

# **Merit System Protection Board Annual Report FY 2006**

**Members:**

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

***Executive Secretary:***  
**Merit System Protection Board**  
**Kathleen J. Taylor**

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**FY 2006**  
**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 2006 were:

Harold D. Kessler	-	Chairman
Rodella E. Berry	-	Vice Chairperson
Charla Lambertsen	-	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 completed 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 2006.

# **DEMOTION**

## **Case No. 05-07**

### **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, Department of Recreation, to demote Appellant to a Recreation Specialist, effective April 11, 2005.

### **FINDINGS OF FACT**

#### **Background**

Appellant has been employed by the Montgomery County Department of Recreation (DR) since 1975. The Department of Recreation provides programs, services and facilities to the community. At the time of Appellant's demotion, Appellant was a Recreation Supervisor in DR's Sports Division, supervising four subordinate Recreation Specialists.

In December 2004 or early January 2005, Appellant's second-level supervisor became aware Appellant was engaging in outside employment with the Center, a private organization, and Appellant was performing some of this work at Appellant's place of DR employment while on official duty time. Following consultation with the Office of Human Resources (OHR), Appellant was placed on administrative leave effective January 31, 2005, and notified through a Statement of Charges that Appellant was the subject of an investigation and faced possible suspension.

On January 31, 2005, Appellant's second-level supervisor, along with Appellant's immediate supervisor, and another Division Chief in DR, interviewed each of Appellant's four Recreation Specialist subordinates in connection with the DR investigation into Appellant's activities. The responses by each interviewee to a series of questions were memorialized by the Division Chief in interview notes. Appellant's second-level supervisor testified the interview notes introduced into evidence at the hearing accurately reflected the answers given by the subordinates.

On February 4, 2005, the three DR supervisors interviewed Appellant. Appellant was asked a series of questions and Appellant's responses memorialized in interview notes taken by the Division Chief. Appellant provided additional written comments to Appellant's second-level supervisor on February 5, 2005.

In addition, on February 4, 2005, DR's Director met with Appellant to receive Appellant's response to the allegations contained in the January 31, 2005 Statement of Charges. Appellant also provided DR's Director with a written response to the Statement

of Charges.

On February 15, 2005, Appellant was issued a Notice of Disciplinary Action – Suspension Pending Investigation of Charges, which informed Appellant that 5 days from the receipt of the notice Appellant would be placed on leave without pay status pending the outcome of DR’s investigation. The Notice also informed Appellant of Appellant’s right to appeal the suspension.<sup>1</sup>

On March 3, 2005, Appellant was issued a Statement of Charges for Demotion; Appellant was charged with violating various County laws and regulations and behaving insubordinately or failing to obey a lawful direction from a supervisor. Appellant, through counsel, declined to provide a detailed response to the Statement of Charges.

On March 29, 2005, Appellant was issued a Notice of Disciplinary Action – Demotion to Recreation Specialist at a salary of \$66,931. The Notice of Disciplinary Action set forth the following charges:

1. Appellant worked for the Center without approval by the Ethics Commission;
2. Appellant used Appellant’s subordinate staff to perform work on behalf of the Center and the Association with which Appellant also had an employment relationship;
3. Appellant allowed a County volunteer to provide assistance to the Center without disclosing to the volunteer that Appellant was employed by the Center;
4. Appellant provided false statements in the course of Appellant’s employment when Appellant informed Appellant’s supervisor Appellant was not going to be involved in running the 2005 Tournament and when Appellant did not include the Center on Appellant’s Financial Disclosure

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<sup>1</sup> Thereafter, Appellant was placed in a leave without pay status pending the outcome of the DR investigation. In accordance with the Montgomery County Personnel Regulations (MCPR), Section 33-3(f), *Suspension pending investigation of charges or trial*, the Chief Administrative Officer (CAO) must allow an employee to return to work at the end of an investigation unless the County dismisses or terminates the employee, which is not the case with regard to Appellant. The regulations require the CAO to give an employee back pay and benefits for the period the employee was on suspension (less any earnings or income earned by the employee during the period of suspension) except as provided in a separate disciplinary action imposed by the County. As no mention was made of denying Appellant back pay for the period of Appellant’s suspension in the demotion action which is before the Board, it is the Board’s interpretation of the regulations that Appellant is entitled to reimbursement for Appellant’s back pay and benefits for the period of Appellant’s suspension.



Forms for 2002 and 2003;<sup>2</sup>

5. Appellant failed to disclose a private interest or to disqualify Appellant from participating in the development of a Memorandum of Understanding (MOU) with the Center;
6. Appellant did work for the Center and the Association while on official time;
7. Appellant solicited employment from the Association which does business with the County;
8. Appellant used Appellant's agency title in connection with Appellant's work for the Association;
9. Appellant used County facilities, property and work time for the Association and the Club; and
10. Appellant behaved insubordinately or failed to obey a lawful direction from Appellant's supervisor to not permit the use of Department facilities by the Club and to remove Appellant's e-mail address from its website. Appellant also agreed to Appellant's supervisor's request not to do Association work on County time using County equipment but nevertheless did so. Appellant was directed not to provide meeting space to the Association after February 3, 2005 but approved the scheduling of Association meetings for February 9, 2005 and March 22, 2005.

This appeal followed.

#### Appellant's Outside Employment With The Center

Appellant began working for DR as a part-time employee. Approximately twenty years ago, Appellant became a Recreation Specialist I, working in the eastern region. Appellant's supervisor at the time was Ms. A. Sometime in 1983 or 1984, Ms. A asked Appellant to start a ball tournament for adults. Appellant was paid part-time money by the County to run the Tournament.

The Center also ran a smaller tournament. It took place around the same time as the County-sponsored Tournament. At some point, the Executive Director of the Center, went to Mr. B, the sports supervisor for adult sports in DR, to discuss the County taking over the Center Tournament. Mr. B subsequently went to Ms. A and suggested the Center Tournament and the County-sponsored Tournament run by the eastern region be

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<sup>2</sup> The County dropped certain additional allegations that were part of this charge during the hearing before the Board. The dropped allegations are not addressed in this Decision.

merged and run by adult sports section, which was headed by Mr. B. Mr. B asked Appellant to continue to coordinate the Tournament and indicated Appellant would be paid for this part-time work by adult sports. For the next two years DR completely ran the Tournament. Once all the fees were paid for the Tournament, DR would pay the Center a donation.

After two years, the program manager for adult sports told Mr. B that DR could no longer support the Tournament because of budgetary reasons. Mr. B then went to the Center's Executive Director and told the Executive Director DR could no longer support the Tournament. The Executive Director testified the reason the Center took over the Tournament was that DR revised its rules on County involvement in charity tournaments.

When told of DR's decision to no longer support the Tournament, the Executive Director asked Mr. B if Appellant could work as an independent contractor with the Center coordinating the Tournament. Appellant, who was more than willing to coordinate the Tournament, began being paid by the Center in 1985, while Appellant was still a part-time employee for DR. Appellant received \$900 a year from the Center for Appellant's work on the Tournament.

Appellant testified Appellant filled out an ethics form indicating Appellant's employment in 1985 with the Center and gave it to Appellant's supervisor, Ms. A. According to Appellant, Ms. A was a stickler for ensuring everyone followed the applicable guidelines and procedures. In Appellant's written response to DR's Director on February 4, 2005, Appellant stated "[m]y supervisor at the time, Ms. A, helped me fill out the appropriate paperwork with the Ethics Commission and it was submitted." However, according to an e-mail from Ms. A to Appellant's immediate supervisor, dated February 21, 2005, "[a]t some point I believe [the Center] began paying [Appellant] to direct the tournament. [Appellant] did the work on County time and I addressed it with Ms. E (Director of DR at the time). [Appellant] never had formal permission to do it."

While DR had on file two requests from Appellant to engage in outside employment during 1985 (one to work as a basketball coach and the other to work as a basketball referee), neither of the requests involved the Center. Both requests were sent through Ms. A to the Ethics Commission. DR also had a copy of the January 1986 approval by the Ethics Commission for Appellant to engage in outside employment as a basketball coach and a basketball referee. DR had no copy of any Ethics Commission approval for Appellant's outside employment with the Center. The Executive Secretary of the Ethics Commission indicated the Commission could not locate any requests from Appellant in 1985 to engage in outside employment nor the Ethic Commission's approval of the two basketball-related requests in 1986.

Appellant and Mr. B wanted to keep DR involved in the Tournament as they saw DR's involvement as good public relations. Accordingly, it was agreed that DR would continue as a coordinator as long as there were no direct costs. Specifically, Appellant related that DR would assist in marketing the Tournament by sending out flyers, seeding the teams after the registrations came to the Center, and scheduling the games.

