 2003.

The April 2002 Plan

In April 2002, Appellant's supervisor, the Captain, received a complaint from a co-worker of Appellant regarding Appellant's poor treatment of a patient. The co-worker complained that Appellant was uncaring, cold and callous during a call, and the Captain testified that the Captain confirmed with the patient that this was an accurate statement of Appellant's behavior. In response to the complaint, the Captain developed a work plan for Appellant. According to the Captain, the plan required Appellant to be taken out of the normal rotation and to ride the medic unit for a month. The Captain testified that Appellant was required to ride the medic unit normally in the charge position as senior paramedic and be evaluated as to Appellant's interaction with the patients. The Captain indicated that the result of the evaluation was that there were no further problems. Accordingly, the plan was discontinued, and Appellant was placed back in normal status where Appellant rotated among the units as necessary.

No one ever talked to Appellant about this issue once Appellant came off the work plan.

The April 2003 Incidents

At the suggestion of several co-workers, a Firefighter/Rescuer II prepared a statement dated April 9, 2003, which described an incident on April 3, 2003, when the Firefighter and Appellant were dispatched to deal with a 1-year old patient who was sick. The parents, according to the Firefighter, did not speak English.

¹ The Statement of Charges and Notice of Disciplinary Action both cite the date of the failure to respond in 5 minutes as March 2002. However, Appellant placed into evidence a rebuttal to this incident, dated March 16, 2003. The County did not introduce into evidence any contemporaneous documentation regarding the March incident. The Board finds, therefore, that the event happened in March 2003.

In the statement, the Firefighter indicated concern about Appellant having asked the father of the patient whether he had a car. The Firefighter viewed the question as implying that the parents could take the child to the hospital instead of the medic unit. According to the Firefighter, during the call, Appellant became irritated, started tapping a foot on the floor, crossed Appellant's arms and raised Appellant's voice to the father. The Firefighter concluded the statement by indicating that the Firefighter was uncomfortable with Appellant's behavior and believed Appellant was unprofessional during the call.

In a statement dated April 9, 2003, addressed to the Captain, a Master Firefighter discussed multiple issues regarding Appellant's behavior on April 6, 2003. The Master Firefighter cited the following incidents:

- 1) Appellant purportedly made an inappropriate comment about a prospective patient when Appellant and the Master Firefighter were dispatched to deal with an individual who was unconscious due to an overdose.
- 2) On three occasions, Appellant allegedly used a cell phone while driving.
- 3) While driving the medic unit, M-129, Appellant, when returning to the station, purportedly pulled into the front ramp without giving cars a chance to clear out. According to the Master Firefighter, Appellant would pull out in front of the cars and often lay on the air horn, which the Master Firefighter believed increased the risk of a collision.
- 4) While Appellant was loading a patient into the back of M-129, Appellant got a finger caught inside the spring mechanism in the cot and repeatedly cursed.
- 5) Appellant, while responding to a call, allegedly pulled out of the bay, and cut off another vehicle, Truck 12 (T-12), also dispatched to the same call. According to the Master Firefighter, Appellant was ordered to stop because the Master Firefighter thought M-129 would hit T-12 but Appellant failed to obey the Master Firefighter's order.
- 6) Appellant, while responding to another call to a nursing home, purportedly could not get the medic bay overhead door to close, got mad with the remote control door opener, threw it at the window and cursed and shouted. Appellant then allegedly picked up the remote control, tried again and cursed.
- 7) Upon arriving at the nursing home, Appellant, when using the intercom, allegedly repeatedly cursed at the receptionist.

After providing the statement to the Captain, the Master Firefighter was subsequently contacted about the statement by the Chief sometime in late October or early November 2003.

On April 17, 2003, the president of a Volunteer Fire Department wrote the

District Chief a memorandum, concerning Appellant's inappropriate actions towards citizens, patients, community and other Fire and Rescue personnel, as reported to the president by Fire and Rescue personnel.

The April 2003 Counseling Session

Because of information that had been brought to the attention of the Captain and the District Chief in April 2003, the District Chief testified that the District Chief had the Captain do a fact-finding and after the Captain completed it, both the District Chief and the Captain agreed that it was necessary to meet with Appellant. The purpose of the meeting was to discuss the allegations made against Appellant, to determine why the incidents were occurring and how to move forward. The meeting covered the incident documented by the Firefighter, the memorandum from the president of the Volunteer Fire Department, and the Master Firefighter's statement. Appellant was counseled on all of the incidents in the three documents.

During the meeting, according to the Captain, Appellant attributed Appellant's behavior to the rocky relationship Appellant had with the rest of Appellant's shift. The Captain stated that, at the meeting, the Captain and the District Chief indicated they would be willing to work with Appellant on a possible transfer if Appellant wanted. Both the Captain and the District Chief testified that they believed that, if they relocated Appellant and gave Appellant a new start, Appellant would improve Appellant's shift relations and it would help to alleviate the attitude that Appellant had been displaying on the various calls. They also testified that they believed that they needed to take immediate action to "start putting Appellant down the right path." Moreover, they testified that, during the counseling session, it was suggested that Appellant get anger management counseling. On April 9, Appellant was detailed from Station A to Station B, and then subsequently officially transferred there.

On April 24, 2003, the Captain, in a memorandum to Appellant, documented the counseling session held on April 21. The Captain cautioned Appellant that there could not be a repetition of the events that occurred on April 6 and that any future occurrences of such problems would result in more severe discipline.

The District Chief, in a May 1, 2003 memorandum to the Assistant Chief, reported on the three written complaints against Appellant (i.e., the Firefighter's statement, the Master Firefighter's statement, and the memorandum from the president) and the April 21, 2003 meeting with Appellant. The District Chief indicated that it was the District Chief's belief that a change in work site for Appellant would be a positive move.

The May 19, 2003 Incident

On May 27, 2003, a Firefighter/Rescuer III (paramedic) with Station B, at the request of the Firefighter's supervisor, the Lieutenant, sent the supervisor an e-mail message discussing an incident involving Appellant which occurred on May 19, 2003, while running a call regarding an injured person. The Firefighter indicated that there was a

language barrier with the patient's family. According to the Firefighter, the Firefighter and the EMT, who was also present on the call, were having trouble obtaining information about what was wrong with the person. Approximately five minutes into the incident, Appellant said "I'm tired of this crap" and left the residence, slamming the door. Appellant acknowledged saying "I've heard enough of this crap," picking up the bags and exiting the residence with the door slamming as Appellant exited. The Firefighter testified that, after Appellant's outburst, everyone in the room stopped talking. Subsequently, the patient refused service. The Firefighter was concerned that the patient might have refused service because of Appellant's conduct.

The Firefighter told the Lieutenant about the incident and was requested to write it up. The Lieutenant forwarded the Firefighter's e-mail to the District Chief on June 2, 2003.

After receipt of the Firefighter's e-mail, the District Chief, together with the Assistant Chief, and another Captain, held a counseling meeting with Appellant. Appellant's performance and attitude issues were discussed. The Assistant Chief made several suggestions, including the Employee Assistance Program (EAP), to resolve the issues.

The Request for Discipline

At some point, an EMS Incident Referral Control Sheet, control number 03-416 (EMS Referral #03-416), was prepared. Although the EMS Incident Referral Control Sheet contains instructions that it is to be submitted within 24 hours of any incident involving EMS personnel and be signed and dated by the person initiating the inquiry, EMS Referral #03-416 was neither signed nor dated. EMS Referral #03-416 indicated that the May 27, 2003 e-mail from the Firefighter should be referred to for details of the inquiry. EMS Referral #03-416 was forwarded to the Quality Assurance (QA) Office of Emergency Medical Services under the supervision of the Battalion Chief. The Battalion Chief testified that, when the QA Office receives complaints such as this one, it reviews them from a quality assurance perspective to determine whether they are conduct complaints requiring discipline or whether they raise medical issues. According to the Battalion Chief, medical issues concern whether the protocol for treatment is followed and the medical care provided the patient. The Battalion Chief indicated that the issue of discipline goes on a separate track to MCFRS' administrative services. In reviewing the information contained in the EMS Referral #03-416, the Battalion Chief testified that the QA Office determined there was no medical issue and that it needed to be referred to the Assistant Chief in administrative services.

On June 5, 2003, the District Chief forwarded a memorandum through the Assistant Chief, to the Deputy Chief, requesting disciplinary action for Appellant. In the memorandum, the District Chief indicated that, after the first wave of issues, Appellant was placed at Station B. The District Chief noted, however, that since Appellant's placement, Appellant had stumbled again. Accordingly, the District Chief requested appropriate disciplinary action.

The June 11, 2003 Incident

On June 11, 2003, a basic life support unit, ambulance A-18, staffed by two EMT/basics, was called to the scene of a doctor's office where a 2-year old child was complaining of respiratory distress and appeared to have croup-like symptoms.

According to the Patient Information Sheet completed by A-18, the patient had experienced symptoms for the past two days. The EMT/basic testified that, when A-18 arrived, the child appeared to be having difficulty breathing. The EMT/basic stated that the child had already been given a nebulizer to help the child's breathing but it was not working. The child's oxygen saturation was 93.

The EMT/basic testified that there was a language barrier with the mother and the doctor. According to the EMT/basic, the mother, via translation of the doctor, requested that the child go to Children's Hospital as she lived closer to that area. The crew of A-18 attempted to give the child oxygen but was unsuccessful. Accordingly, the EMT/basic testified that the crew of A-18 decided to call for the assistance of a medic unit as they did not feel comfortable taking the patient to Children's.

The medic unit which responded, M-19, was staffed by Appellant and another individual, both ALS providers. Appellant was the officer in charge. Upon arrival, Appellant testified that Appellant went immediately to speak with the doctor. The medic unit then took another oxygen saturation reading on the patient. It was at 87%.

Then Appellant indicated that Appellant was told by the doctor that the mother wanted the child transported to Children's Hospital. Appellant testified that Appellant responded that Appellant could only go to the two closest hospitals – Holy Cross and Washington Adventist. According to both Appellant and the EMT/basic, the doctor agreed that transporting the child to Holy Cross would be fine and the mother agreed that the child could go to Holy Cross. At that point, Appellant indicated that the crew of A-18 would transport the child.

The EMT/basic testified that the EMT/basic was uncomfortable with Appellant's decision to have A-18 transport as the EMT/basic was concerned that the child's condition could go down very fast. The EMT/basic asked the partner, who was in charge of A-18, whether the partner was comfortable transporting. The EMT/basic testified that the partner indicated that the partner was comfortable transporting the child to Holy Cross. According to the EMT/basic, the child was transported to Holy Cross Hospital without incident.

The EMT/basic subsequently discussed the matter with a Captain and provided the Captain a memorandum, dated June 21, 2003, regarding the matter. The partner also provided written documentation, dated June 20, 2003, regarding the matter.

The June 15, 2003 Incident

On June 15, 2003, a Captain and a Firefighter/Rescuer III were dispatched to an

elderly person's house. Appellant was not on the call. In an e-mail to the Battalion Chief on June 16, 2003, the Captain reported that one of the first things the elderly person asked them was, "That person isn't with you is that person?" The Captain testified that the Firefighter told the Captain that the elderly person was talking about Appellant. According to the Firefighter, the Firefighter and Appellant had responded to a call from this elderly person's home on November 20, 2002. The Captain testified that the elderly person indicated to the Captain that the elderly person was afraid of calling 911 because the elderly person didn't want "that person" to take care of the elderly person again. At no point did the elderly person actually mention Appellant by name.

The Chief's Meeting with Appellant and Appellant's Subsequent Removal from Public Contact

The Chief became the Chief of Fire and Rescue Service in May 2003. The Chief testified that the Chief learned about issues concerning Appellant in the June-July 2003 timeframe. According to the Chief, some of the issues were raised through the supervisory chain and others were brought to the Chief through the Battalion Chief's quality assurance chain. Because so many issues were occurring back to back regarding Appellant, the Chief testified that the Chief asked to have a face-to-face meeting with Appellant.

The Chief indicated that the Chief met with Appellant in early July. Although the issues regarding Appellant were still being investigated, the Chief stated that the Chief did present them to Appellant. According to the Chief, Appellant provided only a limited verbal response during the meeting.

The Chief testified that, when the pieces of the on-going investigation into the various incidents concerning Appellant came back to the Chief, the Chief determined that it was appropriate to immediately remove Appellant from direct public contact while the Chief sorted all of the issues out. Accordingly, Appellant was put in an administrative assignment on August 1, 2003.

The Quality Assurance Inquiry

At some point, an EMS Incident Referral Control Sheet, control number 03-417 (EMS Referral #03-417), was completed and submitted to the QA Office regarding the June 11, 2003 incident. It was neither signed nor dated. The Battalion Chief testified that the QA Office began gathering information with regard to the matter as it believed that there was a significant medical concern. The Battalion Chief indicated that the QA Office obtained the patient care records from A-18.

The Battalion Chief testified that the QA Office made a determination that the child patient involved in the June 11, 2003 incident was a priority 2. According to the Medical Protocol dealing with a priority 2 patient with croup, there are certain steps to be followed in treating the patient. The Battalion Chief testified that the ALS unit, M-19, should have taken charge of the child instead of turning care back to the BLS unit, A-18. The QA Office, according to the Battalion Chief, also made a determination that medical

remediation (i.e., training) of Appellant was the appropriate course of action based on the June 11, 2003 incident.

The Battalion Chief acknowledged that, during the course of the QA investigation, no statement was taken from Appellant or the other ALS present on June 11, 2003. The Battalion Chief could not explain why neither individual had been interviewed. The Battalion Chief testified that normal procedure would have been to obtain a statement from the person that was being charged with committing a violation of a Maryland Medical Protocol. Appellant testified that Appellant has never been interviewed about the June 11, 2003 incident.

Appellant received a memorandum, dated October 8, 2003, from a Captain notifying Appellant that Appellant was involved in a Quality Assurance Inquiry. The memorandum also indicated that the investigation has been completed. The Battalion Chief testified that the information gathered by the QA Office was forwarded to the Medical Director and the Medical Review Committee for review.

However, as of the date of the hearing in this matter, according to the Battalion Chief neither the Medical Director nor the Medical Review Committee has made a determination with regard to the June 11, 2003 incident. The Battalion Chief testified that MCFRS' administrative section, at some point, instructed the QA Office to suspend making a determination as to whether there was a violation of a Maryland Medical Protocol pending the outcome of Appellant's disciplinary process. According to the Battalion Chief, administrative services also directed the QA Office not to take any medical remediation or construct a medical remediation plan pending the outcome of the disciplinary process. The Battalion Chief testified that even though the quality assurance track is distinct from the disciplinary track, and the two tracks are not mutually exclusive, there was a concern that if the Medical Review Committee took some action it would be viewed as some sort of disciplinary action against Appellant. Thus, no violation of a Maryland Medical Protocol has been found to date, although the Battalion Chief testified that there is a high suspicion that a violation occurred.