Appellant testified Appellant's paid role for the Center was to formulate the contents of the flyer, ensure the flyer was printed, and work with the Center to ensure that a letter was sent to the Maryland National Capital Park and Planning Commission (Park and Planning Commission) requesting the fields for the Tournament as well as a waiver of the normal fees for use of the fields. In addition, Appellant was responsible over the weekend for making sure the games went on. Appellant had to call the teams on Saturday night to ensure they knew the exact time and place they were to be at the next day. Appellant also was responsible for ordering the awards for the Tournament. Appellant indicated all of the registration money went directly to the Center. This was the way things were handled from approximately 1985 or 1986 until 2004. The only change was that both the City of Rockville and the City of Gaithersburg were asked to get involved in the marketing of the Tournament by handing out flyers and were also asked to provide some fields at no charge for the Tournament.

The Executive Director for the Center testified one of Appellant's duties as a contractor for the Center was to schedule the games; Appellant developed the master schedule. Two of Appellant's subordinates indicated they worked on preparing the schedules for the Tournament for Appellant. Both subordinates did the scheduling during their regular work day. Appellant acknowledged during the hearing that one of the subordinates did the scheduling for the Tournament four or five times over the years. However, Appellant maintained the scheduling was actually part of the coordinating duties of DR.

In February 2004, Mr. C, Chief of the Revenue Division and in Appellant's supervisory chain, asked Appellant to develop a Memorandum of Understanding (MOU) with the Center for the Tournament. Just before Mr. C left in May 2004, Mr. C indicated to Appellant there was not enough time to get an MOU done before the 2004 Tournament. Appellant's new second-level supervisor, in an e-mail dated July 7, 2004, informed Appellant that an MOU needed to be done with the Center before the 2005 Tournament. Appellant's second-level supervisor reminded Appellant about the MOU in early August 2004. Appellant responded back, requesting a copy of an MOU. In early October, Appellant's second-level supervisor again asked about the status of the MOU. Appellant responded back that Appellant was struggling with the language of the MOU but hoped to have a draft for Appellant's immediate supervisor's review in the next two weeks.

Appellant stated that Appellant contacted the Executive Director about the MOU in September but the Executive Director was opposed to doing one. According to the Executive Director, the Executive Director was first approached by Appellant concerning the MOU in November or December of 2004. Appellant indicated the Executive Director finally agreed to do the MOU but only if the Executive Director could resolve another issue that had arisen – the Park and Planning Commission no longer wanted to waive the fees for use of its fields by the Center. Appellant testified that Appellant gave Appellant's immediate supervisor updates on the status of the MOU. Appellant's second-level supervisor indicated Appellant's second-level supervisor was never told by Appellant that there was an issue regarding the waiver of fees.

Appellant's second-level supervisor gave Appellant a deadline of November 12, 2004, to complete the MOU with the Center or the relationship would have to be terminated. However, November 12 came and went and there was no MOU. On November 17, both Appellant's second-level supervisor and Appellant were at a public forum for sports organizations. An umpire asked Appellant's second-level supervisor about the status of the Tournament and Appellant's second-level supervisor referred the umpire to Appellant. Appellant's second-level supervisor overheard Appellant telling the umpire the Tournament probably wasn't going to be held that year because the Parks and Planning Commission was not willing to waive the fees for the use of the fields. This was the first time Appellant's second-level supervisor had heard of this issue. Based on this conversation, Appellant's second-level supervisor assumed the Tournament was over.

In December, Appellant received a telephone call from Ms. D of the Center. Ms. D told Appellant the Park and Planning Commission had agreed to the fee waiver. Because the deadline had passed for the MOU, Appellant told Ms. D that DR could not participate in the 2005 Tournament. The Center then asked Appellant to hold a meeting with the umpires and the Center staff about the Tournament; Appellant held the meeting in December.

Sometime several weeks after the public forum a long time volunteer coach for the County, Mr. E, came to see Appellant's second-level supervisor about what had occurred at the public forum on November 17, which he had missed. Mr. E also asked about the Tournament and Appellant's second-level supervisor told him what Appellant's second-level supervisor had learned, i.e., there would be no Tournament this year. Mr. E was very disappointed. Mr. E indicated he had assisted Appellant over the past few years with the Tournament, had taken over running one of the divisions and also assisted Appellant by making phone calls. Appellant acknowledged Mr. E assisted Appellant by making phone calls on Saturday night to ensure the teams knew the exact time and place they were to be on Sunday for the Tournament.

Appellant's second-level supervisor subsequently received a call from Mr. E a few days later. He indicated he had gone to the Center's office and had been informed the Tournament was on, Appellant was running it and Appellant had held a meeting and the Tournament was all set to go. Following this conversation, Appellant's second-level supervisor asked Appellant's immediate supervisor to find out what was going on with the Tournament and whether DR needed to get the MOU in place.

On January 7, 2005, Appellant's immediate supervisor asked Appellant about the status of the MOU for the Tournament. Appellant replied that DR would not be involved in the Tournament and that in the past few years DR's contribution had greatly declined. When Appellant's immediate supervisor asked Appellant whether Appellant was involved at all in the Tournament this year, Appellant said no. Appellant's immediate supervisor relayed this information to Appellant's second-level supervisor and also indicated Appellant stated individuals associated with the City of Rockville and City of Gaithersburg would do the scheduling this year. Appellant testified Appellant had

decided Appellant could not continue in the role of the Center's director of the Tournament if DR was no longer going to be involved in the tournament. However, Appellant believed Appellant could find others to do the work previously done by DR for the Tournament as well as the work Appellant had done.

At this point, Appellant's second-level supervisor was confused and decided to contact the City of Rockville and the City of Gaithersburg staffs. The City of Rockville staff indicated to Appellant's second-level supervisor they were not running the Tournament, were doing no more than they had previously done, and had been invited by Appellant to a meeting in December. The City of Gaithersburg staff told Appellant's second-level supervisor they were no longer even providing fields, just giving out fliers and were not involved in running the Tournament.

Appellant's second-level supervisor was even more confused about the Center tournament and decided to call the Center. Appellant's second-level supervisor spoke with Ms. D, the Center's Development Manager. Ms. D indicated the Tournament was on, Appellant was running it, and Appellant had held several meetings about it. Appellant's second-level supervisor asked Ms. D whether Appellant had discussed the need for an MOU and Ms. D indicated she knew nothing about an MOU. Appellant's second-level supervisor asked Ms. D about Appellant's involvement with the Tournament over the past few years and Ms. D indicated Appellant was an independent contractor with the Center. Appellant's second-level supervisor then asked Ms. D about how much Appellant was being paid and Ms. D was reluctant to respond. However, Ms. D agreed to follow up in writing.

On January 19, 2005, Appellant's second-level supervisor received a letter from the Center's Executive Director indicating Appellant had been acting as an independent consultant for the Center ever since DR revised its rules concerning County involvement in charitable tournaments. The Executive Director indicated Appellant "has already begun to consult for us for the 2005 Tournament. This has been a long-standing arrangement and relationship, that we expect will continue in the future."

After receiving the letter from the Center, Appellant's second-level supervisor checked DR's list of employees with outside employment and did not see Appellant's work with the Center listed. Appellant's second-level supervisor then met with OHR to determine what the next steps should be. As previously noted, DR began an investigation into Appellant's outside employment activities. As part of DR's investigation, Appellant's 2002 and 2003 Financial Disclosure Forms were obtained. Neither form listed Appellant's outside employment with the Center. Appellant acknowledged Appellant had not included the Center on Appellant's Financial Disclosure Forms.

#### Appellant's Outside Employment With The Association

DR had a fifty year relationship with the Association, during which it was an actual part of DR. A DR staff member, Mr. F, ran the Association for many years. His responsibilities were permitting of the fields, scheduling, make-up games, standings, and

registration. When Mr. F decided not to do the Association work anymore, Appellant took over running the Association, serving as DR's League Director for the Association for eleven years.

As part of Appellant's County duties directing the Association, Appellant handled new team applications, the scheduling of the fields, the scheduling of the umpires, the actual game and make-up schedules, decided any protests by participants and was in charge of suspensions of players. Marketing and mailings, seeding and registration were performed by the Association. The County provided meeting space for the Association's meetings.

At the end of January 2004 or beginning of February, DR held a meeting with the Association. Mr. G, the County Attorney assigned to DR, Mr. C, the division chief of DR, Appellant, Mr. H, the president of the Association, and Mr. I, the treasurer of the Association, attended the meeting. Mr. G informed the Association it was in violation of one of the provisions of the County Charter. Specifically, it was against County regulations for a County agency to provide support to an outside private entity, such as the Association. The Association had to end the relationship with DR. Mr. H was upset the relationship was ending and he was being told this just as the season was starting in less than a month. Appellant voiced Appellant's opposition to the ending of the relationship as Appellant wanted the Association to continue a relationship with DR.

At the January 2004 meeting, DR indicated its name was to come off all of the Association's letterhead, contracts, etc. Mr. H was told he had a year to accomplish this. In a follow-up letter to Mr. H from Mr. C, Mr. C memorialized the request that all reference made to partnerships or support from the Montgomery County Department of Recreation be removed from the Association's by-laws and advertisements. Mr. C also indicated in the letter that, as a good faith gesture, DR would provide meeting space for the Association without charge for a period of one year, February 3, 2004 to February 3, 2005.

During the meeting with DR, Mr. H asked whether the Association could hire Appellant as its League Director. Mr. C was in favor of it but indicated it would be up to the Ethics Commission to give approval. Subsequently, Mr. H contacted Appellant and asked Appellant if Appellant was willing to be the League Director and Appellant indicated Appellant was. Mr. H asked Appellant to put together a list of job duties, and indicate how much Appellant believed it was worth. Mr. H then brought Appellant into the Association Board meeting. Mr. H testified he solicited Appellant to work for the Association; Appellant never solicited him.

The meeting minutes for the Association Board meeting on February 18, 2004, indicate Appellant made a proposal for Appellant to serve as the Association League Director. The minutes reflect Appellant indicated that Appellant's duties for the Association would be formulating schedules, organizing make-ups, obtaining fields, coordinating AABC activities, enforcing rules and regulations, and supervising the league office. According to the minutes, Appellant proposed Appellant receive \$3,000 for each

of the 3 seasons for a total of \$9,000. The Association Board meeting minutes for March 2, 2004, indicate the Association approved offering Appellant the job of League Director at \$3,000 for the spring contract. Additional contracts for summer and fall were to be considered later.

On March 10, 2004, Appellant submitted a request to work for the Association. By memorandum dated March 29, 2004, a Division Chief in DR wrote to the Executive Secretary, Ethics Commission, concerning Appellant's request for approval of outside employment with the Association. In the memorandum, the Division Chief indicated the Director of DR was hesitant to approve the request because of the relationship DR had had with the Association. On June 10, 2004, the Executive Secretary indicated the Commission had approved Appellant's request for outside employment with the Association. The Executive Secretary informed Appellant that Appellant's outside employment was subject to the rules and regulations which were enclosed with the letter of approval. Enclosed with the letter was Montgomery County Ethics Commission Regulation No. 25-1, Administrative Policies and Procedures for Outside Employment.

In mid-September 2004, Appellant's immediate supervisor received a complaint from the person who schedules the use of DR's theater. Appellant's immediate supervisor was informed Appellant held an Association meeting there the previous night but had not scheduled it and the scheduled group got bumped. Appellant's immediate supervisor then looked at the Association website and discovered Appellant's County e-mail address on it. Accordingly, Appellant's immediate supervisor met with Appellant on September 17, 2004, to discuss the matter. Appellant's immediate supervisor told Appellant all meetings had to be in reserved spaces. Appellant told Appellant's immediate supervisor that although DR was no longer associated with the Association Appellant had been hired as their League Director and had permission from the Ethics Commission to do this work. Appellant also indicated Mr. C had informed the Association it could use DR's offices for meetings for a one to two year period. Appellant indicated Appellant would not do any of the Association's work on County time. Appellant's immediate supervisor told Appellant that included not doing faxing, scheduling, and printing for the Association on County time and Appellant agreed. Appellant's immediate supervisor documented this conversation in a note to the file.

As previously noted, the Association had permission from Mr. C to use its offices for meetings up until February 3, 2005. The County offered into evidence an e-mail from Mr. J (who, according to Appellant was the Assistant League Director for the Association) to Appellant in late December 2004 requesting Appellant inform Mr. J of the date, time and location of the spring Association meeting. The County also offered into evidence an e-mail from Mr. H, dated February 1, 2005, to Appellant and others, indicating the Association's February Board meeting would be held at DR's offices on February 7, 2005, and the annual Spring meeting would be held at DR's theater on February 22, 2005. A copy of the Association's website which Appellant's immediate supervisor accessed on February 9, 2005, indicated the location of the February 22 meeting was the Rockville Church.

### Appellant's Volunteer Work With The Club

Appellant has served as a volunteer for the Club for approximately twenty-four years, coaching several teams, and is a member of the Club's Board of Directors. Appellant acknowledged Appellant permitted the Club to use County offices for Board meetings. Appellant conceded Appellant has received e-mails, telephone calls and faxes at Appellant's office regarding soccer.

In late August 2004, Appellant's second-level supervisor gave Appellant's immediate supervisor copies of the Club's website that listed DR's main offices as a meeting site for the Club. Upon looking at the Club's website, Appellant's immediate supervisor also noted Appellant was using Appellant's County e-mail address on the website. Appellant's immediate supervisor met with Appellant in August to discuss the fact that it was inappropriate for the Club, which is an outside group, to use DR's building for meetings. Appellant's immediate supervisor also counseled Appellant that Appellant needed to cease using Appellant's County e-mail address for Appellant's outside activities. The County offered into evidence an e-mail from Mr. K, dated December 14, 2004, sent to Appellant and others, referencing a meeting held by the Club's Board at DR's office on September 7, 2004.

On September 30, 2004, Appellant's immediate supervisor sent an e-mail to Appellant reminding Appellant that Appellant's immediate supervisor had talked to Appellant about not using Department facilities or Appellant's e-mail address for Appellant's Club work as it was a conflict of interest. In the e-mail, Appellant's immediate supervisor indicated Appellant's immediate supervisor had discovered the Club's website listed a scoring clinic to be held at DR on two dates in October. Appellant's immediate supervisor informed Appellant this was not appropriate and had to be changed immediately.

However, the Club continued to schedule meetings at DR's main office where Appellant worked through January and February of 2005. Appellant conceded Appellant had used County rooms since September 2004 for Board and tournament meetings for the Club. The February 1, 2005 Club meeting was moved from Appellant's office to the Community Center on January 31, 2005, the day that Appellant was placed on administrative leave. By e-mail dated February 14, 2005, Mr. K notified all Club members to change their e-mail address for Appellant and indicated Appellant's work e-mail address should no longer be used.

### Appellant's Use Of County Facilities And Resources For Appellant's Outside Employment And Volunteer Work

In Appellant's written memorandum to Appellant's second-level supervisor on or about February 5, 2005, Appellant acknowledged Appellant used County property, including the telephone, e-mail system, fax machine, computer work and internet on outside activities. Appellant also acknowledged Appellant performed work on Appellant's outside activities and outside employment during the normal work day.



Appellant testified Appellant understood Appellant couldn't do outside activities throughout Appellant's work day and that it was a violation of the County's rules to do so.

Appellant claimed Appellant only spent about 40 hours doing work for the Center during regular working hours. As for Appellant's work for the Association, Appellant acknowledged Appellant received daily calls from the league, used about one half hour per week on official time scheduling fields and made calls during working hours if there was a major problem. Appellant also indicated in Appellant's February 4, 2004 reply to DR's Director that Appellant used disks and files in Appellant's computer to do the schedules, mailings, rules, and playoff tournaments for the Association. Evidence introduced by the County regarding Appellant's outgoing telephone calls reflect Appellant expended over 6 hours in June 2004 and over 9 hours in September 2004 making calls to the Club and/or the Association. It should be noted these totals reflect only outgoing, not incoming calls, and therefore represent only a percentage of the official duty time spent by Appellant on outside work. One of Appellant's subordinates reported that the subordinate had heard Appellant in conversation by phone about Club activities "all the time." Another subordinate reported Appellant had frequent calls about Club activities.

In addition, e-mails introduced by the County indicate Appellant received a substantial amount of e-mail regarding the Club even after Appellant had been counseled by Appellant's immediate supervisor that Appellant could not use Appellant's County e-mail for Appellant's outside activities. Likewise, the County introduced a substantial number of e-mails into evidence that Appellant received which dealt with Association business. Appellant acknowledged during Appellant's investigatory interview Appellant had not discontinued the use of all County communication equipment for Appellant's outside interests since September 2004 but was "now in the process of contacting all outside business interests (the Club and Appellant's two teams and the Association)" to have them contact Appellant at Appellant's residence.

In February 2005, after Appellant was issued a Statement of Charges on January 31, Appellant's immediate supervisor began monitoring the Association website to determine whether Appellant had updated Appellant's contact information. At the time Appellant's immediate supervisor began monitoring, the contact information still reflected Appellant's County e-mail address. However, when Appellant's immediate supervisor accessed the Association website on February 9, 2005, it indicated Appellant should be contacted at Appellant's private e-mail address and not at Appellant's County e-mail address.