Initiation of Discipline

As previously noted, Appellant was issued a Statement of Charges, dated October 28, 2003, proposing Appellant's dismissal. According to the Fire Chief, the long delay between the incidents described in the Statement of Charges and the actual issuance of the Statement of Charges was due to the ever changing environment with additional incidents occurring, as well as an ongoing extensive investigation into the incidents. Upon becoming aware of the various incidents, the Fire Chief indicated that the Fire Chief had staff undertake an investigation and report back to the Fire Chief. The Fire Chief testified that the events which occurred in 2002 before the Fire Chief became the Fire Chief in 2003 were not investigated further. The Fire Chief could not remember any specifics about the investigation into the April 3 or April 6 incidents. Moreover, the Fire Chief testified that there was no actual written report of this investigation, only the Statement of Charges.

In arriving at the appropriate discipline, the Fire Chief stated that the Fire Chief bypassed progressive discipline because of the June 11, 2003 incident. According to the Fire Chief, this incident reflected serious misconduct and was a violation of policy and protocol.

APPLICABLE REGULATIONS AND CONTRACTUAL PROVISIONS

Agreement between Montgomery County Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, (CBA) Article 30, *Discipline*, which states in applicable part:

Section 30.2 General Procedures

- A. Whenever the Employer proposes to discipline an employee, the Employer shall issue a Statement of Charges to the employee within a reasonable time after the Employer knows or reasonably should have known of the event giving rise to the proposed discipline. . . .

- D. If the Employer decides to implement the disciplinary action, the Employer shall issue a Notice of Disciplinary Action within a reasonable time, usually thirty (30) days, after the employee has submitted his/her response to the Statement of Charges. . . .

Montgomery County Personnel Regulations (MCPR), Section 33, *Disciplinary Actions*, which states in applicable part:

33-2 *Policy on disciplinary actions*

- (b) Prompt discipline
 - (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.

 - (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

33-6 *Disciplinary process.*

(a) Prior to taking disciplinary action. A supervisor who is considering taking a disciplinary action should:

- (1) document the incident or employee's behavior that caused concern;
- (2) conduct an investigation, if appropriate and necessary; and
- (3) interview the employee and others who may have witnessed the conduct or have information about it.

POSITIONS OF THE PARTIES

County

- Disciplinary action was taken because Appellant had engaged in a pattern and practice of behavior of inappropriately interacting with patients and the public during EMS calls, particularly when responding to foreign-speaking members of the public, disobeying and disregarding supervisors and directives concerning Appellant's behavior, and violating EMS protocols.
- Appellant's actions were hostile and offensive and failed to meet the standard of care and level of compassion MCFRS strives to meet in delivering EMS care to the public.
- Although Appellant's Statement of Charges originally was for dismissal, the discipline was modified to a demotion for one year.
- Just because Appellant received a counseling session regarding some conduct does not prevent the Fire Chief from disciplining Appellant for the same conduct.
- Any delay in issuing the Statement of Charges was due to the need to investigate the various incidents relied upon in the Statement.
- Any delay in issuing the Notice of Discipline was due to the parties' participation in ADR and lengthy, albeit unsuccessful, settlement negotiations.
- To the extent the collective bargaining agreement conflicts with the Montgomery County Personnel Regulations, the collective bargaining agreement controls with regard to the procedures for imposing discipline.

Appellant

- The County has acted in a manner which so disregarded the personnel regulations and the mandates of the collective bargaining agreement that any discipline should not be allowed to be implemented.
- Disciplinary action under the CBA must be issued within a reasonable amount of time after the employer knows, or reasonably should have known of the event giving rise to the proposed discipline. The Statement of Charges was issued on October 28, 2003 and covers events that go as far back as March 2002. The most

- recent event contained in the Statement of Charges is June 15, 2003. The time period between this event and the issuance of the Statement of Charges is not reasonable.
- The CBA states that a Notice of Disciplinary Action should issue within a reasonable time, usually 30 days after the employee has submitted the response to the Statement of Charges. Appellant submitted Appellant's response on November 18, 2003; the Notice of Disciplinary Action was not issued until six months later, on May 19, 2004. This is a violation of the CBA.
 - The County Personnel Regulations indicate that disciplinary proceedings are to be implemented promptly. Section 33-2 provides that a Statement of Charges should issue within 30 calendar days from the date the supervisor became aware of the employee's conduct. The only exception to this rule is if an investigation of the employee's conduct or other circumstances justify a delay. Neither of these conditions was met in the instant case.
 - There is no substantive basis for the discipline. For several of the charges, verbal counseling or a written memorandum of counseling already occurred. They have been addressed and disposed of and should not be relied upon to impose discipline.
 - Appellant was never found to have committed a violation of the Maryland Medical Protocol, which is the entire basis for the June 11, 2003 matter contained in the Statement of Charges. Therefore, there is no basis for disciplining Appellant.
 - The June 15, 2003 issue involves a matter in which Appellant was not even working on that day, much less present at the incident.

ISSUES

1. Does the CBA between the Firefighters Association and the County conflict with the MCPR, so that the CBA would control with regard to the disciplinary process and procedures?
2. If it is determined that there is no conflict between the CBA and the MCPR, did the County correctly follow the disciplinary procedures contained in both documents?
3. Has the County proven, by a preponderance of the evidence, that the disciplinary demotion of Appellant from Appellant's position as Firefighter/Rescuer III was reasonably justified and consistent with applicable law and regulatory provisions?

ANALYSIS AND CONCLUSIONS

There Is No Conflict Between the CBA and the MCPR.

At the outset, the Board notes that it is not the appropriate forum for interpreting or enforcing the provisions of the collective bargaining agreement. However, even if the Board had the authority to interpret and enforce the collective bargaining agreement, it does not see any conflict between the CBA and the MCPR. As noted above, the MCPR states that discipline should be initiated within 30 days from the date the supervisor

became aware of the employee's conduct unless an investigation of the employee's conduct or other circumstances justify a delay. The CBA requires that discipline be initiated within a reasonable time after the Employer knows or reasonably should have known of the event giving rise to the proposed discipline. In a subsequent subsection of Article 30, Discipline, the CBA defines "a reasonable time" as usually thirty days. Accordingly, the Board finds that a Statement of Charges under both the CBA and the MCPR should be issued within 30 days of when the supervisor became aware of the employee's conduct unless an investigation of the employee's conduct or other circumstances justify a delay.

The MCPR is silent as to when a Notice of Disciplinary Action should issue after an employee responds. However, the CBA requires that a Notice of Disciplinary Action be issued within a reasonable time, usually thirty days after the employee submits the response to the Statement of Charges. Therefore, with regard to when the Notice of Disciplinary Action should be issued, the CBA controls.

The County Failed to Follow the Procedures in the MCPR and CBA to Initiate Prompt Discipline.

Under the County's Administrative Procedures Act, the County has the burden of proving by a preponderance of the evidence that it adhered to the applicable regulations when imposing discipline. As previously noted, both the MCPR and the CBA require that the Statement of Charges be issued within 30 days of when a supervisor knew of the event giving rise to the proposed discipline. The MCPR provides an exception to this 30-day requirement where an investigation is necessary. The Statement of Charges references one March 2002 allegation, but thereafter basically relies on alleged incidents of misconduct occurring between April 3 and June 15, 2003. The Statement of Charges issued over four months later, on October 28, 2003. The County seeks to excuse its delay in issuing the Statement of Charges by asserting that an extensive investigation was required into the various charges. The County claims that only after the investigation was completed was it able to proceed. This argument simply is not supported by the evidence in the record.

The Fire Chief testified that the Fire Chief requested an investigation of the various incidents that appear in the Statement of Charges. While indicating that the investigation was delegated to staff, who reported back to the Fire Chief the results of their investigation, the Fire Chief failed to identify a single individual by name that was tasked with the investigation into the various incidents. The Fire Chief could not remember the specific details about the investigation. Nor was there any written report of the results of the investigation. The Fire Chief did indicate that there was a written document that supported each of the investigations done.

The Board takes note that all of the documents entered into evidence by the County regarding the incidents in the Statement of Charges are fairly contemporaneous with the incidents they describe. The County did not offer any contemporaneous document regarding the March 2003 incident or the April 2002 plan. The Quality Assurance File, introduced into evidence by Appellant, does contain two documents

dated October 8, 2003, although all the other documents have June 2003 dates. However, neither of the October documents appears to be part of an investigation into the June 11, 2003 incident. Moreover, the Fire Chief was not sure that the Fire Chief had actually seen the Quality Assurance File before the hearing, but indicated the Fire Chief was briefed on the situation.

The Fire Chief did not know when the actual investigation which led to the Statement of Charges being issued was concluded. Also, the Fire Chief indicated that the Fire Chief did not know whether the investigation was completed more than 30 days prior to the issuance of the Statement of Charges.

The County did not even offer the April 2002 work plan into evidence. Furthermore, the Fire Chief acknowledged that the April 2002 incident which led to the work plan was not investigated after the Fire Chief came on board. When asked what justified an 18-month delay in starting the disciplinary process for the April 2002 incident, the Fire Chief testified it was cumulative – it was one of many incidents that led to the Statement of Charges. Because no investigation was conducted into this matter, the Board finds that this incident, which occurred more than 30 days prior to the issuance of the Statement of Charges, should not have been made a part of the Statement of Charges.

The County offered no documentary evidence regarding the March 2003 incident. The Fire Chief acknowledged that the March 2003 incident, which occurred prior to the Fire Chief's coming aboard, was not investigated after the Fire Chief took charge. When asked what justified the delay between the March 2003 incident and the issuance of the Statement of Charges, the Fire Chief again testified it was cumulative. Accordingly, because no investigation was conducted, the Board finds this incident, which occurred more than 30 days prior to the issuance of the Statement of Charges, was improperly made a part of the Statement of Charges.

The Fire Chief could remember no specifics about the April 3 and April 6, 2003 incidents contained in the Statement of Charges. With regard to the April 3 incident, the only documentary evidence offered by the County was the written statement of the Firefighter, dated April 9, 2003. With regard to the April 6 incidents reported by the Master Firefighter, the County produced the Master Firefighter's written statement of April 9, 2003. Subsequent to these incidents, and the receipt of the memorandum from the president of a community Volunteer Fire Department, the District Chief had the Captain do a fact-finding. Based on the fact-finding, Appellant was counseled about these matters and transferred. The counseling session occurred on April 21, 2003 and was memorialized in a written memorandum dated April 24, 2003. On May 1, 2003, the District Chief reported the three written complaints (i.e., the Firefighter's statement, the Master Firefighter's statement and the president's memorandum) and the personnel actions taken with regard to Appellant based on these complaints. The County produced no evidence as to why any additional investigation into these matters was necessary before a Statement of Charges regarding these incidents was issued. Accordingly, the Board finds that these incidents, which occurred more than 30 days prior to the issuance

of the Statement of Charges, should not have been made part of the Statement of Charges.

The Fire Chief was unable to provide any specifics with regard to the investigation into the May 19, 2003 incident. The County offered into evidence an e-mail from the Firefighter to the supervisor, the Lieutenant. This e-mail was subsequently forwarded to the District Chief on June 2, 2003. According to the District Chief, the District Chief, together with the Assistant Chief and a Captain, met with Appellant to discuss the May 19 incident. At that meeting, the Assistant Chief provided several suggestions to Appellant including using EAP. On June 5, 2003, the District Chief requested disciplinary action be initiated against Appellant, at least in part, because of the May 19, 2003 incident.

The County also offered into evidence an undated and unsigned EMS Incident Referral Control Sheet dealing with the May 19, 2003 incident. The EMS Referral, in the Section entitled "Details of Inquiry," states: "See memo from the Firefighter." According to the Battalion Chief, when the Quality Assurance Office received this EMS Referral, it reviewed the complaint and determined that it needed to be referred to administrative services for consideration of discipline.

The County offered no further evidence regarding any subsequent investigation into the May 19, 2003 incident. The Fire Chief could not remember any specifics regarding the investigation. Accordingly, the Board finds that the May 19, 2003 incident, which occurred more than 30 days prior to the issuance of the Statement of Charges, was improperly made a part of the Statement of Charges.

In support of the June 11, 2003 incident, the County offered into evidence the June 20, 2003 statement of an EMT/basic and the June 21, 2003 statement of an EMT/basic. It also offered into evidence an EMS Referral #03-417, which was neither signed nor dated. The Battalion Chief testified that the QA Office began gathering information with regard to the June 11 matter as it believed that there was a significant medical concern. The QA Office obtained the patient care records from A-18. The Battalion Chief provided no date with regard to when the patient care records were obtained.

The Battalion Chief acknowledged that even though the QA Office investigated the June 11, 2003 incident neither Appellant nor the other ALS present during the incident were interviewed regarding the matter. The MCPR states that prior to taking disciplinary action, a supervisor who is considering disciplinary action should conduct an investigation, if appropriate and necessary, and interview the employee and others who may have witnessed the conduct or have information about it. The Battalion Chief could offer no explanation as to why Appellant had not been interviewed, although the Battalion Chief admitted that Appellant should have been interviewed.

The County has the burden of proof to demonstrate that it complied with the MCPR and CBA in processing the disciplinary action. As previously noted, the Fire Chief did not know when the investigation was completed into the various incidents.

Thus, the County has not proved that it issued the Statement of Charges within 30 days of the date of the completion of the investigation into the June 11, 2003 incident. Moreover, the County did not follow the MCPR in conducting the investigation as it did not interview Appellant and the other ALS. Accordingly, the Board finds that the June 11, 2003 incident, which occurred more than 30 days prior to the issuance of the Statement of Charges, was improperly included in the Statement of Charges.²

To support the June 15, 2003 incident, the County offered into evidence an e-mail, dated June 16, 2003, from a Captain to the Battalion Chief. The Fire Chief testified that the Fire Chief was unaware of the specifics of the investigation into this matter. As the County has not shown any need for a further investigation into this matter, the Board finds that the June 15, 2003 incident, which occurred more than 30 days prior to the issuance of the Statement of Charges, was improperly included in the Statement of Charges.

The County Failed to Follow the Requirement in the CBA to Issue a Notice of Disciplinary Action within 30 days from Appellant's Response.

Even if the Statement of Charges had been issued in a timely manner, the Board finds that the Notice of Disciplinary Action was not issued in a timely manner.

As previously noted, in accordance with the provisions of the CBA, the Notice of Disciplinary Action is to be issued within a reasonable period of time, usually 30 days from the date of the employee's response to the Statement of Charges. Appellant responded to the Statement of Charges on November 18, 2003. The Notice of Disciplinary Action was not issued until May 19, 2004.

The Board notes that the County bears the burden of proving that it acted in a timely manner. The County has failed to meet this burden. The County argues that because Appellant elected to participate in ADR, it delayed the issuance of the Notice. However, there is nothing in the CBA that authorizes the delay of the issuance of the Notice of Disciplinary Action while ADR is pending. While Appellant could have waived the 30-day requirement while participating in ADR, no such evidence was offered into the record. In fact, the Fire Chief acknowledged that there was no agreement that the ADR process tolled the time frame for issuing the Notice of Disciplinary Action.

Even assuming that ADR somehow stays the issuance of the Notice of Disciplinary Action, it was concluded on December 11, 2003. However, the Notice was not issued until May 19, 2004. The County attributes this delay to the fact that there were on-going settlement discussions. The record is devoid of any evidence regarding precisely when these discussions took place and when they ceased. Nor is there any provision in the CBA that tolls the issuance of a Notice of Disciplinary Action while

² While the Board finds that this incident should not have been included in the Statement of Charges because of the failure to timely process it, the Board has not addressed the merits of the charge. The Board urges the County to proceed with any medical remediation it deems necessary based upon its findings regarding this incident.

settlement discussions are on-going. Again, the Board notes that Appellant could have waived the 30-day requirement but there is no evidence that Appellant did. The Fire Chief was unable to recall how long the settlement negotiations lasted or how long a period of time elapsed between the end of the negotiations and the issuance of the Notice of Disciplinary Action. Accordingly, the Board finds that the County failed to prove that it issued the Notice of Disciplinary Action in a timely manner.

Because of the significant procedural defects in the processing of Appellant's disciplinary action, the Board makes no findings as to whether the conduct alleged in the Statement of Charges and Notice of Disciplinary Action was improper.

The County Has Failed to Meet Its Burden of Proof.

Based on the foregoing, the Board concludes that the County has failed to meet its burden of proving that Appellant's demotion was consistent with the MCPR and CBA. Therefore, the Board concludes that the twelve-month demotion at issue was inappropriate, and should be revoked, with Appellant to be made whole for lost wages and benefits.

ORDER

On the basis of the above, the Board sustains the appeal, and orders that the County revoke the twelve-month demotion, and make Appellant whole for lost wages and benefits. In as much as Appellant prevailed, the Board authorizes a request for attorney fees. 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 Montgomery County Code, Section 33-14(c)(9).

DISMISSAL

Case No. 04-14

DECISION AND ORDER

This is a final Decision and Order of the Montgomery County Merit System Protection Board (Board) on the appeal of Appellant from dismissal as a Correctional Officer, in the Department of Correction and Rehabilitation (Department).

FINDINGS OF FACT

Appellant's assignment

Appellant was employed as a Correctional Officer at the Montgomery County Correctional Facility in Boyds, Maryland. The facility where Appellant worked is a new 305,000 square foot building located on 33 acres, with approximately 700 inmates. It is a maximum level security facility operated on a 24-hour basis. There is a Central Control, the nucleus of the facility, which monitors over 400 security doors within the correctional facility. In a competitive appointment and based on seniority, the Appellant was selected as one of only 21 correctional officers assigned to work in Central Control. Two of the Central Control officers are assigned to be on duty in the unit at all times.

Absence from duty station

The Department initiated an investigation based on an anonymous note received by management that contained a number of allegations of improper conduct by corrections officers in the facility. One of the allegations was that, “. . . the past two evenings, one of the control officers have left (sic) the center for more than 1 hour at a time.” According to the testimony presented by the County's witnesses, without targeting any particular Correctional Officer, a review was made of the electronically produced record of the use of “proxy card” by employees during the period mentioned in the anonymous note. Each employee working in the facility is issued a “proxy card,” which is used to pass through locked doors. An electronic record of the use of these cards is created, and can be accessed by management.

The County's witness who conducted the investigation testified that the proxy card use record revealed that, on November 29, 2003, at 2:59 a.m., Appellant's proxy card was used to gain access to the North Housing unit. Appellant's proxy card was then used at 6:01 a.m., to exit from the North Housing unit. The proxy card use record also reflected that, on November 30, 2003, at 4:10 a.m., Appellant's proxy card was used to gain access to the West Housing unit, and then used at 5:07 a.m., to exit that unit. The West Level 1 Cluster Officer testified that he clearly remembers Appellant walked through the West Level 1 Cluster Area and entered Pod West 1-3.

Making false statements

On the basis of what had been disclosed by the review of the proxy card record, Appellant was questioned. Appellant denied the accuracy of the record pertaining to the use of Appellant's proxy card, asserting that Appellant had not been away from Appellant's post. Appellant suggested during the interview that at times control officers loan their cards to other staff. When asked if Appellant had loaned Appellant's card to anyone, Appellant stated that Appellant did not remember. The County witness indicated that the investigation was extended to include the records of the proxy card usage of every staff member working (including non-uniformed) on both shifts in question. The County contends that this review disclosed that all staff members on duty during the shifts at issue had used their own proxy card.

Applicable rules and regulations

Department Policies and Procedure, Duties of the Correctional Officer, provides as the first of listed activities that may also be considered reasons for disciplinary action, "Abandoning an assigned post without first receiving authorization from the senior officer present in the subsection and being properly relieved." Item 7., provides, "Officer(s) . . . are prohibited from visiting any area of the facility that they are not assigned, unless prior approval has been obtained from a supervisor." Item 10., provides, "Officers may not leave their assigned post for a work break unless approved by a supervisor."

The Departmental Policy and Procedures Manual "Department Rules for Employees," provides, in pertinent part, "Employees shall not make untruthful statements, either verbal or written, pertaining to official duties."

Relevant prior disciplinary actions

On December 12, 2000, and in June 2002, disciplinary action was taken against the Appellant for making false statements in the course of Appellant's employment.

POSITIONS OF THE PARTIES

County

- That the record clearly demonstrates that Appellant abandoned Appellant's post at Central Control for more than three hours on November 29, 2003 and more than one hour on November 30, 2003, on each occasion leaving only one officer at the controls for the entire facility.
- That Appellant knowingly made false statements in the course of Appellant's employment.
- That Appellant's actions jeopardized the safety of inmates, correctional officers, and other individuals working within the center.
- That conduct like that engaged in by Appellant cannot be tolerated in a correctional facility.

Appellant

- That a disciplinary action of dismissal was unwarranted.
- That based on Appellant's exemplary work record, good character and a respectable length of service with the Montgomery County Government, a lesser form of discipline was more appropriate.
- That Appellant answered questions during the investigation to the best of Appellant's recollection at that time.
- That should the discipline of dismissal be mitigated, there will be no recurrence of the type of conduct that is at issue in the case.

ISSUES

1. Has the County sustained the allegations relied upon for the discipline, i.e., that the Appellant,

- on November 29 and 30, 2003, abandoned Appellant's assigned post for lengthy periods of time without authorization, in violation of established rules and regulations; and
- made untruthful statements during the investigation of the allegations of abandonment of Appellant's assigned post?

2. In the totality of the facts and circumstances of the case, is dismissal the appropriate discipline?

ANALYSIS AND CONCLUSIONS

1. The Board concludes that the County has presented compelling evidence that on November 29 and 30, 2003, Appellant left Appellant's assigned post in the Central Control for the periods of time alleged. The electronic record of the use of Appellant's proxy card shows the exact path from the Control Room to the West Housing Unit. Appellant's offered explanations, variously, that Appellant didn't do it, or that someone else might have used Appellant's card, were, in the Board's view, clearly contrived to avoid the charges made against Appellant. The electronic record showing that everyone on duty that shift was using their own card make it clear that it was Appellant who used the card to go where Appellant was not suppose to be. Additionally, there is independent evidence by a correctional officer who saw Appellant go into the West Housing Unit. Accordingly, the Board concludes that the County has sustained the allegation that Appellant improperly abandoned Appellant's post.

The Board further concludes that the County has sustained the allegation that Appellant made untruthful statements during the investigation of the allegation that Appellant abandoned Appellant's post. Appellant made numerous inconsistent statements, initially denying that Appellant left the Central Control on the days in question, then contriving a story about the possibility that someone else used Appellant's card. While Appellant may have not remembered exactly how long Appellant was away

from Appellant's post, it is clear to the Board that at the time Appellant was questioned, Appellant knew what Appellant had done but did not answer honestly, instead trying to fashion untruthful explanations. Accordingly, the Board concludes that the County has sustained the allegation that Appellant made untruthful statements during the investigation of the allegation that Appellant abandoned Appellant's assigned post.

2. The determination of the appropriateness of the discipline of dismissal must be viewed within the specific facts and circumstances of the case, particularly the place of employment, i.e., a maximum security facility, and the post that Appellant abandoned, i.e., the Central Control unit where all activity in the facility is monitored. It is not an exaggeration to say that the absence of one of the assigned Central Control officers for the periods of time proven jeopardized the security of the facility. Assignment to Central Control is a most important task, one that few of the facility officers can perform. Appellant, who does indeed have considerable tenure, should have known better.

Similarly, with respect to Appellant's failure to truthfully respond to the questions asked during the investigation, Appellant is a law enforcement officer who must be trustworthy, as evidenced by the existence of a rule specifically addressing the fact that disciplinary action can be taken for making false statements in the course of employment. While for some employees, a lesser form of discipline may be appropriate for shading the truth to escape harm's way, a law enforcement officer is, justifiably, held to a higher standard. Noting also that Appellant had previously faced discipline for making false statements, the Board is of the view that the discipline of dismissal should be sustained.

ORDER

On the basis of the above, the Board concludes that Appellant's appeal should be denied, and so orders.

APPEALS PROCESS

DENIAL OF EMPLOYMENT

Montgomery County Code Section 33-9 (c) permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with Section 6-11 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005), an employee or an applicant may file an appeal directly with the Board alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors or that the announced examination and scoring procedures were not followed.

Section 35-3 of the MCPR specifies that the employee or applicant has 10 working days to file an appeal with the Board in writing after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position. The employee or applicant need only file a simple written statement of intent to file an appeal. Upon receipt of the notice of intent, the Board's staff will provide the employee or applicant with an Appeal Petition which must be completed within 10 working days. Upon receipt of the completed Appeal Petition, the Board's staff notifies the County of the appeal and provides the County with 15 working days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the denial of employment or promotion.

During fiscal year 2005, the Board issued the following decisions on appeals concerning the denial of employment.

EMPLOYMENT

Case No. 05-03

DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Director of the Office of Human Resources (OHR) to rescind a conditional offer of employment made to Appellant based on the results of a pre-employment physical.

FINDINGS OF FACT

On November 3, 2004, Appellant received a conditional offer of employment for a term position of "Conservation Corps Crew Trainer." The offer of employment was conditioned upon the successful completion of a medical evaluation, including drug and alcohol screening through urinalysis. On November 4, 2004, Appellant accepted the conditional offer of employment and was scheduled for the medical evaluation on November 10, 2004. It is undisputed that Appellant was erroneously advised the medical evaluation would include only a physical and medical examination and a pre-employment drug and alcohol screening was not required.

On November 10, 2004, Appellant reported to Montgomery County's (the County's) Occupational Medical Services (OMS) and completed the medical evaluation, including the provision of a urine specimen for drug and alcohol screening. Prior to providing the sample, Appellant completed, signed, and dated an authorization form for and allowing the release of the screening results to the County. The authorization form is also date and time logged, and signed by the "Collector." The date and time on the form is November 10, 2004, at 12:20 p.m. It is undisputed that Appellant at no time during the medical evaluation objected or refused to provide a urine sample.

On November 12, 2004, OMS received the drug and alcohol screening results which reflected a positive result of .150 alcohol concentration. On November 26, 2004, by confidential memorandum, OMS advised the County's OHR of the positive results of the drug and alcohol screening. On December 1, 2004, Appellant was advised by letter from the OHR Director of the results of the medical examination and the decision to rescind the conditional offer of employment and to remove Appellant from consideration for the Conservation Service Corps Crew Trainer position. 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 Appellant.

On December 9, 2004, Appellant submitted a one-page letter to the Board appealing the County's decision to rescind the offer of conditional employment. (It should be noted this document makes reference to the same set of facts set forth above

with respect to the days of the month of the conditional offer of employment, and the scheduling of the medical evaluation, but refers to the month of DECEMBER, rather than NOVEMBER. The Board considers this to be an innocent oversight, and relies on the record to find November the appropriate and accurate month.) On December 23, 2004, Appellant submitted the Appeal Petition in support of Appellant's appeal.

On January 25, 2005, the County's OHR submitted its response to the appeal contending the rescission of the conditional job offer was reasonable and appropriate.

On February 18, 2005, Appellant submitted final comments to the County's response to Appellant's appeal.

POSITIONS OF THE PARTIES

Appellant

- Appellant contends that although Appellant "consumed a quantity of alcohol the evening before" the medical evaluation, Appellant would not have done so had Appellant not received erroneous information from the OHR representative. Appellant contends Appellant advised the attending physician Appellant had consumed alcohol the previous evening, and that the physician suggested Appellant discuss the matter with OHR. Appellant further contends, upon contacting OHR subsequent to the medical evaluation, Appellant was first advised the OHR representative would request a re-test if problems arose, and then advised by the same OHR representative Appellant would have no opportunity to request a second drug and alcohol screening.

- For relief, Appellant claims that, since alcohol is not an illegal substance, and because Appellant was misinformed about the nature and extent of the medical evaluation, Appellant should be given the opportunity to be retested, and that, upon satisfactory results of the drug and alcohol screening, Appellant be awarded the position that was originally conditionally offered to Appellant.

County

- The County contends Appellant had ample opportunity to object when requested to provide a urine specimen for the drug and alcohol screening while at the OMS offices for Appellant's medical evaluation, nor did Appellant advise OMS that Appellant had received erroneous information from OHR regarding the screening. The County further contends Appellant had the opportunity to decline to provide a urine sample until such time as the erroneous information Appellant had been provided by the OHR representative could be clarified. Finally, with respect to the drug and alcohol screening, the County contends Appellant, by completing the disclosure form, consented to the drug and alcohol screening.