The County introduced into evidence multiple memoranda from Appellant to the Park Permit Office and various Regional Parks dealing with Association business. Some of the memoranda used Appellant's County title, and almost all contained Appellant's County work number. The County also introduced into evidence multiple faxes from Appellant to Regional Parks in which Appellant commingled DR and Association business. All of the faxes contained a DR address and phone number, as well as

Appellant's work title of "Team Leader II".

Appellant's Use Of Appellant's Subordinates To Do Work For Appellant's Outside Employment.

Appellant acknowledged Appellant assigned Appellant's subordinates to develop schedules for the Center but claimed that was part of the "coordination" work done by DR. However, as previously noted, the Executive Director testified the Center paid Appellant to do the scheduling. One of Appellant's subordinates stated that the subordinate always helped do the schedules for the Center except for last year when the subordinate was sick. Another subordinate did the schedules and delivered them to the Center when the first subordinate was out sick and Appellant was away. Appellant acknowledged Appellant "allowed [Appellant's] position with the Center regarding their tournament to cloud the areas of [Appellant's] responsibility."

In addition, one of Appellant's subordinates stated the subordinate delivered equipment (sound equipment, tents, etc.) to Cabin John for an Association tournament Appellant was doing in July. Appellant testified Appellant never had Appellant's staff deliver equipment to Cabin John and noted the Association had no program there in the fall. The County produced a letter dated May 16, 2005, with Appellant's name on the signature line, which indicated the Association was hosting a 2004 tournament on July 22-July 25, 2004, at Cabin John Regional Park. In addition, the County introduced into evidence an e-mail from Appellant about this tournament which indicates Appellant "will make arrangements for 1 canopy, 3 walkie talkies, and 1 sound system. [A subordinate] from my office will make sure these items get to Cabin John Regional Park." The e-mail also indicates Appellant had "already received the team awards and [the subordinate] will bring them to Cabin John."

**APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Charter, Article 4, Section 406, Prohibition against Private Use of Public Employees, which states:**

No member of the Council, the County Executive, or any officer or employee of the County shall detail or cause any officer or employee of the County to do or perform any service or work outside of the officer's or employee's public office or employment.

**Montgomery County Charter, Article 4, Section 408, Work During Official Hours, which states:**

All officers and employees of the Executive or Legislative Branches who receive compensation paid in whole or in part from County funds shall devote their entire time during their official working hours to the performance of their official duties.

**Montgomery County Code, Chapter 19A, Ethics, Section 19A-12, Restrictions on other employment and business ownership**, which states in applicable part,

(a) **General restrictions**

- (1) A public employee must not engage in any other employment unless the employment is approved by the Commission. The Commission may impose conditions on its approval of other employment.

**Montgomery County Code, Chapter 19A, Ethics, Section 19A-14, Misuse of prestige of office; harassment; improper influence**, which states in applicable part,

...

- (b) Unless expressly authorized by the Chief Administrative Officer, a person must not use an official County or agency title or insignia in connection with any private enterprise.
- (c) A public employee must not use any County agency facility, property, or work time for personal use or for the use of another person, . . .

**Montgomery County Personnel Regulations (MCPR), 2001, Section 33, Disciplinary Actions**, which states in applicable part:

**33-2. Policy on disciplinary actions.**

(c) ***Progressive discipline.***

- (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:
  - (A) the severity of the employee's misconduct and its actual or possible consequences; or
  - (B) the employee's continuing misconduct or attendance violations over time.
- (2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass

progressive discipline and dismiss the employee or take another more severe disciplinary action.

- (d) **Consideration of other factors** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:
  - (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
  - (2) the employee's work record;
  - (3) the discipline given to other employees in comparable positions in the department for similar behavior;
  - (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
  - (5) any other relevant factor.

**33-5. Causes for Disciplinary Action.** The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

...

- (c) violates an established policy or procedure;
- (d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, . . . ;
- (f) behaves insubordinately or fails to obey a lawful direction from a supervisor;
- (g) knowingly makes a false statement or report in the course of employment;
- ...
- (o) takes, steals, misuses, or misappropriates County funds or property or the property of a client, patient, citizen, or other person with whom the employee deals while on duty;
- ...
- (u) fails to disclose a private interest or to disqualify himself or herself from participation in a decision or other action in which there is a

conflict between the employee's official duties and a private interest in violation of Section 19A, "Ethics", of the Montgomery County Code;

- (v) directs an employee to perform service or work outside of the employee's official duties;
- (w) engages in a private business, trade, or occupation during official working hours in violation of County statutes, regulations, or administrative procedures;  
...
- (y) solicits an endorsement for employment or promotion from an individual who is or may be engaged in doing business with the County Government; . . .

**Montgomery County Executive Regulation No. 25-01, Administrative Policies and Procedures for Outside Employment**, dated November 13, 2001, which states in applicable part:

- 4.0 County employees must receive approval pursuant to these regulations for all outside employment, regardless of whether the employment is performed after hours or during vacation periods.
- 4.1 County employees shall not engage in outside employment during the hours for which they are scheduled to work for the county. . . .
- 4.2 County employees and uncompensated appointed officials, while on duty, may not accept or solicit referrals for their outside employment, . . .
- 4.5 County employees and uncompensated appointed officials may not use any county property whatsoever in the discharge of their outside employment. . . .

### **POSITIONS OF THE PARTIES**

#### County

- Appellant used Appellant's official duty time, that of Appellant's subordinates, Appellant's agency title and County resources to support Appellant's outside employment with the Center and the Association in violation of applicable County laws and regulations. Appellant also used County time and resources for Appellant's outside activity with the Club in violation of applicable County laws and regulation.
- Appellant never requested approval from Appellant's supervisory chain and the

- Ethics Commission for Appellant's outside employment with the Center as required by County law and regulation.
- Appellant did not disclose Appellant's outside employment with the Center on Appellant's Financial Disclosure Statements for 2002 and 2003 as required by County law and regulation.
  - Appellant told Appellant's supervisor Appellant was not involved in the 2005 Tournament when in fact Appellant was.
  - Appellant failed to disclose Appellant's outside employment with the Center when asked by Appellant's supervisory chain to work on a Memorandum of Understanding (MOU) between the County and the Center. This clearly violated the County's ethics law.
  - Once the County terminated its relationship with the Association, Appellant solicited employment with the Association in violation of the Montgomery County Personnel Regulations.
  - Appellant failed to obey a lawful direction from Appellant's supervisor who informed Appellant that County facilities could not be used for Appellant's Club meetings and Appellant's e-mail address must be removed from its website. Appellant also failed to obey a lawful direction from Appellant's supervisor that Appellant's Association work would not be done on County time, using County resources.
  - The penalty of demotion is appropriate given the seriousness of the offenses committed by Appellant and the fact that, as a supervisor, Appellant should be a role model for Appellant's subordinates.

### Appellant

- Appellant has been an employee of the Department of Recreation for thirty years and has never been disciplined before. Rather, Appellant has received awards for Appellant's service.
- The Association was a County program for 51 years until the relationship ended in 2004. Appellant was demoted because Appellant continued to get e-mails, phone calls and faxes about it after a half century of a relationship between the Association and the County.
- Likewise, the Tournament sponsored by the Center was officially coordinated by the County until this year. Appellant should not be demoted because of residual communication which occurred and which Appellant was trying to resolve at the time of Appellant's demotion.
- Appellant never solicited the Association for employment. Rather, the Association solicited Appellant and Appellant never received any compensation until after this outside employment was approved by the Ethics Commission.
- Appellant did submit a request for outside employment with the Center even though the Ethics Commission cannot find it. Appellant notes that the Ethics Commission could not find documentation regarding other outside employment that it approved for Appellant in 1986. Moreover, Appellant never sought to hide Appellant's employment with the Center as Appellant indicated it was related experience on Appellant's application for promotion in 1999.

- Appellant attempted to get the Center to sign an MOU but was unsuccessful.
- Appellant never participated in the Tournament in 2005.
- The penalty of demotion is not warranted. Management should have followed the concept of progressive discipline which requires the use of other lesser penalties before imposing demotion.

### ISSUES

1. Has the County proven its charges by a preponderance of the evidence?
2. Given the totality of the circumstances, is the penalty of demotion excessive?

### ANALYSIS AND CONCLUSIONS

#### **The County Has Proved Most Of Its Charges By A Preponderance Of The Evidence.**

1. The County Has Failed To Prove That Appellant Did Not Have Approval For Outside Employment With The Center.

The evidence introduced by the County consists of copies of two requests by Appellant in 1985 for permission to engage in outside employment and the subsequent approval of both by the Ethics Commission in January 1986. This evidence was produced from DR's files. Appellant's second-level supervisor testified that both requests were found in Appellant's personnel file as well as the file kept by the executive aide to DR's Director. The Executive Secretary of the Ethics Commission could not locate the approval for these two activities or the actual requests.