- With respect to the rescission of the conditional job offer, the County contends its decision was fair and reasonable based on the "relatively high level" of the alcohol

concentration of .15, well in excess of the .02 cutoff specified in the County's Administrative Procedures 4-11, Section 4 (M)(8), and almost twice that of the .08 cutoff set forth in Maryland's Motor Vehicle Code for a presumption of driving under the influence of alcohol. In addition, the County contends the .15 alcohol concentration at 12:20 p.m., is not consistent with someone who states the positive result was due to alcohol consumption the previous night. Finally, the County cited its "heightened concern" given the fact that the position in question requires the incumbent to supervise "at-risk" adolescents in support of its decision.

- The County contends the appropriate remedy is the denial of the appeal and to allow the rescission of the conditional job offer that had been extended to Appellant.

ISSUE

Was the County justified in rescinding the conditional offer of employment made to Appellant on November 3, 2004?

ANALYSIS AND CONCLUSIONS

Throughout Appellant's filings with the Board, Appellant consistently bases Appellant's appeal on the fact that Appellant received erroneous information regarding the scope of the medical evaluation. Specifically, Appellant asserts that, had Appellant been advised of the drug and alcohol screening, Appellant would have abstained from consuming alcohol the evening prior to the medical evaluation and, thus, the conditional offer of employment would not have been rescinded. With regard to the erroneous information provided to Appellant by the OHR representative, the Board does not consider this to present an irreversible error for which the County must bear the burden. More precisely, it is the very existence of the erroneous information which may have provided a reasonable justification for Appellant's refusal to provide a urine specimen, or to reschedule the medical evaluation to a date when the results would have been more favorable to Appellant. Appellant did neither; instead, completing a disclosure form and providing the urine sample.

It is undisputed the record contains the results of the drug and alcohol screening which reflects an alcohol concentration of .15, for a sample that was provided at 12:20 p.m. Appellant's only reference to the high-level concentration is in Appellant's February 17, 2005, final comments, where Appellant contends the results are consistent with the consumption of alcohol the evening prior to the screening. In its response to the appeal, the County cites Administrative Procedures 4-11, Section 4 (M)(8), which sets the cutoff level of .02 for alcohol concentration for pre-employment drug and alcohol screening results. The existence of such a policy demonstrates the County does not require a zero-level drug and alcohol screening result for alcohol. In addition, the County cites the Maryland Motor Vehicle Code which sets the alcohol concentration level at .08 for a presumption of driving under the influence of alcohol.

The Board finds, based on the erroneous information provided to Appellant, Appellant reasonably could have refused or rescheduled all or part of Appellant's medical

evaluation until such time as the results would have been favorable to Appellant. Having failed to do so, or even attempt to do, Appellant must be willing to abide by the results of the screening of the sample Appellant provided.

Additionally, the Board finds the County was reasonable in its actions when it rescinded its conditional offer of employment to Appellant based on the very high-level of alcohol concentration in the urine specimen provided by Appellant. Given the State and County guidelines set forth, coupled with the fact that the position in question requires the supervision of “at risk” adolescents, the County must be allowed to make employment decisions that are in the best interest of public safety. Based on the foregoing, the Appellant’s appeal dated December 9, 2004, is denied.

ORDER

Based on the above, the Board denies Appellant’s appeal of the OHR’s rescission of the conditional offer of employment and denies Appellant’s request for remedy.

Case No. 05-06

DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant’s appeal from the determination of the Montgomery County, Maryland, Human Resources Director rescinding an offer of conditional employment.

Upon the docketing of the instant appeal, the Board forwarded a copy of the appeal to the Office of Human Resources for a response. On March 29, 2005, the County responded, indicating that the County had subsequently offered and Appellant had accepted the Program Manager II position referenced in Appellant’s appeal. The County indicated that Appellant would be attending new employee orientation on April 4, 2005 and, therefore, requested the Board dismiss the appeal as moot.

Under applicable Board procedures, Montgomery County Personnel Regulations (MCPR), Section 35-8(b), Appellant had 15 working days from the date of the County’s response to provide final comments. Appellant’s comments were due on April 20, 2005. Appellant was informed that, if Appellant did not wish to submit final comments, a negative reply was required. Appellant provided no response.

Pursuant to MCPR, Section 35-7(b), the Board may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. Because Appellant failed to adhere to the Board’s request to provide any final comments or a negative reply by April 20, 2005, the Board hereby dismisses Appellant’s appeal for failure to prosecute.

APPEALS PROCESS **GRIEVANCES**

In accordance with Section 34-10(a) of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR (as amended February 15, 2005) specifies that any such appeal must be filed within 10 working days of the receipt of the final written decision on the grievance. As with all appeals, the employee need only initially file a notice of intent to appeal.

Upon receipt of the notice of intent, the Board's staff will provide the employee with an Appeal Petition which must be completed within 10 working days. Upon receipt of the completed Appeal Petition, the Board's staff notifies the Office of Human Resources (OHR) of the appeal and provides OHR with 15 working days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. OHR must also provide the employee with a copy of all information provided to the Board. After receipt of OHR's response, the employee is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the CAO's grievance decision.

During fiscal year 2005, the Board issued the following decisions on appeals concerning grievance decisions.

GRIEVABILITY

Case No. 04-03

DECISION AND ORDER

This is a final decision of the Montgomery County, Maryland, Merit System Protection Board (Board) on the joint appeals of the Kensington Voluntary Fire Department (KVFD) and Appellant, from the decision of the Montgomery County, Maryland, Fire and Rescue Commission (Commission), denying Appellant's request that the remedy for improper termination include an award of Length of Service Award Program (LOSAP) points.

FINDINGS OF FACT

Disciplinary Action and Processing of Appeal

Appellant is a volunteer firefighter with the Montgomery County Fire and Rescue Service (FRS). On August 13, 2002, the FRS Administrator (Administrator) issued Appellant a Notice of Disciplinary Action discharging Appellant from the FRS, and permanently removing Appellant from the Integrated Emergency Command Structure. (IECS). On September 16, 2002, Appellant appealed the disciplinary action to the Commission. The Montgomery County Code, Section 21-7(b) provided 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 Commission automatically stayed the imposed discipline.

By letter dated October 22, 2002, KVFD and Appellant asked the Commission to stay the appeal pending the outcome of what they contended was a "controlling" case pending in the Montgomery County Circuit Court, which the Commission did do. On November 13, 2002, the Administrator responded by asking the Commission to vacate the automatic stay of Appellant's discipline. By Order dated November 25, 2002, the Commission vacated the automatic stay of the discipline, and stayed the processing of the appeal pending the outcome of the Circuit Court case. On May 5, 2003, KVFD and Appellant filed a motion with the Commission requesting, in pertinent part, that it lift the stay of Appellant's appeal, set a hearing date, and that the Commission reinstate the stay of Appellant's discipline pending the hearing on the merits. The Commission denied KVFD and Appellant's motion, as it did a motion to reconsider.

The Commission's denial of KVFD and Appellant's motions was appealed to the Board, which on August 21, 2003, ordered that the Commission either lift the stay of the processing of Appellant's appeal, and proceed with its processing with all due haste, or, reinstate the stay of the discipline pending the resolution of Appellant's appeal of Appellant's discipline. The County appealed this decision to the Circuit Court. In its response to that appeal, KVFD and Appellant contended that the appeal was premature, as there had been no final order by the Board, and, additionally, sought attorney fees

expended in responding to the appeal. The Circuit Court, without explanation, denied both the request for dismissal of the appeal, and the request for attorney fees.

According to KVFD and Appellant, no action was taken to comply with the Board's order until December 22, 2003, when the Commission ordered that the stay of the processing of Appellant's appeal be vacated, and that a hearing on Appellant's appeal be scheduled by staff. No hearing was in fact scheduled.

Related Litigation

On August 19, 2002, the Board issued its Decision and Order in the matter of Case No. 02-13 (*Kensington VFD*), which grew out of the Administrator's imposition of discipline of a volunteer. The Board concluded, in pertinent part, that,

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

The Board ordered that the Administrator cease and desist from imposing additional disciplinary measures on Appellant, and to purge from Appellant's file any reference to the additional disciplinary measures. Further, the Administrator was ordered to notify in writing the Appellant KVFD, that the Administrator will not impose disciplinary measures unless and until the Commission issues by regulations, policies required by Code Section 21-3(g). The County appealed the Board's decision in *Kensington VFD*, to the Circuit Court, which on October 16, 2003, affirmed the Board's decision. The Circuit Court, without explanation, denied Appellant's request for attorney fees. There was no appeal of the Circuit Court's affirmation of the Board's decision to the Maryland Court of Special Appeals.

Revocation of the Termination

On February 18, 2004, counsel for the Administrator filed with the Commission, a "Line," which provided, in pertinent part, "Given the Circuit Court's recent decision in [*Kensington VFD*], the Fire Administrator withdraws the discipline imposed on August 13, 2002, and [Appellant] is eligible for reinstatement to the IECS assuming [Appellant] meets all controlling criteria." (While it appears that at some point after the Administrator advised the Commission that Appellant was eligible for reinstatement, that Appellant resumed activities as a volunteer firefighter, the Board cannot ascertain from the record before it when this occurred.)

On February 23, 2004, the Commission issued an Order to Show Cause, giving the parties until March 15, 2004, to show cause as to why the pending appeal should not be dismissed as moot. On March 12, 2004, KVFD and the Appellant filed with the Commission a "Request for Affirmative Relief," contending that Appellant should receive "Length of Service Award Program (LOSAP) Points" lost as a result of Appellant's discipline. The request provided, in pertinent part,

As the Administrator has withdrawn the discipline based upon the Circuit Court decision that Administrator did not have the power to impose such discipline, Appellant should be put in the position Appellant would be in, if not for the Fire Administrator's action.

Until this action is taken, good cause remains to keep the appeal open.

Specifically, KVFD and the Appellant sought that Appellant should be awarded 70 LOSAP points for the year 2002, and 50 LOSAP points for the year 2003.

On April 8, the Commission issued a Memorandum Opinion and Order with respect to the request for the award of the LOSAP points, and status of the processing of the appeal. As to the former, the Commission denied the request, relying on the following rationale:

- The Interim Appeal Procedure, which then governed the processing of an appeal from an action of the Administrator, required that an appellant set forth in the appeal document the basis relied upon in seeking relief from the Commission. Appellant did not raise the issue of LOSAP points in Appellant's appeal document. Therefore, Appellant may not use the instant appeal to obtain relief for something not raised in Appellant's appeal document, and Appellant's time to include such issue has long passed.
- Such claims are not within the appellate authority of the Commission. LOSAP benefits are administered by the County Administrator under Executive Regulations, which govern appeals if a volunteer whose name does not appear on the LOSAP approved certified list feels aggrieved. Appellant must follow the appeal procedure for LOSAP claims, and whether Appellant has done so is not part of the record in the case.
- Appeals to the Commission are heard on the record. The factual statements made by the attorney for Appellant are not part of the record in the appeal. Thus, the Commission, even if it did have jurisdiction, has no basis for reviewing the factual statements asserted by Appellant's attorney.

The Commission, having concluded that the granting of the relief requested was not appropriate, and having noted that the Administrator has withdrawn the discipline imposed on Appellant, ordered that the pending appeal be dismissed as moot.

LOSAP Points Program

County Executive Regulation Administration of the LOSAP Program, number 82-91, provides for a uniform procedure to administer the length of service awards program for volunteers of the fire and rescue corporations in the County. Award points are granted

for various activities, and a volunteer must accumulate at least 50 points each year in order to receive credit for one year of active service. Volunteers who accrue no service points in any category for two consecutive years will be considered to be inactive, and will be required to reactivate their registration before receiving future annual certifications of service. Benefits for sufficient “good” years of service are monthly monetary retirement payments for life.

The Regulation provides in section 6 for an annual certification process, which requires the “LOSAP Administrator” to calculate points awarded, “and submit the list to the Fire and Rescue Commission for approval.” “The Fire and Rescue Commission will review the verified list of volunteers and approve the final annual certification.” Section 6(c) provides,

Volunteer Annual Certification Appeals Process. A volunteer whose name does not appear on the approved certified list has the right to appeal within 30 days after the date written notice of the finding is mailed to the volunteer. The appeal must be written and forwarded to the LOSAP Administrator. The LOSAP Administrator will investigate the appeal and make a recommendation to the Fire and Rescue Commission. The Commission’s decision on the appeal is final.

It appears from the record, that Appellant received in excess of 50 points for the year 2002, awarded for Appellant’s service at the Laytonsville VFD, prior to Appellant’s transfer to KVFD, and the imposition of Appellant’s discipline, resulting in 2002 being a year counted toward Appellant’s LOSAP benefits. Further, it appears that the LOSAP Administrator denied Appellant’s request for 36 points for time allegedly worked at KVFD, which represented the period that Appellant was barred from working due to the discipline. It further appears that because of the imposition of the discipline, which, according to KVFD and the Appellant, lasted some 18 months, that sufficient points were not awarded in 2003, for being a year counted toward Appellant’s LOSAP benefits. At the time of the parties’ submissions in the instant case, the LOSAP Administrator had not issued the 2003 LOSAP point certification. KVFD and Appellant’s submission contains contentions that Appellant’s past record would indicate that, if allowed to participate as a volunteer, Appellant would have earned more than the requisite 50 points for the year 2003.

Appeals to the Commission

The applicable appellate functions of the Commission are provided for by County Code Chapter 21. Section 21-7, *Appeals to and from Commission*, provides as to jurisdiction, “The Commission must hear and decide each appeal,” then specifying who may file such appeals, including “volunteer firefighters or rescuers . . . concerning any adverse action of the Administrator.” While Section 21-7 has provisions describing procedures, subpoenas, depositions, temporary chair, and appeals of Commission decisions, there are no specified references to remedial authority.

POSITIONS OF THE PARTIES

Appellant

- If it were not for the Administrator's invalid discipline, and the Commission's failure to follow the law during the appeal process, Appellant would have earned the LOSAP points, which Appellant now seeks.
- Appellant's initial appeal to the Commission, that the Administrator's actions be declared null and void, is broad enough to cover the remedy of awarding LOSAP points.
- The Commission, both as an ultimate arbiter of disciplinary disputes, and over the award of LOSAP points, has the authority to correct the effects of the improper discipline.
- The Administrator and the Commission compounded the damage done to Appellant by ignoring the Board's decision in *Kensington VFD* that it was without authority to discipline in the absence of required regulations.
- Attorney fees are available, and should be awarded to KVFD and the Appellant in the instant case. The Board decision denying such fees in *Kensington FVD*, is not controlling in the instant case, which presents different facts, nor is the Circuit Court's denial of such fees.

County

- The County is unaware of any law or regulation that permits the Commission to consider LOSAP points in conjunction with a Section 21-7 Commission appeal, or authorizes the Board to grant LOSAP points.
- Even assuming the Commission and the Board could consider LOSAP with a Section 21-7 appeal, Appellant failed to raise LOSAP in Appellant's original Commission appeal, thereby failing to preserve this issue for review.
- Because Appellant received in excess of 50 LOSAP points for 2002 for Appellant's Laytonsville VFD service, Appellant has not suffered any damage for that year by the LOSAP Administrator's denial of the requested 36 points for Appellant's KVFP service. To date, the LOSAP Administrator has not issued Appellant's 2003 LOSAP point certification. Additionally, Appellant must contest awarding of Appellant's LOSAP points through the Executive Regulations governing the LOSAP program.
- The request for attorney fees should be dismissed because:
- At the time that the County appealed the Board's *Kensington VFD* decision to the Circuit Court, KVFD and Appellant requested the Circuit Court to award attorney

fees, arguing that Code Section 21-7(g) permits volunteers to appeal Commission decisions to the Board, “as if the aggrieved persons were merit system employees,” who are permitted to be awarded attorney fees. However, the Circuit Court rejected this argument and denied KVFD and Appellant’s request for attorney fees. Since the Circuit Court previously addressed the attorney fees issue, the Board must comply with the Court’s directive.

- In a supplemental decision in *Kensington VFD*, the Board refused to grant attorney fees because volunteers are not “employees,” as contemplated under Code Chapter 33.

ISSUES

1. Does Appellant’s failure to raise LOSAP points in Appellant’s initial appeal to the Commission bar Appellant from seeking the awarding of such points as a remedy following the revocation of Appellant’s discipline?
2. Does the Commission have legal authority to grant the requested remedy of the awarding of LOSAP points?
3. What is the appropriate disposition of the appeal before the Board?
4. Are KVFD and the Appellant entitled to attorney fees/costs related to the processing of the instant appeal of the Commission’s Order?

ANALYSIS AND CONCLUSIONS

1. The Board rejects the Commission’s conclusion that Appellant’s failure to raise LOSAP points in Appellant’s initial appeal bars the Commission from considering and granting such a remedy at the time the awarding of the points were requested. It is not uncommon in appellate procedures for issues as to remedy to be raised and considered subsequent to the filing of an appeal. For example, frequently the Board considers requests for attorney fees after issuing a final decision.

Moreover, in the facts of the instant case, it would be particularly unjust to follow the reasoning and conclusion of the Commission on this issue. Appellant filed the appeal of Appellant’s discipline on August 13, 2002, some 27 days after the imposition of the discipline. At that time, Appellant had no reason to believe that lost LOSAP points would be an issue. Because the County was seeking judicial review of *Kensington VFD*, rather than complying with the Board’s decision, KVFD and Appellant understandably sought to stay the processing of the appeal, assuming that, by operation of law, the discipline would be stayed. However, when the Commission complied with the Administrator’s request that the automatic stay of the discipline be terminated, while continuing to stay the proceeding, Appellant was unable to perform duties which would have earned Appellant LOSAP points. It was only when the Board’s *Kensington FVD* decision was judicially affirmed, and the Administrator revoked the discipline, followed by the Commission’s Order to Show Cause why the appeal should not be dismissed, that the issue of remedy was presented. It is understandable, and reasonable, that in response

to that Order, Appellant would raise the issue of Appellant's LOSAP points, which had become an issue because of the length of time Appellant had been precluded from functioning as a volunteer.

Accordingly, the Board concludes that the fact that Appellant did not raise the issue of lost LOSAP points in Appellant's initial appeal to the Commission cannot be used as a basis for the Commission to refuse to consider Appellant's request that Appellant be awarded points for the period Appellant was unable to serve as a volunteer because of the imposed discipline.

2. In concluding that it lacked legal authority to grant the requested remedy, the Commission points to the fact that the LOSAP program is governed by an Executive Regulation, and that claims and appeals with respect to LOSAP benefits are not within the jurisdiction granted to the Commission under Code Section 21-7, which is where it gets its authority to consider Appellant's appeal from Appellant's dismissal. Rather, appeals related to the LOSAP program must follow procedures set out in the applicable Executive Regulation.

The Commission based its view that it lacked authority to grant the remedy requested by KVFD and the Appellant on being unaware of any law or regulation that permits it to consider LOSAP points in conjunction with Section 21-7 appeals. The Board disagrees with this conclusion. Code Section 21-7 directs that the Commission "must hear and decide each appeal." The mandate to "decide" each appeal is meaningless if it were not further envisioned and intended that the Commission include in its decisional process the arriving at a remedy when it finds a violation has been committed. If the Commission's view were correct, it would serve no useful purpose for someone to take an appeal to it.

The Board also looks to the Commission's responsibility set forth in the Executive Regulations setting forth the LOSAP program, that it make final decisions on a volunteer's appeal. Hence, the Commission has within the scope of its responsibility, to look at claims under the LOSAP program. While the appeal process for the LOSAP program is not a Section 21-7 appeal, the Board does not see a barrier between these Commission responsibilities. That is, the Commission has Section 21-7 authority to remedy violations, and can consider LOSAP points in conjunction with Section 21-7 appeals.

Accordingly, based on the above, the Board concludes that the Commission did in fact have legal authority to grant the requested remedy of the award of LOSAP points.

3. As to the proper disposition of the appeal before the Board, KVFD and the Appellant seek to have the Board grant the requested LOSAP. However, the Board is of the view that the appropriate disposition is for it to remand the case to the Commission for consideration of the request, consistent with the Board's conclusions as to its authority. Appellant did in fact prevail in Appellant's appeal. That is, Appellant's discipline was withdrawn based on the precedent set in *Kensington VFD* that the Administrator could not discipline a volunteer in the absence of the regulations required

by the Code. The Commission can ascertain the facts as to Appellant's claim for 2002 and 2003 LOSAP points, and make a decision as to how many points Appellant should have earned, but for Appellant's improper termination.

The Board recognizes that Appellant did not initiate a timely appeal seeking the 36 additional points Appellant claims should have been awarded for 2002, and, at least at the time of the filings in this case, because there had not been an issuance of the 2003 points allocations, no LOSAP appeal had been filed. However, in the Board's view, the time limits in the Executive Regulation should be tolled, noting that when Appellant might have filed a timely appeal under the LOSAP program, Appellant was awaiting a disposition of Appellant's Section 21-7 appeal.

4. KVFD and the Appellant seek an award of attorney fees, dating from the August, 2002, imposition of the discipline of Appellant, presumably through the processing of the instant appeal of the Commission's Opinion and Order denying the requested remedy of the awarding of LOSAP points. The Board is of the opinion that Appellant did in fact prevail in Appellant's appeal. That is, Appellant's discipline was withdrawn based on the precedent set in *Kensington VFD* that the Administrator could not discipline a volunteer in the absence of the regulations required by the Code. However, the issue is whether there exists legal authority for the awarding of attorney fees in the instant facts.

In a Supplemental Decision and Order in *Kensington VFD*, the Board dealt with this issue, and held, in pertinent part,

. . . Section 33-14 of Chapter 33, governs hearings and decisions of the Board, including its remedial authority, which provides in subsection (c)(9), the authority to "Order the county reimburse or pay all or part of the employee's reasonable attorney's fees." (Emphasis supplied) Code Section 33-6 defines "County employees," as "All persons who are employed by the county in full-time or part-time year-round permanent career positions" Clearly, the literal language of the Code provides authority for the Board to order the reimbursement of attorney fees to only County employees, and there is no indication found in the Code that the word "employees" means any prevailing appellant, regardless of employee status.

. . . The recently passed County Bill 37-97, which reorganized the County Fire and Rescue Service, defines "volunteer" as, "an individual who, without salary, performs fire, rescue, emergency, medical, or related services" While Bill 37-97 provides volunteers with certain appeal rights to the Board, there is nothing in that legislation which would indicate an intent to make them "employees" who could be reimbursed for attorney fees within the provisions of Code Section 33-14. As argued by the County, if it was intended that volunteer fire fighters be authorized to be reimbursed for attorney fees, the Council could have so provided when passing Bill 37-97.

The Board's decision in *Kensington VFD*, is, in all respects, applicable to the instant case, and, accordingly, the request for attorney fees is denied.

Having determined that its precedents are applicable on the issue of attorney fees, the Board finds it unnecessary to determine the applicability of the Circuit Court decisions denying such requests following its review of *Kensington VFD*, and/or review of the Board's decision in the instant case ordering that either the lifting of stay of the processing of the appeal, or the reinstatement of the stay of the discipline.

ORDER

The Board hereby remands the instant proceeding to the Commission for consideration of Appellant's request that Appellant be awarded LOSAP points for the period of time that Appellant was unable to work as a volunteer because of Appellant's improper termination.

Case No. 05-02

DECISION AND ORDER

This is a final Decision and Order of the Montgomery County, Maryland, Merit System Protection Board (Board) on the appeals of 42 management personnel in the Montgomery County Sheriff's Office (Appellants), from the determination of Office of Human Resources' (OHR) Labor/Employee Relations Division Manager, that their jointly-filed grievance over a newly approved salary schedule was not grievable through the administrative grievance procedure.

FINDINGS OF FACT

Background and the Grievance

Salary schedules for Deputy Sheriffs in the County Sheriff's Office are determined by collective bargaining. The new 2004-2007 collective bargaining agreement between the County and the Municipal and County Government Employees Organization (MCGEO), Local 1994, established a new salary schedule which increased compensation for the Deputy Sheriffs, effective July 11, 2004.¹

Each year that bargaining unit salaries are adjusted, OHR evaluates the impact of those salary adjustments on the compensation structure for unrepresented job classes, such as Sheriff Management, and recommends adjustments to the Chief Administrative Officer (CAO). The CAO, in turn, recommends to the County Council modifications to

¹ In Resolution No. 15-589, adopted April 27, 2004, the Council expressed its intent to appropriate the funds necessary to implement the collective bargaining agreements with MCGEO for the period July 1, 2004 through June 30, 2007.

salary structure.

For Fiscal Year (FY) 2005, OHR recommended to the CAO, who in turn recommended to the County Council, the salary schedule now in effect for Sheriff Management. The County Council, in Resolution No. 15-630, adopted on May 27, 2004, specifically appropriated funds in FY 2005 for the implementation of the salary schedule for the Deputy Sheriffs. See Resolution No. 15-630, ¶ 14. Likewise, the County Council specifically included non-represented employees in the ranks of Sergeant, Lieutenant, Captain, and Colonel in the Sheriff's Office in a Salary Schedule for Sheriff Management, effective July 11, 2004. Id. ¶ 18. The Council also appropriated funds in FY 2005 to provide a 2.0% general wage adjustment to each grade in the Salary Schedule for Sheriff Management, effective September 5, 2004. Id.

Following the Council's action, on or about June 21, 2004, 42 management employees in the Sheriff's office filed individual grievances under Montgomery County Administrative Procedure 4-4 (AP 4-4), *Grievance Procedure*. The grievances specifically alleged that the newly approved salary schedules for Deputy Sheriff and Sheriff Management

are inequitable and in violation of various sections of the County statute and regulations including, but not limited to, MCPR 10-2, and Section 33-5(b) and Section 33-11 of the Montgomery County Code, because these salary schedules: (1) do not maintain a proper alignment between the Deputy Sheriffs and Sheriff Management; (2) do not adequately reflect the differences in job demands, levels of responsibilities, and levels of authority between Deputy Sheriffs and Sheriff Management; and (3) in conjunction with pay policies and practices, will result in pay inequities between Deputy Sheriff and Sheriff Management personnel.

The grievance requested as relief:

1. Adjustment of the . . . salary to maintain proper alignment and reflect equitable differences between Deputy Sheriffs and Sheriff Management.
2. "Pass through" current and future union negotiated salary increases to Sheriff Management employees based upon salary schedule changes.
3. Longevity increases awarded for twenty (20) years of service without any requirement to be at salary grade maximum.
4. Reimbursement for all reasonable attorney fees and costs.

By memorandum dated August 10, 2004, the Labor/Employee Relations Division Manager notified the Appellants that their grievances were consolidated.

By memorandum dated August 25, 2004, the Director, OHR, responded to the consolidated grievances. The Director, OHR, rejected Appellants' assertion that the citations to the regulations and Code referenced in their grievance required the County to

pass-through current and future union negotiated salary increases or mirror salary schedule structures. Rather, in making its recommendation regarding salary schedules, the Director, OHR, noted that the County evaluates the impact of negotiated salary adjustments on unrepresented job classes and takes into consideration the amount of adjustment necessary to remain competitive in the labor market and how much salary growth fiscal conditions permit. Accordingly, the Director, OHR, denied the grievance.

Appellants filed an appeal with the CAO. By memorandum dated October 1, 2004, Appellants were notified that their grievance and the relief requested was not grievable through the AP 4-4, *Grievance Procedure*, as it sought to change policy as opposed to alleging an improper or unfair application of policy.

Appellants provided a response on October 14, 2004, indicating that the gist of their grievance was pay inequity. They alleged that the failure to address the pay inequity was contrary to, and inconsistent with basic merit service and compensation principles.

The County issued a final decision on November 17, 2004, denying the grievance as non-grievable. This appeal followed.

APPLICABLE LAWS AND REGULATIONS

Montgomery County Code, Section 33-5, sets forth the “merit system principles,” which include, in pertinent part,

(2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment;

(3) Merit system employees shall be provided compensation consistent with standard of comparability with other public agencies and the private sector.

Montgomery County Code, Section 33-11, *Classification; salary and wage plans*, essentially provides for classification procedures, and the role of classification in salary and wage plans.

Montgomery County Code, Section 33-12(b), which states in relevant part:

(b) *Grievances*. A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. The determination of the board² as to what constitutes a term or condition of

² Section 33-12 is part of Article II, Merit System, of the County Code. Section 33-6, also part of Article II, defines the term “Board” as: “The merit system protection board as described in section 403 of the county charter.”

employment shall be final. Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process.

Administrative Procedure (AP) 4-4, *Grievance Procedure*, subsection 2.10, defines “grievance” as,

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

A. A misinterpretation, misapplication, or violation of any policy, procedure, regulation, law or practice which is sufficiently established to have precedential value; . . .

Subsection 4.10, *Matters which are not grievable*, identifies: position classification decisions, performance ratings, terminations during probation, resignations, and employee awards.

Montgomery County Personnel Regulations (MCPR), Section 34-1, *Policy on grievances* (2001),³ provides, in pertinent part,

(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;

.

(4) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential, overtime pay, leave, insurance, retirement, or a holiday; . . .