Appellant indicated Appellant submitted the request for outside employment with the Center and that Appellant's supervisor at the time, Ms. A, helped Appellant with the request. Ms. A indicated in an e-mail to Appellant's immediate supervisor that she was aware that Appellant was paid by the Center to direct the Tournament. Ms. A also indicated she was aware Appellant performed the work on County time and that she addressed it with Ms. E (who Appellant's second-level supervisor testified was the Director of DR at the time). Finally, Ms. A stated Appellant never had formal permission to do it. Thus, conflicting evidence was presented regarding this charge.

It is clear from Ms. A's e-mail DR management at or some time after the time Appellant began Appellant's paid work with the Center became aware of the fact of Appellant's outside employment. Moreover, it appears that DR management did not order Appellant to cease Appellant's work with the Center even if Appellant didn't have "formal" permission. Management's failure to order Appellant to cease outside employment for which Appellant did not have formal permission amounts to an implied approval of Appellant's outside employment. Accordingly, the Board concludes the County has failed to prove Appellant did not have approval for Appellant's outside employment with the Center.

2. The County Has Proved Appellant Directed Appellant's Subordinates To Perform Service Or Work Outside Of Their Official Duties.

During Appellant's investigatory interview, Appellant admitted Appellant's subordinates handled the Center's schedules and the Office Services Coordinator typed schedules once. During the hearing, Appellant testified one subordinate did the scheduling multiple times for the Center. According to the interview notes taken during this subordinate's meeting with the three DR supervisors, as well as Appellant's second-level supervisor's testimony, this subordinate indicated Appellant always had this subordinate do the pairings and help with the schedule except for last year when this subordinate was sick. The interview notes for another of Appellant's subordinates indicate this subordinate may have typed the Center's schedules. That subordinate also stated during that subordinate's interview that another subordinate did the schedules when Appellant was gone. While Appellant testified doing the schedules was part of the work DR was to do in its coordinating role, the Center's Executive Director testified scheduling was part of Appellant's duties as the Center's contractor. Appellant did acknowledge Appellant "allowed [Appellant's] position with the Center regarding their tournament to cloud the areas of [Appellant's] responsibility."

Appellant denied Appellant ever had Appellant's subordinates do any work for the Association. However, according to the interview notes and the Appellant's second-level supervisor's testimony, a subordinate indicated during the interview the subordinate delivered equipment (sound equipment, tents, etc.) to Cabin John last year. An e-mail introduced by the County from Appellant, dated July 12, 2004, concerning the Regional Tournament, indicates Appellant would not be in attendance as Appellant's team had qualified for an international event. The e-mail goes on to state Mr. H will serve as the tournament director "(along with a staff person from my office)." The e-mail also states Appellant will make arrangements for certain equipment for the tournament (i.e., canopy, walkie talkies and sound system) and that a member of Appellant's staff will make sure these items get to Cabin John Regional Park. The Board concludes the County has proved this charge by a preponderance of the evidence.

3. The County Has Proved Appellant Misused A County Volunteer By Allowing The Volunteer to Provide Assistance To The Center For Which Appellant Was Being Paid By The Center.

Appellant's second-level supervisor testified Mr. E disclosed to Appellant's second-level supervisor that Mr. E provided Appellant with assistance to the Center. According to Appellant's second-level supervisor, Mr. E indicated to Appellant's second-level supervisor that he had assisted Appellant over the last few years with the Tournament, including voluntarily coordinating one division because Appellant was overextended with work. Appellant's second-level supervisor also testified Mr. E told Appellant's second-level supervisor he made phone calls for Appellant.

In response to this charge, Appellant indicated Mr. E did place phone calls for Appellant to team managers regarding the Sunday schedule. As previously noted,



Appellant was paid to do scheduling and to call the teams on Saturday night to ensure they knew the exact time and place they were to be at the next day. Accordingly, the Board concludes the County has proved this charge by a preponderance of the evidence.

4. The County Has Proved Appellant Provided A False Statement To Appellant's Supervisor When Appellant Told The Supervisor That Appellant Was Not Going To Be Involved In Running The 2005 Tournament And Has Proved Appellant Falsified Appellant's Financial Disclosure Statements When Appellant Failed To Disclose Appellant's Outside Employment With The Center.

The Board notes the County dropped several portions of this charge. When Appellant discussed the future of the Tournament on January 7, 2005, with Appellant's supervisor, Appellant had already held a meeting at the behest of Appellant's outside employer, the Center, concerning the 2005 Tournament. The Executive Director also indicated in a letter, dated January 19, 2005, that Appellant had already begun to consult for the Center for the 2005 Tournament. Accordingly, the Board concludes the County has proved that Appellant provided a false statement to Appellant's supervisor on January 7 regarding Appellant's involvement in the 2005 Tournament.

Appellant admitted having failed to include the Center on Appellant's Financial Disclosure Statements for 2002 and 2003. Accordingly, the Board finds the County has proved Appellant did falsify Appellant's Financial Disclosure Statements for 2002 and 2003.

5. The County Has Proved Appellant Failed To Disqualify Appellant From Participation In Arranging An MOU With The Center.

The record of evidence indicates Appellant was asked by several of Appellant's supervisors to complete a MOU between the Center and DR. The purpose of the MOU was to ensure a clear understanding of DR's and the Center's responsibilities. As Appellant testified, Mr. C first requested Appellant work on the MOU. When Mr. C left, Appellant acknowledged Appellant's second-level supervisor subsequently requested Appellant work on the MOU. Appellant's immediate supervisor also asked Appellant about this task. Based on the record of evidence, at no time did Appellant indicate to any of Appellant's supervisors there was a possible conflict regarding this assignment given the fact that Appellant was an independent contractor working for the Center, performing work previously done by DR before DR ceased its control of the Tournament. Accordingly, the Board concludes the County has proved this charge by a preponderance of the evidence.

6. The County Has Proved Appellant Violated The County Charter When Appellant Engaged In Appellant's Private Activities And Businesses During Official Work Hours.

Appellant has conceded Appellant performed some of Appellant's outside

activities, such as for the Club, and some of the duties of Appellant's outside employment during Appellant's official work day. Appellant estimated Appellant spent about 40 hours on work for the Club and half an hour a week on work for the Association. Appellant likewise acknowledged Appellant made phone calls during work hours on behalf of the Association and the Club.

The County Charter is quite clear in its mandate that County employees are to devote their entire time during their official working hours to the performance of their official duties. There is no exception in the Charter that would allow an employee to perform paid outside work or volunteer work on County time and then simply remain after the employee's official work hours to perform the employee's official duties, as Appellant allegedly did.

Moreover, at the time that Appellant received permission from the Ethics Commission to engage in outside employment with the Association, Appellant was told it was subject to the rules and regulations enclosed with the letter providing approval. Enclosed was a copy of Ethics Commission Regulation 25-01, Administrative Policies and Procedures for Outside Employment. Section 4.1 of the Ethics Regulation clearly states County employees shall not engage in outside employment during the hours for which they are scheduled to work for the County. Accordingly, the Board concludes the County has proved this charge by a preponderance of the evidence.

7. The County Has Failed To Prove Appellant Solicited An Endorsement For Employment From The Association.

The County relies on the minutes of two Association Board meetings to prove this charge. The minutes for February 18, 2005 indicate Appellant made a proposal for Appellant to serve as the Association League Director and proposed receiving three thousand dollars for each of the three seasons. The second set of minutes, dated March 2, 2004, indicates Appellant met with Mr. H, presented a job description for Appellant as League Director and requested a total of \$9,000.00 for Appellant's services.

However, Mr. H testified it was he who solicited Appellant; Appellant did not solicit him. Mr. H indicated he asked Appellant to develop a job description and indicate how much Appellant wanted to be paid for being League Director. After Appellant developed a list of duties, Mr. H stated he had Appellant appear before the Association Board. Thus, there is conflicting evidence regarding this charge. Accordingly, the Board concludes the County has failed to prove this charge by a preponderance of the evidence.

8. The County Has Proved Appellant Used Appellant's County Agency Title In Connection With Appellant's Private Employment With The Association.

The County introduced evidence showing multiple memoranda were sent to the Park Permit Office and various Regional Parks from Appellant, with Appellant's County title of "Sports Supervisor," dealing with the scheduling of various Association games in

2004. The memoranda all indicated if there was any question, Appellant should be contacted at Appellant's County work number.

The County also introduced evidence demonstrating multiple faxes were sent from Appellant, who designated Appellant as "Team Leader II," to various Regional Parks. The faxes commingled County business and Association business. Specifically, the faxes all contained the base/pitching distances for Association games. The faxes all had a Montgomery County Department of Recreation heading and indicated Appellant should be called at Appellant's County work number if there were any questions. Accordingly, the Board concludes the County has proved this charge by a preponderance of the evidence.