(f) (1) The following matters are not grievable:

(A) a position classification;

³ Section 34 of the MCPR has been amended since the filing of the instant grievance. The definition of a grievance is now found at section 34-4. Matters that are not grievable are found at section 34-6. However, none of the changes are germane to the instant grievance.

(H) a matter that has been clearly identified as not grievable by a statute, regulation, or MSPB decision.

MCPR, Section 10-2, provides,

General compensation policy. The County must provide a total compensation system designed to recruit and retain a high quality workforce. The CAO must periodically compare the compensation of County employees with the appropriate labor market and other area compensation systems to maintain a standard of comparability.

MCPR, Section 10-16(a)(2), provides, in pertinent part,

A department director may, with the written approval of the OHR Director, increase the base salary of a merit system employee to . . . resolve a pay inequity affecting an employee.

ISSUE

Whether, pursuant to applicable law and regulation, the grievance in the instant matter is grievable under the administrative grievance procedure?

POSITIONS OF THE PARTIES

County

The County contends that the subject matter of the grievances, and the relief requested is not grievable under the County Personnel Regulations, and the AP 4-4 grievance procedure. Specifically, it is alleged:

- The complaint, which Appellants refer to as a pay equity grievance, is essentially an argument that Sheriff Management positions have not been properly classified, in terms of pay grade allocation, compared to the Deputy Sheriff positions, and such a claim involving the pay scale of a class is not grievable under MCPR, Section 34-1(f)(1)(A).
- Matters enumerated in the “statute” and regulations as not being grievable are not inclusive. AP 4-4 is intended to resolve certain disputes, and to determine if a dispute is grievable, it is necessary to look at the nature of the dispute. The instant complaint does not allege a misinterpretation or improper application of an established statute, rule, regulation, procedure or policy. Rather, the complaint seeks to “change” the compensation policy that has been approved by the County Council. “A County policy is not appropriately addressed through the grievance process.” “The . . . grievance process is not a mechanism for changing policy.”

“Instead, it is designed to deal with improper or unfair application of policy.”

- The contentions in the instant case are distinguishable from a complaint when a less senior and less experienced employee is promoted and receives a higher base salary than an incumbent as a result of the application of a promotional pay increase authorized by the County Personnel Regulations, which would be grievable.
- County Code and County Personnel Regulations “merit system principles” relied upon by the Appellants are not directly on point. The obligation that the County must provide a total compensation system designed to recruit and retain a high quality work force does not afford a basis for an employee to grieve the adequacy of his/her compensation.
- In determining whether a complaint is grievable, it is necessary to look not just at the nature of the complaint but also at the relief requested, and whether the Board has the authority to provide the remedy requested. The relief requested is within the prerogative of the County Council, and the Board has no authority to direct the Council to take the actions sought by the Appellants.

Appellants

- The gist of the grievances concern pay inequities, and the failure to address these inequities is contrary to, and inconsistent with the basic merit principles set forth in the County Personnel Regulations.
- The claim raises the question of whether Sheriff Management personnel are suffering a pay inequity, not whether the County has an unfettered right to adopt the current salary schedules.
- The relief requested includes appropriate within-grade salary adjustments to Sheriff Management personnel, relief that the County can provide without impacting the legislation concerning salary schedules.
- The County acknowledges that a complaint concerning a less senior employee being promoted and receiving a higher base salary than the incumbent would be grievable on the basis that it involves an inequitable application of the compensation policy. In the present case, there has been evidence provided which shows that there will be such situations.

ANALYSIS AND CONCLUSIONS

It is important to reiterate, and stress, that the sole issue before the Board in the instant case is whether the subject grievance is grievable under the administrative grievance procedure. The merits of the grievance, that is, whether the salary schedules complained about are violative of law, regulation, or otherwise improper, is not at issue.

The County contends that a determination of whether a grievance is grievable requires a look at the “nature of the dispute,” a view of the process that leads the County to hypothesize about what Appellants are actually contending, and whether the remedies sought can legally be granted. In the Board’s view, such speculation is not the appropriate test. Rather, the test is to determine whether the actual grievance makes a claim which is arguably subject to the grievance procedure. The instant grievance, by its specific language, contends that the salary schedules for Sheriff Management is in violation of cited provisions of statute (County Code) and the County Personnel Regulations.

Undisputed is the fact that the coverage of the grievance procedure, either as defined in AP 4-4, or the MCPR, includes allegations of misinterpretation, misapplication, or violations of policy. The County seeks to distinguish the instant grievance from the coverage language by contending that it is not over misinterpretation, misapplication, etc., but over the compensation policy itself. In the Board’s view, this mischaracterizes the grievance, which specifically alleges that the compensation at issue is in violation of policies found in the County Code and the County Personnel Regulations. It should also be noted in this regard that the provisions of the MCPR statement of grievance coverage includes, “improper, inequitable, or unfair application of the compensation policy . . . , which may include salary, a pay differential,” It appears to the Board that this is just what the grievance is alleging.

In this latter regard, the Board finds distinguishable its decision in MSPB Case No. 01-11 (2001), which is cited by the County. In MSPB Case No. 01-11, the Board concluded that the grievance made no claim of misapplication of policy, but only that the regulation at issue was, itself, arbitrary and capricious. Again, in the instant case, the grievance alleges that the pay schedules are violative of law and regulation.

It is also of significance that both the AP 4-4 and the MCPR provide, with specificity, matters which are “not grievable,” none of which apply to the instant case, except to the extent that the County argues that what the instant grievance is essentially over classification, which is an excluded category. The Board sees no merit to this contention. In this regard, it is noted that MCPR, Section 9-1, defines “classification” as, “The assignment or allocation of: (1) a position to an occupational class; and (2) an occupational class to a pay grade or pay band on an approved salary schedule.” A grievance which alleges that pay schedules are violative of law and regulation is not about classification.

The Board also sees no merit to the County’s contention that the grievance is rendered non-grievable because the remedies requested are not within the authority of the Board to grant. Grievances frequently seek remedies that are not granted, and we know of no precedent that to do so renders the grievance non-grievable. Only consideration of the merits of a grievance, and a finding of merit, can lead to a determination of appropriate remedy. Neither of these things have happened in the instant case.

On the basis of the above, the Board finds that the grievance at issue is grievable under the administrative grievance procedure,⁴ granting the Appellants' appeal, and orders that the matter be remanded to the parties for processing on the merits.

ORDER

The appeal of the CAO's determination that the grievance is not grievable under the administrative grievance procedure is granted, and the matter is remanded to the parties for processing on the merits.

⁴ The Board notes that its decision in the instant case is consistent with national policy in the private sector, as defined by the United States Supreme Court in what came to be known as the "Steelworkers Trilogy," three cases on determinations of "arbitrability," which is analogous to the "grievability" issue before the Board. In United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960), the Court found that if a party seeking arbitration makes a claim, which is arguably subject to the arbitration clause, the court should compel arbitration. The fact that the court may believe that a grievance is totally lacking in merit, or is frivolous, should be no concern to the court. In United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960), the Court found that an order to arbitrate a particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. An application of these principles in the instant case would clearly lead to a determination that the grievance is grievable.

TIMELINESS AND MOOTNESS

Case No. 05-04

DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Chief Administrative Officer (CAO), to dismiss Appellant's grievance as portions of Appellant's grievance were not filed timely and the remaining issue was moot.

FINDINGS OF FACT

On March 15, 2004, Appellant filed a grievance alleging that several incidents constituted retaliation and harassment by the Department of Technology Services (DTS) against Appellant for not volunteering to perform certain assignments, namely providing technical support for the primary election and handling of the Department of Liquor Control's ERD system project. Appellant alleged that the following actions constituted retaliation and harassment:

- 1) taking away Appellant's cell phone in the fall of 2003;
- 2) assigning Appellant the smallest office when DTS moved to new offices in the November-December 2003 timeframe;
- 3) being threatened by Appellant's supervisor on December 11, 2003, when Appellant's supervisor stated, "If you don't take the DLC job, you will never be promoted in DTS";
- 4) suspending Appellant's telecommuting privileges on February 20, 2004; and
- 5) placing Appellant on sick leave restriction by memo dated February 25, 2004.

As relief, Appellant sought the lifting of Appellant's sick leave restriction; the restoration of Appellant's telecommuting privileges; and that DTS management refrain from any future intimidating, retaliatory, and harassing behavior.

In a memorandum dated May 3, 2004, the Division Chief responded to Appellant's grievance. The Division Chief asserted that Appellant was placed on sick leave restriction due to Appellant's number of unscheduled absences. The Division Chief noted that if Appellant complied with the sick leave restriction policy, DTS would consider lifting the policy after June 1, 2004. However, the Division Chief also noted that DTS could place Appellant on sick leave restriction in the future. The Division Chief denied that DTS had exhibited intimidating, harassing and retaliatory behavior toward Appellant.

Appellant appealed the Division Chief's response to the CAO. A grievance meeting was held on September 8, 2004. During the meeting, the CAO's designee raised the issue of whether the grievance was timely filed. The Assistant County Attorney moved to dismiss the grievance as being untimely. The parties then requested that the Motion to Dismiss be held in abeyance pending settlement discussions. By letter dated October 12, 2004, the Appellant's attorney informed the CAO's designee that the parties were unable to resolve the matter.

By memorandum dated December 8, 2004, the CAO granted the County Attorney's Motion to Dismiss. This appeal followed.

POSITIONS OF THE PARTIES

Appellant

- With respect to Appellant's March 15, 2004 grievance, Appellant contends that it was filed in a timely fashion and the fact that the time limit on the sick leave restriction has expired does not make it moot.
- Appellant has provided information with respect to other prior incidents which support Appellant's contention that Appellant's placement on sick leave restriction was a retaliatory measure because Appellant refused to volunteer to work the primary election in 2004. The incidents provide a background for Appellant's argument that Appellant has been subjected to a continuing pattern of unlawful treatment.
- The grievance should be remanded to the CAO for further proceedings. Appellant also seeks a hearing and all attorney's fees and expenses incurred related to the prosecution of this claim.

County

- The County contends that most of the incidents giving rise to Appellant's grievance filed March 15, 2004, occurred well over 20 days before the filing. 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.
- Appellant cannot rely on a "continuing violation" theory for purposes of extending the time limitations of the grievance procedure as each incident alleged was a discrete act.
- With respect to the one incident which is timely, i.e., the sick leave restriction, it expired on June 1, 2004 and therefore, the issue is moot.
- The County contends the appropriate remedy is the denial of the appeal on the basis of untimeliness and mootness.

ISSUES

1. Has Appellant filed a timely grievance with respect to several incidents alleged therein in accordance with County Personnel Regulations?
2. Is Appellant's allegation regarding Appellant's sick leave restriction moot because the restriction expired on June 1, 2004?
3. Should Appellant's request for a hearing be granted?
4. Is Appellant entitled to attorney's fees?

ANALYSIS AND CONCLUSIONS

It must be stated at the outset that the only matters before the Board are the timeliness of certain incidents in the grievance filed by Appellant and whether Appellant's allegation regarding Appellant's sick leave restriction is moot. There has been no consideration or determination by the Chief Administrative Officer on the merits of Appellant's grievance.

According to Section 34-1(a) of the Montgomery County Personnel Regulations (MCPR), 2001,¹ 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, that a grievance may be dismissed by the Office of Human Resources (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; or (2) the date on which the employee received notice, if notice of an action is specifically required by another provision of the MCPR.

Appellant seeks to extend the time limits of the grievance procedure by alleging that Appellant's allegations are part of a continuing violation. One circumstance under which a time limitation may be waived is if the otherwise untimely allegation is part of a "continuing violation," i.e., a related series of acts, at least one of which occurred within the limitations period. The various acts complained of must also be sufficiently interrelated. Separate, discrete acts, on the other hand, trigger the running of the limitations period. In determining discreteness, factors to be considered are whether the alleged acts are recurring or more in the nature of isolated employment decisions and whether each act has the degree of permanence which should trigger an employee's awareness of and duty to assert the employee's rights.

¹ Section 34 of the MCPR has been amended since the filing of the instant grievance. The definition of a grievance is now found at Section 34-4. Matters that are not grievable are found at section 34-6. However, none of the changes are germane to the instant grievance.

Applying these criteria in the instant case, the Board finds that the taking away of Appellant's cell phone in the fall of 2003, and the assignment to the smallest office when DTS moved to new offices in the November-December 2003 timeframe, were separate and distinct events which had the degree of permanence to have triggered Appellant's awareness to assert Appellant's rights. The Board likewise finds that Appellant similarly knew or should have known on December 11, 2003, when Appellant was threatened by Appellant's supervisor who stated, "If you don't take the DLC job, you will never be promoted in DTS," that Appellant had a duty to assert Appellant's rights. The Board also finds that, on February 20, 2004, when Appellant's telecommuting privileges were suspended, this was a discrete act which should have triggered the assertion of Appellant's rights. Based on the foregoing, Appellant's grievance, dated March 15, 2004, regarding the above-referenced incidents is denied.

It is undisputed that the incident regarding the sick leave restriction is timely. However, the County argues that the incident is moot, as Appellant's sick leave restriction expired on June 1, 2004. As Appellant notes, however, just because the restriction has expired does not mean that Appellant was not aggrieved by it. Also, there is no assurance that it will not be relied upon in the future by management. Therefore, the Board concludes that the issue of the sick leave restriction is not moot. Accordingly, that portion of the grievance is remanded back to the County for further processing on the merits.

ORDER

Based on the above, the Board denies Appellant's appeal of the CAO's finding that certain incidents in Appellant's grievance are untimely.

The Board remands the remaining issue regarding Appellant's placement on a sick leave restriction for further processing on the merits.

The Board's policy is to grant a hearing in cases other than specified discipline matters only where it is concluded that there are material issues of fact. See, e.g., MSPB Case No. 03-08 (2003). As there has been no review of the grievance on its merits and therefore no development of a factual record, the Board is unable to determine at this time whether Appellant's request for a hearing should be granted.

Inasmuch as the Board has made no decision on the merits of the grievance, no granting of attorney's fees is appropriate at this time.

ATTORNEY FEE REQUESTS

Section 33-14 (c) (9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15 (c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In Montgomery County v. Jamsa, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an employee prevails in a case before the Board, the Board, in its decision, will provide that the employee may submit a request for attorney fees. After the employee submits a request, the County is provided the opportunity to respond. The Board then issues a decision based on the written record.

The following cases involving requests for attorney fees were decided during fiscal year 2005.