9. The County Has Proved Appellant Used County Facilities, Property, And Work Time For Personal Use.

Appellant conceded during Appellant's investigatory interview Appellant used County property and work time for Appellant's outside activities and outside employment. The County introduced evidence demonstrating Appellant allowed the Club to hold meetings in Appellant's office even after being counseled about not doing so.

As previously noted, Appellant conceded during Appellant's investigatory interview that Appellant used work time for activities connected with the Center, the Association and the Club. Appellant also acknowledged using the fax machine, Appellant's computer, and Appellant's phone for Appellant's outside activities. The County introduced evidence demonstrating Appellant used Appellant's computer to prepare memoranda which Appellant sent to the various Regional Parks on behalf of the Association. The Board concludes the County has proved this charge by a preponderance of the evidence.

10. The County Has Proved Appellant Failed To Obey A Lawful Direction From Appellant's Supervisor When Appellant Continued To Use County Property And Resources For Appellant's Outside Activities.

Appellant's immediate supervisor testified that, in late August 2004, Appellant's immediate supervisor counseled Appellant it was inappropriate for Appellant to permit the Club, which is an outside group, to use DR's building for meetings. Appellant's immediate supervisor also counseled Appellant that Appellant needed to cease using Appellant's County e-mail address for Appellant's outside activities. On September 17, 2004, Appellant's immediate supervisor counseled Appellant that none of Appellant's outside employment work for the Association could be done on County time, including faxes, scheduling, etc. Appellant acknowledged Appellant understood the inappropriateness of these actions.

However, as the record of evidence indicates, Appellant continued to allow the Club to use Appellant's office for its meetings. The Club also continued to use

Appellant's County e-mail address. Likewise, the record of evidence indicates Appellant continued to do some of Appellant's outside employment work for the Association on County time, including use of the County fax machine and internet. The Board concludes the County has proved these portions of the charge by a preponderance of the evidence.

Regarding that portion of the charge which alleges Appellant was directed not to provide meeting space to the Association after February 3, 2005, but did so, while the County demonstrated there were two meetings scheduled, it failed to demonstrate they actually took place at DR's office. Accordingly, the Board will not sustain this portion of the last charge.

**Based On The Charges Sustained By The Board, The Penalty Of Demotion Is Appropriate.**

Appellant has argued the County was wrong not to follow the concept of progressive discipline given Appellant's long service with DR and Appellant's outstanding performance. The County has argued that because of the seriousness of Appellant's conduct, it was appropriate to bypass progressive discipline and demote Appellant, particularly given Appellant's supervisory responsibilities.

The Board is aware of the Appellant's career of thirty years service, and receipt of awards for the quality of that service. The Board also notes from the testimony at the hearing, the Appellant's dedication to the work of DR. Notwithstanding Appellant's record, at issue in the instant case is Appellant's supervisory status in light of the proven allegations of misconduct. The County is allowed to hold a supervisor to a higher standard as a supervisor holds a position of trust and responsibility and should be a role model for the supervisor's subordinates. Indeed, Appellant acknowledged as much in Appellant's written memorandum to Appellant's second-level supervisor, wherein Appellant indicated that "[t]he statement that stuck with me the most from yesterday's meeting was the fact that I was not being a very good role model or example for the staff that worked with and for me. With my long time involvement in sports and team activities, I should have recognized this previously and made the appropriate changes."

The charges proved by the County involve serious misconduct. Particularly serious is the fact that Appellant used others – a County volunteer and Appellant's subordinates – to perform work for which Appellant was receiving pay from outside entities. Also egregious is the fact that Appellant did not obey repeated directions from Appellant's supervisor to cease using County property and resources for Appellant's outside activities. While it is true the regulations governing discipline provide it should be progressive in nature, the regulations also permit management to bypass progressive discipline in a case, such as the instant one, involving serious violation of policy or procedure. The Board has specifically held with respect to the regulatory requirement of progressivity in discipline,

[n]otwithstanding its imperative wording, in the Board's view, the language of Section [33-2(c)] does not provide an absolute ban on a

penalty without there having been a prior less severe penalty. The language on progressive discipline must be read in conjunction with the sentence which follows that conveys discretion in the selection of penalty after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors. To interpret the language at issue as always requiring evidence of a prior less severe discipline would lead to the unreasonable interpretation that management could not select any of the disciplines listed in Section [33-3] without first imposing a lesser discipline.

See, e.g., MSPB Case No. 01-08 (2001); MSPB Case No. 00-22 (2000). Accordingly, even after considering Appellant long service and history of awards, the Board concludes that the penalty of demotion is appropriate in this case.<sup>3</sup>

### **ORDER**

On the basis of the above, the Board denies the appeal of Appellant from Appellant's demotion to a Recreation Specialist.

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<sup>3</sup> The Board notes this decision should not be viewed as a bar to future consideration and selection of Appellant for other supervisory positions within the County.

# **SUSPENSION**

## **Case No. 05-05**

### **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, Department of Correction and Rehabilitation's (DCR's) Director to suspend Appellant for a five-day period.

### **FINDINGS OF FACT**

#### **Background**

Appellant has been employed by the Montgomery County DCR since January 1990. The DCR provides correctional services for the County. At all times relevant to the instant appeal, Appellant was a Lieutenant stationed at the Montgomery County Detention Center (MCDC). At the time of the incident which led to Appellant's discipline, Appellant served as a Shift Supervisor (the Shift Supervisor is also referred to as the Shift Commander).

Appellant was given a 5-day suspension after an incident during which Appellant used a Taser on an inmate. This was the first time that the Taser was deployed on an inmate in the MCDC. According to DCR Policy No. 300-28, Taser Use (Taser Policy), the Taser is an electro-muscular disruption device. It shoots two small probes up to 21 feet. Upon contact, the probes transmit an electrical pulse along the wires and into the body. The electrical pulse overrides the central nervous system and directly controls the skeletal muscles, causing an uncontrollable contraction of the muscle tissue, debilitating the inmate. Before being authorized to use a Taser, a MCDC staff member must be certified to use it. Appellant was certified in the use of the Taser at the time of the incident. The use of a Taser constitutes a use of force and has been placed on the DCR's Use of Force Continuum at the Oleoresin Capsicum (i.e., pepper spray) level.

#### **Use Of The Taser**

On Sunday, November 14, 2004, a new inmate was being uncooperative during the booking process at MCDC. The inmate was approximately five feet eight inches tall, 60 years old and 230 pounds. According to the hearing testimony, during the inmate's processing in the Central Processing Unit (CPU), the inmate refused to allow an officer to frisk the inmate and uttered obscenities, indicating that the inmate did not want a female to touch the inmate. The inmate had to be held in place to complete the initial frisk search.

Corporal (Cpl.) A testified that Cpl. A was assigned to escort the inmate up to the

Work Quarters (WQ) to continue the processing. The normal routine for an inmate after completing CPU is to be taken to the WQ where the inmate is searched, given a shower, and put into an institutional jumpsuit. Cpl. B indicated that Cpl. B accompanied Cpl. A in escorting the inmate to the WQ.

The inmate, on the way to the WQ, was brought into receiving and discharge (R&D). Cpl. C, who was working in R&D, subsequently went upstairs to the WQ to begin the booking process. According to Cpl. B's testimony, Cpl. B decided to remain in the WQ as Cpl. B did not believe that Cpl. C would be able to handle the inmate alone. Cpl. C indicated that Cpl. C found the inmate in a locked multi-purpose room on the WQ floor and went into the room to inform the inmate who Cpl. C was and what was going to happen next. Cpl. C testified that Cpl. C explained to the inmate that the inmate would be dressed out in a jumpsuit, booked and taken to medical. The inmate immediately began using profanity, and indicated if Cpl. C came any closer, the inmate would hit Cpl. C with the trash can.

Private (Pvt.) F testified that Pvt. F was assigned to the WQ floor that evening. Pvt. F indicated that Pvt. F witnessed the inmate refusing to cooperate by showering and changing into a jumpsuit, uttering obscenities and threatening to hit Cpl. C with the trash can.

Cpl. C testified that Cpl. C then left the multi-purpose room, locking the door. Cpl. C asked Cpl. B to attempt to calm the inmate down as Cpl. C could see that the inmate was not going to cooperate with Cpl. C. According to Cpl. C's testimony, Cpl. B went with Cpl. C into the multi-purpose room to explain to the inmate that Cpl. C posed no threat to the inmate. Cpl. B indicated to the inmate that all that Cpl. C wanted to do was to process in the inmate. However, the inmate continued to utter obscenities, told Cpl. B to stay away from the inmate and threatened to hit anyone who came near the inmate with the trash can.