Case No. 00-09

DECISION AND ORDER ON ATTORNEY FEE REQUEST

This is a final decision of the Montgomery County Merit System Protection Board (Board) on the request on behalf of Appellant for reimbursement of itemized attorney fees and costs related to the above-entitled case.

FINDINGS OF FACT

Litigation History and Claimed Fees/Costs

Set forth below is the relevant litigation history of the instant case, which includes a statement of the number of attorney fee hours claimed related to the activity described.

2/25/98 - 8/16/99 - Processing of four grievances, filed respectively on July 22, 1996, March 4, 1997, August 22, 1997, and August 17, 1998, consolidated for decision by the Chief Administrative Officer (CAO), who on 8/17/99 denied the grievances. **27.10 hours claimed.**

8/16/99 - 1/27/00 - Filing and processing of an appeal of the CAO's decision to the Board. **11.35 hours claimed.**

3/2/00 - Decision and Opinion of the Board denying the appeals of the CAO's decisions on each of the four grievances.

3/8/00 - 8/16/01 - Filing and processing an appeal of the Board's decision to the Circuit Court. **42.6 hours claimed.**

8/21/01 - Decision of the Circuit Court finding, contrary to the Board's decision, that the withholding of competitive examination scores from the selection committee, the lack of consistent standards used by the selection committee in evaluating candidates, and the Chief's failure to state any rationale for the selection, deprived the candidates of equal consideration according to relevant, rational criteria. This finding of the Circuit Court related only to one of the four original grievances, which were dealt with separately in the Board's decision. On the basis of its findings, the Circuit Court reversed the Board's decision, and remanded the case to the Board to fashion an appropriate remedy.

8/23/01 - 10/3/01 - Activities related to the Board's processing of the remand to fashion a remedy. **14.6 hours claimed.**

11/19/01 - Supplemental Decision and Order of the Board denying the request for retroactive promotion, instead ordering priority consideration. This decision also provided, "The County is hereby ordered to reimburse to the Appellant such attorney fees and costs that the Board determines are appropriate."

11/26/01 - 5/12/03 - Filing and processing an appeal to the Circuit Court of the Board's Supplemental Decision and Order on the remedy. **39.9 hours claimed.**

5/13/03 - Circuit Court decision finding that the Board's decision on the remedy was incomplete and devoid of factual predicate relied upon in reaching its decision, and remanding the case to the Board for a statement of the evidence relied upon.

5/13/03 - 5/20/03 - Activities related to the Board's processing of the remand. **1 hour claimed.**

7/22/03 - Board issues its Second Supplemental Decision and Order affirming its conclusion and Order in its Supplemental Decision and Order.

7/24/03 - Activities related to filing a request for reconsideration with the Board. **.25 hours claimed.**

8/11/03 – Board's denial of the request for reconsideration.

6/10/04 - Circuit Court decision upholding Board decision on the remedy.

9/16/04 - 9/27/04 - Activities related to filing the attorney fees/costs request with the Board. **3.75 hours claimed.**

As described above, the request for attorney fees seeks reimbursement for a total of 140.55 hours.¹ The Appellant seeks reimbursement of claimed hours through 2001, at an hourly rate of \$200 per hour; for claimed hours in 2002, at an hourly rate of \$250 per hour; and claimed hours in 2003-2004, at an hourly rate of \$200 per hour. Additionally sought is reimbursement for **\$603.95** in costs, incurred between 8/9/00 and 12/17/01.

POSITIONS OF THE PARTIES

County Response²

- There is no opposition to the "reasonableness" of the hours expended to perform the tasks identified, or of the costs claimed.
- The allowed hours should be reimbursed at an hourly rate of \$150 for work performed in the years 1998 - 2003, and at an hourly rate of \$160 for work performed in 2004.

¹ Not deemed relevant is a .9 hour difference between the Board's described break out of the claim, and the 141.45 hours total set forth in the request.

² The County's response discusses the claimed hours by calendar year, as they appear in the request, while the Board's analysis is by hours, as they relate to particular activities.

- Originally at issue were four separate grievances, consolidated for processing during the CAO's consideration of the case, and before the Board. Appellant ultimately prevailed before the Circuit Court only on matters raised in one of those four grievances. Accordingly, reimbursement should only be for work associated with that grievance.
- Appellant should not be reimbursed for hours following the issuance of the Board's November 19, 2001 Supplemental Decision and Order, which denied the request for retroactive promotion, instead ordering, in pertinent part, priority consideration, as Appellant did not prevail in Appellant's subsequent appeals of that Decision and Order.
- There is no opposition to a claim for .75 hours claimed for Appellant's counsel to review a court decision referred by County counsel.
- Board precedent is that reimbursement will not be allowed for time spent reviewing a Board decision, where Appellant did not prevail.
- The hours claimed for time spent preparing the attorney fee request exceeds "reasonable," under criteria prescribed by the Board in applicable precedent.
- Any award arrived at should be reduced by one-half, because Appellant did not obtain the remedy sought. Appellant prevailed in only one of the four grievances at issue, and never obtained a retroactive promotion, the remedy sought from the outset.

Appellant Response

- The requested hourly rate of \$200 is fair and reasonable, and should be adopted by the Board. "Indeed, at least since 2002, the Human Rights Commission has awarded attorney's fees using an hourly rate of \$170.00."
- The "prevailing party" rule has no application in this case, noting that the Code provisions on the authority of the Board to award attorney's fees makes no reference to being limited to a "prevailing party."
- It is not accurate that Appellant did not prevail on the first three grievances. All four grievances were consolidated into one proceeding, and were subject to the CAO's decision at the third step of the grievance procedure to find that Appellant was entitled to a 10% salary increase, a finding that the Board did not reverse.
- All four grievances were interrelated, as demonstrated by the complexity of the litigation. The test as to whether Appellant is or is not entitled to attorney fees and costs, is not whether a specific argument was, or was not, successful. The County may not isolate upon specific arguments among multiple different arguments to claim that specific activities are not reimbursable.

- Because Appellant had retired on disability, the relief affording Appellant priority consideration for a future promotion, was of no value. “(Appellant) should be made whole as to those fees under the circumstances of the case.” “(Appellant’s) pyrrhic victory on the merits . . . should not be translated into an economic loss resulting from an award of attorney’s fees which do not reimburse [Appellant] fully.”

ISSUES

1. In the facts and circumstances of this case, should the Board delineate between the four grievances consolidated for processing in determining attorney fees/costs appropriate for reimbursement?
2. Is Appellant’s entitlement to reimbursement of attorney fees/costs limited to the grievance where Appellant was the “prevailing party?”
3. What, if any, hours associated with the preparation of the attorney fee request are appropriate for reimbursement?
4. Applying the conclusions as to issues 1, 2, and 3, what claimed hours are appropriate for reimbursement?
5. What should the hourly rate be for determining the amount of reimbursement?
6. Should the amount of attorney fees to be reimbursed be further reduced because Appellant did not obtain the remedy Appellant was seeking?
7. What costs are appropriate for reimbursement?

ANALYSIS AND CONCLUSIONS

1. Before the CAO during the grievance procedure, and before the Board, on appeal of the CAO’s decision, were four distinct grievances, which, in its initial decision, the Board considered and decided as totally separate matters. The Circuit Court’s decision reversing the Board’s decision was based solely on the allegations contained in the fourth grievance, which alleged flaws in the selection process. The Circuit Court remanded the case to the Board to fashion a remedy only with regard to what it found violative. This the Board did in its Supplemental Decision and Order. In that decision, the Board references the Circuit Court’s findings, and on the basis of those findings, provided for reimbursement of appropriate attorney fees and costs. In these circumstances, the Board concludes that it is appropriate to limit reimbursable attorney fees/costs to those associated with only the grievance concerning the selection process.

2. The Board rejects the contention of the Appellant that the authority to award attorney fees/costs is not limited to a prevailing party. It must first be noted that the Board has never awarded reimbursement of attorney fees, except in the circumstance where an appellant has prevailed before the Board. In this regard, the Board’s remedial

authority is provided for by County Code Section 33-14, Subsection (c), *Decisions*, which provides, in pertinent part, “The Board shall have the authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following,” which provides in subsection (9), “Order the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The County Code then specifically relates the awarding of attorney fees/costs to the circumstance of a remedy. That is, when the Board has found for the employee on the merits of an appeal, the employee being the “prevailing party,” and a remedy is being ordered. The Board also rejects the Appellant’s contention that what is at issue is simply “separate arguments.” Each of the four grievances are directed at totally separate and distinct circumstances, rather than different arguments concerning the same circumstance. Accordingly, the Board’s award of attorney fees/costs in the instant case will be limited to the single grievance where the Appellant prevailed.

3. In Case No. 98-02, the Board addressed the issue of the appropriateness of including in an order of reimbursement of attorney fees time spent preparing a request for attorney fees, and concluded that while the Board has the discretion to order reimbursement for the time reasonably required to prepare such an application, such an award would only be appropriate “to accomplish the remedial objectives” of the Code. “That is, the Board will direct payment for the time spent in preparing the request for attorney fees only in unusual circumstances, such as, where there is a showing that a more extensive explanation is reasonably required to be documented in the fee application.” Therefore, any reimbursement of Appellant’s claim for hours spent preparing the request for attorney fees is dependent on the application of this precedent.

4. With respect to the specific hours requested for reimbursement, the Board concludes as follows:

- The description of 2 hours claimed between February 25, 1998, and August 7, 1998, appears to relate solely to the processing of the first three grievances, as the grievance leading to the Circuit Court decision in favor of Appellant was not filed until August 17, 1998. Accordingly, Appellant’s claim for reimbursement for 2 hours prior to that date is disallowed.
- The description of 11.60 hours claimed between September 11, 1998, and March 5, 1999, appears to all relate to the processing of the first three grievances. Accordingly, Appellant’s claim for reimbursement for 11.60 during that period is disallowed.
- The description of 12.75 hours claimed between April 12, 1999, and August 16, 1999, appears to all relate to the processing of the fourth grievance, except for the .50 hours on August 10, 1999, which is described as being related to the first three grievances. **Accordingly, Appellant’s claim for reimbursement for 12.25 hours**

during this period is granted.³

- The description of the one-hour claimed on August 16, 1999, appears to relate solely to the processing of the first three grievances. Accordingly, Appellant's claim for reimbursement for 1 hour on this date is disallowed.

- The description of 10.35 hours claimed between August 23, 1999, and January 27, 2000, appears to relate to the processing of the four consolidated appeals before the Board. As there is no basis from the submission to discern which of those hours were devoted to the one grievance where Appellant prevailed, the Board will grant one-fourth of the claimed hours. **Accordingly, the Appellant's claim for reimbursement for hours during this period is granted in the amount of 2.6 hours.**

- The description of 42.6 hours claimed between March 8, 2000, and August 21, 2001, relates to the processing of the appeal of the Board's decision to the Circuit Court.⁴ As there is no basis from the submission to discern which of those hours were devoted to the one grievance where the Appellant prevailed, the Board will grant one-fourth of the claimed hours. **Accordingly, Appellant's claim for reimbursement for hours during this period is granted in the amount of 10.65 hours.**

- The description of 14.65 hours claimed between August 23, 2001 and October 5, 2001, relates to activities necessitated by the Circuit Court's finding that the promotion process was flawed, and remanding the case to the Board for the fashioning of a remedy; and the Board's processing of the remand. As these fees resulted from Appellant prevailing on the one grievance, Appellant is entitled to reimbursement for all of these fees. **Accordingly, Appellant's claim for reimbursement for 14.65 during this period is granted.**

- The description of 40.80 hours between November 26, 2001, and May 12, 2003, relate to Appellant's appeal to the Circuit Court of the Board's decision denying the remedy of reinstatement and back pay, and, instead, ordering that Appellant be granted priority consideration for the next available Captain position. An additional

³ Board precedent provides that its remedial authority, as provided in the Montgomery County Code, includes the discretion to award fees related to time spent processing the original grievance, time which is part of the processes available to employees to assert claims against the County. (Case No. 96-08, (Sept. 15, 1999)). Such fees are granted in the instant case only as to the grievance where Appellant prevailed.

⁴ In the matter of Montgomery County v. Jamsa, 2003 Md. App. LEXIS 145 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney's fees for services rendered on judicial review of Board decisions. In the Board's view, such an award is appropriate in the instant case, to the extent that Appellant has prevailed.

1.00 hour between May 12, 2003, and May 20, 2003, is claimed for activities following the Circuit Court's remand to the Board for a statement of the evidence relied upon for its directed remedy. An additional .25 hours is claimed for activities related to consideration of the Board's supplemental decision. All of these claimed hours relate to the litigation of an issue over which Appellant did not prevail, that is, the pursuit of the remedy of retroactive promotion. While the Circuit Court did remand the matter to the Board for further findings, the Court ultimately sustained the Board's remedy. Accordingly, Appellant's claim for reimbursement of 42.05 hours for the period November 26, 2001 through July 24, 2003, is disallowed.

- In the Board's view, Appellant's request for 3.75 hours on September 16-17, 2004, is reasonable under the particular circumstances of this case, noting that the period at issue was some six years, and involved assorted steps of litigation. **Accordingly, Appellant's claim for reimbursement for 3.75 hours for this activity is granted.**

5. With the exception of the hours spent in preparing the request for attorney fees, the hours determined by the Board to be appropriate for reimbursement took place between April 12, 1999, and October 5, 2001, a period during which the Board was awarding attorney fees at an hourly rate of \$150.00. (See Case No. 99-17 (Sept. 30, 1999), and Case No. 02-07 (June 4, 2002)). Accordingly, the Board concludes that these 40.15 hours should be reimbursed at an hourly rate of \$150.00, for a total of **\$6,022.50**. With respect to the 3.75 hours in 2004, spent preparing the request for attorney fees, in the Board's view, applying the factors for determining the reasonableness of attorney fees set forth in Code Section 33-14 (c)(9), results in an hourly rate of \$175.00. Noted in particular is the increase in customary rates since the Board began using an hourly rate of \$150.00. Accordingly, the 3.75 hours spent in preparing the attorney fee request should be reimbursed for a total of **\$656.25**.

6. The County seeks a reduction in the reimbursement otherwise determined appropriate on the grounds that Appellant did not receive the remedy sought, relying on Board cases where there has been such a reduction. Those cases are not applicable to the instant case. Appellant is to receive reimbursement for hours related to matters where Appellant totally prevailed. That is, the decision of the Circuit Court sustaining Appellant's grievance that the promotion process was flawed. On the issue of the remedy sought, Appellant did not prevail, and no reimbursement is ordered for those hours. Accordingly, no additional reduction in reimbursement is appropriate.