Cpl. C and Cpl. B left, locking the inmate in the multi-purpose room, which contained two tables, several chairs, and the metal trash can. The record of evidence established that the multi-purpose room also has a glass window through which the inmate could be observed from the booking area, which is adjacent to the multi-purpose room. Cpl. C testified that Cpl. C then notified Appellant, the Shift Supervisor, that the inmate was being uncooperative. Cpl. C also notified the incoming Shift Supervisor, Lt. H, about the inmate.

The testimony established that Appellant requested Pvt. G go to the WQ to assist Cpl. C and Pvt. F in dressing the inmate. Pvt. G indicated that Pvt. G heard the inmate cursing at Pvt. F when Pvt. G arrived.

Appellant testified that when Appellant arrived at the WQ, Cpl. C, Cpl. B, Pvt. F, and Cpl. A were present. The inmate was still in the multi-purpose room, holding a trash can and threatening to hurt any staff that approached the inmate. Appellant indicated that Appellant attempted to talk to the inmate and convince the inmate to comply with staff

directives and change into an institutional jumpsuit. The inmate replied, “You will have to kill me first.” Appellant testified that Appellant believed that the inmate appeared mentally unstable and needed to go to the Crisis Intervention Unit (CIU), i.e., the mental health unit, in Clarksburg. Accordingly, Appellant decided that Appellant might need to use force to subdue the inmate and prevent harm to the officers.

Thereafter, as the record of evidence established, Appellant decided to gather additional staff. Appellant had already asked Cpl. C to inform the incoming Shift Supervisor, Lt. H, that there was an incident regarding the inmate. Lt. H, who was in the roll call room, testified that Lt. H asked Master Correctional Officer (MCO) J to report to the WQ. Upon MCO J reporting, Appellant indicated that Appellant asked MCO J to assemble some officers. It took about 10-15 minutes to assemble everyone.

The testimony established that Appellant also asked Cpl. C to go to the Shift Commander’s office to get the video camera. Cpl. C was unable to locate the key to unlock the box containing the video camera. Cpl. C told Lt. H about this. Lt. H testified that Lt. H subsequently retrieved the video camera but could not get it to work. Lt. H tried the alternate battery but it still did not work. As the testimony established, Lt. H informed Appellant that the video camera would not work.

In the meantime, MCO J testified that MCO J assembled three female officers – Cpl. C, Private First Class (PFC) I and Pvt. F. MCO J indicated that MCO J briefed this team on what MCO J wanted done with regard to restraining the inmate. However, because the inmate weighed more than two hundred pounds, it was suggested to MCO J that MCO J might want to assemble a different team. MCO J thereafter assembled Cpl. D, as well as Cpl. B and Cpl. A. The record of evidence established that MCO J informed each member of this second team about their area of responsibility in restraining the inmate. MCO J testified that MCO J then informed the first team, Cpl. C, PFC I, and Pvt. F, that when the second team placed restraint equipment (i.e., leg irons and handcuffs) on the inmate, MCO J wanted the first team to conduct a frisk search on the inmate for any contraband items. Cpl. A testified that Cpl. A retrieved the restraint chair from the Emergency Equipment closet.

The record of evidence established that MCO J asked Appellant whether the shield was needed and suggested that MCO J could retrieve it from the Emergency Equipment closet in a few minutes, as the Emergency Equipment closet is a few feet from the Shift Commander’s office. Appellant indicated that it was not needed. Appellant testified that Appellant believed that the officers did not need to dress in protective gear as Appellant did not envision a direct confrontation between the inmate and the officers. According to Appellant, Appellant’s plan was to either talk the inmate into surrendering without any force being used or to use the Taser to incapacitate the inmate, so that the inmate would not be a threat to the officers. One of the officers, Pvt. F, testified that Pvt. F pulled out pepper spray but Appellant told Pvt. F to put it back. Appellant explained that Appellant would use Appellant’s Taser to subdue the inmate. Appellant indicated Appellant was going to talk to the inmate and if the inmate did not comply with Appellant’s commands Appellant would then ask the team to step inside the WQ booking



area outside of the multi-purpose room.

Appellant testified that Appellant instructed the officers who had been assembled that Appellant would give two verbal warnings to the inmate about using the Taser. If the inmate did not comply, Appellant would then use the Taser. After Appellant incapacitated the inmate, the officers should go in and get control of the inmate.

While Appellant was waiting for the additional staff to arrive, the record of evidence established that the inmate barricaded the multi-purpose room. The inmate placed two tables with chairs on top of them in front of the inmate. The inmate also picked up a trash can and threw it down and then raised a chair above the inmate's head and began threatening to harm anyone who came near the inmate. The inmate became very agitated. Appellant again attempted to reason with the inmate. The inmate indicated the inmate would cause harm to anyone who approached the inmate.

At this juncture, MCO J indicated that Appellant signaled to MCO J to come in. MCO J informed both teams to enter the WQ booking area outside of the multi-purpose room. As the officers entered the booking area, the inmate became very agitated and threw something towards the officers. The testimony established that Appellant pulled the Taser from its holster and showed it to the inmate through the glass window. Appellant advised the inmate several times that Appellant would have to use the Taser if the inmate tried to hurt the officers. When the inmate continued to appear agitated, the record of evidence indicated that Appellant removed the cartridge and discharged the Taser for a couple of seconds, resulting in the activation of a spark, to try to get the inmate to give up without the need to use force. Again there was no effect on the inmate.

Appellant testified that Appellant then determined that Appellant would deploy the Taser against the inmate. At this point in time, in addition to Appellant and MCO J, the record of evidence established that there were nine other officers (Lt. H, Cpl. D, Cpl. B, Cpl. C, Pvt. F, Cpl. A, Cpl. E, Pvt. G, and PFC I) present on the WQ floor. Although the testimony varied with regard to how much time it took to assemble and instruct the officers before Appellant deployed the Taser, it appears that at least 20 to 30 minutes elapsed between when the officers began to gather in the WQ and when the Taser was discharged by Appellant.

Appellant testified that Appellant asked MCO J to unlock the door and hold it open partially while Appellant took aim at the inmate. MCO J was charged with keeping control of the door so as to use it as a shield for Appellant and be able to close it if the inmate threw the chair or other objects at them. Appellant gave the inmate a direct order to put the chair down, but the inmate did not comply and continued to yell obscenities.

Accordingly, Appellant testified that Appellant decided to aim the Taser at the inmate. However, the inmate stood behind a table and maneuvered the chair to block Appellant's aim. While Appellant waited for the opportunity to take a shot, Appellant continued to instruct the inmate to drop the chair and comply with orders. Finally, Appellant did disperse a charge at the inmate. The shot was not successful; one prong

imbedded itself in the table and the other got caught in the inmate's clothing. Appellant indicated that Appellant was unable to take a second shot, as the second team of officers had charged into the room and were in Appellant's line of fire. According to both MCO J and Appellant, the second team had jumped the gun and rushed the inmate without an order from either MCO J or Appellant.

As the inmate continued to resist the officers who were trying to subdue the inmate, Appellant testified that Appellant deployed the Taser in the "touch stun" mode on the inmate's right shoulder blade. Appellant then "safed" the Taser as the officers gained control of the inmate. The inmate was placed on the floor and the restraint equipment was placed on the inmate. The inmate was then frisk searched, undressed and a jumpsuit was put on the inmate. Medical was then called to the scene and Nurse K checked the inmate for injuries and checked the restraints.

Then the inmate was placed by several officers in the restraint chair, which had previously been brought up from the Emergency Equipment closet. Nurse K again checked the inmate's restraints for placement. Once in the restraining chair, the inmate was placed in the observation room across from the multi-purpose room. The hearing testimony indicated that this observation room was used to place inmates in administrative isolation.

The record of evidence established that subsequently, emergency transport was requested for the inmate. The inmate remained in the restraint chair until the inmate was transported by Montgomery County police to the Montgomery County Correctional Facility. Lt. H, the incoming Shift Supervisor at MCDC, requested a CIU evaluation as soon as possible, because of concerns that the inmate was mentally unstable. Lt. H also noted in Lt. H's incident report that precautions should be used as the inmate "is very aggressive."

### Disciplinary Action

Thereafter, the Deputy Warden was notified by Appellant about the use of the Taser on the inmate. The Deputy Warden testified that because the Deputy Warden viewed this incident as serious in nature, the Deputy Warden brought it to the attention of the Warden. The Warden met with Appellant during the course of the Warden's investigation into the incident, as the Warden wanted to insure that the incident reports did not leave out information that might provide an insight into what occurred. After completion of the Warden's investigation, and reviewing the incident reports, the Warden testified that the Warden concluded that there was no reason for Appellant to take the actions Appellant did. The Warden concluded that Appellant was in clear violation of DCR Policy Number 300-16, Use of Force (Use of Force Policy) and the Taser Policy. Accordingly, the Warden proposed a 5-day suspension, as it was in keeping with the principle of progressive discipline since Appellant had previously received a written reprimand.