7. The costs claimed for reimbursement were \$423.95 on August 9, 2000, and \$180.00 on September 17, 2001, both of which relate to Appellant's appeal of the Board's initial decision to the Circuit Court. As discussed above, at that time, Appellant was pursuing the Board's denial of all four grievances, only one of which resulted in Appellant's prevailing. Accordingly, as the Board concluded with respect to the claimed hours, only one-fourth of the claimed \$603.95 will be reimbursed, for a total of \$150.

ORDER

On the basis of the above-stated conclusions, the County is ordered to reimburse the Appellant for \$6678.75 in attorney fees, and \$150.00 in costs, for a total of **\$6828.75**.

Case No. 04-07

DECISION AND ORDER ON ATTORNEY FEE REQUEST

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellant for reimbursement of itemized attorney fees and costs related to the above-referenced case.

Appellant has submitted a request for attorney fees and costs in the amount of \$9,487.50, and expenses in the amount of \$55.80. The County has filed a response raising issue with respect to the hourly rate charged for the services rendered by the attorney in this matter. Section 33-14(c)(9) of the County Code vests the Board, as part of its remedial authority, to order the County to reimburse or pay all or part of the employee's reasonable attorney fees. Set forth below is a discussion of the issues of this case and the Board's determinations.

Final Decision of the Board in the Instant Case

The Board's decision on the merits of the instant case, dated June 3, 2004, granted Appellant's appeal of the County's Chief Administrative Officer's (CAO) denial of Appellant's grievance over a five-day suspension. The Board authorized Appellant to request attorney fees, pursuant to procedures set forth in its Decision and Order.

Subsequent to the issuance of the above-described Board Decision and Order, and affirmation by the Court, Appellant's Attorney (Attorney) filed a Request for Attorney's Fees in the amount of \$9,487.50, and expenses in the amount of \$55.80. Attorney's fees were based on hourly rate of \$275.00.

The County responded to the Attorney's request, accepting the Attorney's accounting of 34.50 hours billed, and expense reimbursement of \$55.80. The County did, however, take issue with the hourly rates charged by the Attorney, and requested a reduction of the attorney fees awarded by the Board based on the excessive amount charged for an hourly rate.

Appropriate Reimbursement Formula

Section 33-14, *Hearing Authority of the Board*, in providing remedial authority, empowers in subsection (c), that the Board may "Order the County to reimburse or pay all or part of the employee's reasonable attorney fees" (emphasis added). In the instant case, the Appellant has prevailed on the essence of Appellant's appeal, that is, contesting

the disciplinary action of a five-day suspension. In this circumstance, the Board has determined that a reimbursement of all of the amount of otherwise allowable attorney fees is appropriate, but only at the usual and customary rate recognized by the Board.

The Board has considered the nature and complexity of the case, the experience of the counsel, the tasks necessary in presenting the case, and the customary fees charged in these type cases, along with judicial decisions awarding attorney fees (see, for example, Brady Miller, et al., Civil No. 188676 (Circuit Court for Montgomery County, Maryland, Jan. 22, 1999)) and determined that an hourly rate of \$150.00 is appropriate. Accordingly, Appellant's allowed attorney fees are to be reimbursed at an hourly rate of \$150.00.

ORDER

Based on the above, the Board concludes that 34.50 hours of attorney fees are allowable at an hourly rate of \$150.00, for a total of \$5,175.00, plus costs of \$55.80 for a total reimbursement of fees and costs of \$5,230.80. Accordingly, the County is hereby ordered to reimburse the Appellant for attorney fees and costs in the amount of \$5,230.80.

Case No. 04-10

DECISION AND ORDER ON ATTORNEY FEE REQUEST

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellant for reimbursement of itemized attorney fees and costs related to the above-referenced case.

Appellant has submitted a request for attorney fees and costs in the amount of \$14,948.75, and expenses in the amount of \$137.94. The County has filed a response raising issue with respect to the hourly rate charged for the services rendered by the attorney in this matter. Section 33-14(c)(9) of the County Code vests the Board, as part of its remedial authority, with the authority to order the County to reimburse or pay all or part of the employee's reasonable attorney fees. Set forth below is a discussion of the issues of this case and the Board's determinations.

Final Decision of the Board in the Instant Case

The Board's decision on the merits of the instant case, dated July 12, 2004, granted 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 of the Fire/Rescue District Chief. The Board authorized Appellant to request attorney fees, pursuant to procedures set forth in its Decision and Order.

Subsequent to the issuance of the of the above-described Board Decision and Order,

and affirmation by the Court, Appellant's Attorney filed a Request for Attorney's Fees in the amount of \$14,948.75, and expenses in the amount of \$137.94. The Attorney's fees were based on hourly rates of \$250.00 for work performed in 2002, and \$275.00 for work performed in 2003 and 2004.

The County responded to the Attorney's request, accepting the Attorney's accounting of 54.95 hours billed, and expense reimbursement of \$137.94. The County did, however, take issue with the hourly rates charged by the Attorney, and requested a reduction of the attorney fees awarded by the Board based on the excessive amount charged for an hourly rate.

Appropriate Reimbursement Formula

Section 33-14, *Hearing Authority of the Board*, in providing remedial authority, empowers in subsection (c), that the Board may "Order the County to reimburse or pay all or part of the employee's reasonable attorney fees" (emphasis added). As to the County's contention that the Appellant has "partially prevailed," and, therefore, pursuant to Board precedent, there should be a 50% reduction in the number of compensable hours, the Board concludes that as the Appellant has prevailed on the essence of Appellant's appeal, that is, contesting the imposition of an educational requirement beyond that specified by the classification specification, i.e. that of a college degree, when making a selection for the position of Fire/Rescue District Chief, no reduction in the number of compensable hours is appropriate. In this circumstance, the Board has determined that a reimbursement of the full amount of otherwise allowable attorney fees is appropriate, but only at the usual and customary rate recognized by the Board.

The Board has considered the nature and complexity of the case, the tasks necessary in presenting the case, and the customary fees charged in these type cases, along with judicial decisions awarding attorney fees (see, for example, Brady Miller, et al., Civil No. 188676 (Circuit Court for Montgomery County, Maryland, Jan. 22, 1999)) and determined that an hourly rate of \$150.00 is appropriate. Accordingly, Appellant's allowed attorney fees are to be reimbursed at an hourly rate of \$150.00.

ORDER

Based on the above, the Board concludes that 54.95 hours of attorney fees are allowable at an hourly rate of \$150.00, for a total of \$8,242.50, plus costs of \$137.94 for a total reimbursement of fees and costs of \$8,380.44. Accordingly, the County is hereby ordered to reimburse the Appellant for attorney fees and costs in the amount of \$8,380.44.

Case No. 05-04

**DECISION AND ORDER ON REQUEST FOR RECONSIDERATION ON THE
ISSUE OF GRANTING ATTORNEY FEES**

On March 31, 2005, the Montgomery County Merit System Protection Board (Board) in a Decision and Order, denied, in part, and granted, in part, the appeal of Appellant from the determination of the Montgomery County, Maryland, Chief Administrative Officer (CAO) that certain incidents in Appellant's grievance were untimely and one incident was moot. Specifically, in granting a portion of the appeal, the Board found that Appellant's placement on a sick leave restriction was not moot and remanded that issue for further processing on the merits. In its Decision and Order, the Board indicated it was not granting attorney's fees as it had made no decision on the merits of the grievance.

Appellant has filed a timely request for reconsideration with regard to the denial of attorney's fees.

POSITIONS OF THE PARTIES

On April 12, 2005, the Board received a request for reconsideration of the Board's Decision and Order from Appellant, pursuant to Montgomery County Personnel Regulations (2001), Section 35-7. Appellant argued that Appellant prevailed with respect to that aspect of Appellant's grievance dealing with Appellant's sick leave restriction and, accordingly, prevailed on the merits with regard to the issue of mootness. Therefore, Appellant seeks attorney's fees.

On April 18, 2005, the County responded to the Appellant's request for reconsideration. The County noted that the Board dismissed 90% of the Appellant's case to date. The one remaining issue, involving a sick leave restriction, had not been adjudicated on the merits and no factual record had been created. Accordingly, the County argues that no attorney's fees are warranted.

ANALYSIS AND CONCLUSIONS

Appellant correctly points out that the Board decided that the CAO had erred in deciding that Appellant's issue regarding Appellant's sick leave restriction was moot under the County's administrative grievance procedure, and remanded the matter to the County to make a determination on the merits. Therefore, Appellant did prevail with respect to the issue of mootness, thereby providing a basis for the awarding of appropriate fees and costs. Accordingly, the Board grants the request for reconsideration with respect to attorney's fees and amends its decision to provide for the awarding of attorney's fees and costs. However, the Board will only grant attorney's fees for those fees incurred in prosecuting the appeal and subsequent request for reconsideration before the Board.

ORDER

The Board's decision in the above entitled case is amended to provide for the awarding of appropriate attorney's fees and costs related to the Appellant's prevailing on the issue of mootness. Appellant must submit a detailed request for attorney's fees to the Board, with a copy to the County Attorney, who shall have ten (10) days from receipt to file a response. Fees will be determined by the Board in accordance with the factors stated in the Montgomery County Code, section 33-14(c)(9).

Case No. 05-04

DECISION AND ORDER ON ATTORNEY FEE REQUEST

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellant for reimbursement of itemized attorney fees and costs related to the above-referenced case.

Appellant has submitted a request for attorney fees and costs in the amount of \$3,705.00, and expenses in the amount of \$35.25. The County has filed a response raising issue with respect to the hourly rate charged for the services rendered by the attorney in this matter as well as the number of hours billed. Appellant has filed a reply to the County's response and seeks an additional \$285.00 in fees for filing the reply and an additional \$8.55 in expenses. Set forth below is a discussion of the issues of this case and the Board's determinations.

Final Decisions of the Board in the Instant Case

The Board's decision on the merits of the instant case, dated March 31, 2005, denied in part and granted in part Appellant's appeal from the determination of the Montgomery County, Maryland, Chief Administrative Officer (CAO), that certain incidents in Appellant's grievance were untimely and one incident was moot. Specifically, the Board agreed with the CAO that certain incidents were untimely. However, in granting a part of the appeal, the Board found that Appellant's placement on a sick leave restriction was not moot because it had expired and remanded that issue for further processing on the merits. In its Decision and Order, the Board indicated it was not granting attorney's fees as it had made no decision on the merits of the grievance. After receiving Appellant's request for reconsideration on the issue of attorney fees, the Board, in its Decision and Order On Request For Reconsideration, dated April 21, 2005, amended its original decision in this case to provide for the awarding of attorney fees and costs. The Board indicated, however, that it would grant attorney fees only for those fees incurred in prosecuting the appeal and subsequent request for reconsideration before the Board.

Subsequent to the issuance of the of the above-described Board Decisions and Orders, Appellant's attorney (Attorney), filed a request for attorney fees in the amount of

\$3,705.00, and expenses in the amount of \$35.25. The Attorney's fees were based on hourly rates of \$285.00 for work performed in 2004 and 2005.

The County responded to the Attorney's request, taking issue with the hourly rates charged by the Attorney, and requested a reduction of the attorney fees awarded by the Board based on the excessive amount charged for an hourly rate. The County argued that a rate of \$150.00 an hour was reasonable. The County also took issue with the amount of hours claimed, based on the fact that Appellant only prevailed on the issue of mootness.

Appropriate Reimbursement Formula

Montgomery County Code, Section 33-14, *Hearing Authority of the Board*, vests the Board with the authority to order, as part of its decision, the County to reimburse or pay all or part of the employee's reasonable attorney fees. As to the County's contention that the Appellant has only "partially prevailed," and, therefore, pursuant to Board precedent, there should be a reduction in the number of compensable hours, the Board agrees. As the Appellant has prevailed on only the mootness issue, under Board precedent, the Board will reduce by 50% the number of compensable hours. See, for example, MSPB Case No. 03-05 (2003); MSPB Case No. 02-07 (2002). Accordingly, the Board will grant attorney fees for 6.75 hours and expenses of \$35.25.

As previously noted, Appellant seeks an additional hour of fees and additional expenses of \$8.55 for filing a reply to the County's response. In its Decision and Order on Request for Reconsideration, the Board specifically ordered that Appellant file the request for attorney fees and that the County respond to the request. The Board neither ordered nor provided for any additional reply by Appellant to the County's response. Accordingly, the Board denies the additional fees and expenses submitted by Appellant for the reply to the County's response.

In determining the appropriate hourly rate, the Board has considered the nature and complexity of the case, the tasks necessary in presenting the case, and the customary fees charged in these type cases, along with judicial decisions awarding attorney fees (see, for example, Brady Miller, et al. v. Montgomery County, Civil No. 188676 (Circuit Court for Montgomery County, Maryland, Jan. 22, 1999)) and determined that an hourly rate of \$175.00 is appropriate. Accordingly, Appellant's allowed compensable attorney hours are to be reimbursed at an hourly rate of \$175.00.

ORDER

Based on the above, the Board concludes that 6.75 hours of attorney fees are allowable at an hourly rate of \$175.00, for a total of \$1,181.25, plus costs of \$37.25 for a total reimbursement of fees and costs of \$1,218.50. Accordingly, the County is hereby ordered to reimburse the Appellant for attorney fees and costs in the amount of \$1,218.50.

OVERSIGHT

Pursuant to statute, the Board performs certain oversight functions. Section 33-11 of the Montgomery County Code provides, in applicable part, that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service . .

. .

In accordance with the above-referenced provision of the Code, Section 9-3(b)(3) of the Montgomery County Personnel Regulations, 2001, provides that the Office of Human Resources Director notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class.

In fulfilling this mandate during FY 05, the Board reviewed and where appropriate provided comments on the following new class creations:

- 1) Licensed Practical Nurse (Correctional Facility), Grade 18;
- 2) Group Insurance Fund Manager, Grade 26;
- 3) Forensic Firearms/Toolmark Examiner, Grade 20;
- 4) Correctional Supervisor – Sergeant, Grade 22;
- 5) Self-Contained Breathing Apparatus Technician, Grade 14;
- 6) Behavioral Health Associate Counselor (Alcohol & Drug), Grade 20;
- 7) Behavioral Health Technician (Alcohol & Drug), Grade 18;
- 8) Environmental Compliance Supervisor, Grade 25;
- 9) Transportation Emergency Response Patrol Technician I, Grade 14;
- 10) Transportation Emergency Response Patrol Technician II, Grade 15;
- 11) Water Quality Specialist III, Grade 23;
- 12) Epidemiologist I, Grade 23; and
- 13) Epidemiologist II, Grade 25.