Appellant responded to the Statement of Charges on December 2, 2004. The

DCR issued a Notice of Disciplinary Action on January 11, 2005, suspending Appellant for five days. Specifically, the Notice of Disciplinary Action – Five (5) Day Suspension stated that,

[t]his action is being taken for violation of the following:

Montgomery County Personnel Regulations, 2001, Section 33, Disciplinary Actions, Subparagraph 33-5, Causes for Disciplinary Action, (c) “violates an established policy or procedure”; (e) “fails to perform duties in a competent or acceptable manner”; and (h) “is negligent or careless in performing duties”; and Department Policy and Procedures, Taser Use. II. Responsibilities. If the Shift Commander or higher authority deems it appropriate for a staff member to utilize the Taser upon an inmate, the Deputy Warden, Custody and Security, will be notified prior to utilization (if time allows), or immediately following the utilization. Policy and Procedure Use of Force 300-16 Procedures – The Shift Supervisor also designates an observer to document and video record the incident, especially when several officers are involved. At no time, with the exception of extreme emergency, is force used without officers first being properly briefed on how to handle the situation with minimal chance of injury.

The Notice of Disciplinary Action concluded:

As a Supervisor, you failed to use good judgment in your decision for using force with what you deemed a dangerous situation. The inmate was locked in a multi-purpose room alone and was posing no danger to the inmate’s own person or others. You failed to act in a responsible manner and showed a lack of supervisory leadership and character by ignoring the proper established procedures. The Officers you summoned did not put on the cell extraction equipment located in the Emergency Equipment closet, nor was the video camera used which is required by established policy and procedures. Lastly, the Deputy Warden was not notified until after the Taser was used. Your behaviors were negligent and careless while placing others in harms way.

This appeal followed.

### **APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001, Section 33, *Disciplinary Actions***, which states in applicable part:

#### **33-3. Types of disciplinary actions.**

(e) *Suspension.*

...

- (3) Because it is inconsistent with the employee's FLSA status, a department director must not impose a suspension on an exempt employee unless the suspension is for a full workweek from Sunday to Saturday or for multiple full workweeks.

**33-5. Causes for Disciplinary Action.** The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

...

- (c) violates an established policy or procedure;

...

- (e) fails to perform duties in a competent or acceptable manner;

...

- (h) is negligent or careless in performing duties[.]

**Montgomery County Department of Correction and Rehabilitation  
Detention Division Policy and Procedure Manual, Policy Number: 300-16, *Use of Force*** (January 1, 2003), which states in applicable part:

## **II. USE OF PHYSICAL FORCE:**

### **A. Restrictions**

Only the minimal amount of force necessary is used to control an inmate or situation in the Detention Center. The use of force for inmate control is limited to the following conditions:

1. In self-defense and/or to prevent an assault;
2. To prevent escape;
3. To prevent destruction of property;
4. To prevent commission of a felony;
5. To restrain a physically violent inmate;
6. To restrain an intoxicated inmate;
7. To move an inmate who refuses to cooperate;
8. To conduct a "frisk" or strip search of an unruly inmate; and
9. To prevent an inmate from self-injury.

B. Procedures:

The following guidelines must be strictly followed whenever it becomes necessary to use physical force on an inmate:

1. Except in cases of extreme emergency, ONLY the Shift Supervisor shall authorize the use of physical force to either move or restrain an unruly or uncooperative inmate. Whenever an officer believes that the use of physical force may be necessary, he/she must immediately contact the Shift Supervisor.
2. Upon notification that the use of force may be necessary, the Shift Supervisor immediately responds to the area. Once at the scene, he/she makes certain that sufficient manpower, adequate security, and restraint equipment are available. In addition, the Shift Supervisor instructs the officers present and then personally directs their efforts. The Shift Supervisor does not get physically involved in the incident unless absolutely necessary. The Shift Supervisor also designates an observer to document and video record the incident especially when several officers are involved. At no time, with the exception of an extreme emergency, is force used without officers first being properly briefed on how to handle the situation with minimal chance for injury.
3. Physical force is used only after all other means to handle the situation have been exhausted. When at all possible, inmates should be persuaded to carry out instructions. Often times the show of sufficient manpower in itself is enough to persuade an individual to comply with given orders and instructions.
4. In any situation where physical force is used, the Shift Supervisor makes certain that the incident is properly documented. Each officer who is involved in the incident must submit a written report detailing both why the use of force was necessary and the amount of force that was used to accomplish the assigned task. The officer's written report must be submitted before the end of his/her tour of duty.
- ...
8. Whenever physical force is used, the inmate(s) involved must be placed in an Administrative Isolation status pending an investigation of the incident and given notice thereof.
9. The Warden is notified of any incident in which physical force is used on an inmate.

**Montgomery County Department of Correction and Rehabilitation Detention Division Policy and Procedure Manual, Policy Number: 300-28, Taser** (January 5, 2004), which states in applicable part:

## **II. Responsibilities**

If the Shift Commander or higher authority deems it appropriate for a staff member to utilize the Taser upon an inmate, the Deputy Warden, Custody and Security, will be notified prior to utilization (if time allows), or immediately following the utilization.

...

### **B. Shift Lieutenant/Captain**

1. Can authorize the X26 Taser usage by a certified staff member.
2. Must respond to the area where the X26 Taser is being utilized.
3. Notifies the Medical staff to report to where the Taser has been used, and to administer emergency medical care, if needed.
4. Ensures that staff members who are issued the X26 Taser are certified, and ensures that each staff member who uses the Taser upon an inmate submits full documentation of the incident. Use is defined as: presentation, drawing and pointing the Taser; stuns; or discharges of the Taser.
5. Investigates each incident in which the X26 Taser is fired or used and reviews all incident reports that are written regarding such use.
6. Ensures that photographs are taken of the probe penetration sites on the inmate's body, and that photographs are also taken of any secondary injuries caused by the inmate's falling to the ground, etc.
7. Forwards an investigative report on the use of the Taser, and all other related reports, to the Deputy Warden of Custody and Security within a reasonable time after the conclusion of the Taser use incident.

## **III. Use of the X26 Taser**

### **The use of the X26 Taser constitutes a Use of Force**

#### **A. Restrictions:**

The Taser is placed on the Use of Force Continuum at the OC Spray level. Only staff that has been certified and properly trained may utilize the Taser under the authorization of the Shift Commander or higher authority. The Taser should not be used unless the authorizing Shift

Commander/Captain is present on the scene where use is contemplated. The facility Warden shall determine who may be certified to utilize the X26 Taser. Certification and training will be conducted by a certified taser instructor. The use of the Taser is limited to the following conditions:

1. Self Defense
2. Situations where it is necessary to use force in order to prevent serious bodily injury to other inmates, staff members or visitors.
3. To prevent escape
4. To disarm an inmate who has a weapon or an object that has been fashioned into a weapon.
5. Hostage situations
6. The inmate poses a threat from a distance and staff and the inmate are at risk of injury if manual attempts are made to restrain the inmate(s).
7. Any situation deemed appropriate by the Shift Administrator, Unit Manager, Assistant Unit Manager or higher authority on the scene, when lesser force options have been ineffective or are considered likely to be ineffective.

### **POSITIONS OF THE PARTIES**

#### County

- Disciplinary action was taken because Appellant failed to use good judgment in arriving at Appellant's decision to employ force on the inmate. The inmate was locked in a multi-purpose room alone and was posing no danger to the inmate's own person or others.
- Appellant showed a lack of supervisory leadership by ignoring proper established policy and regulations which required that the officers summoned to deal with the inmate put on cell extraction equipment located in the Emergency Equipment closet.
- Appellant also failed to insure that a video camera was used as required by the regulations.
- Appellant failed to notify the Deputy Warden as required by regulation before employing a Taser on the inmate.
- Appellant's behavior was negligent and placed others in harm's way which cannot be tolerated.

#### Appellant

- Appellant made the correct decision to use force given the fact that the inmate had already made threats against officers, was obviously mentally unstable, and the inmate's level of agitation was rising, rather than lowering as time progressed. Moreover, the inmate was capable of doing harm to the inmate.

- Appellant did not have the officers don protective equipment because Appellant did not plan for the officers to have a direct confrontation with the inmate. Rather, Appellant foresaw two potential outcomes. First, the inmate would surrender without any force being used and comply with the booking process. Otherwise, Appellant would use the Taser to incapacitate the inmate, thus insuring the inmate was not a threat to the officers. It was only because the officers jumped the gun and charged into the room without being ordered to do so that there was any confrontation.
- Appellant did ask an officer to get the video camera. There were problems with the video camera's batteries working. That is why the camera was not used.
- Appellant did not contact the Deputy Warden until after the Taser was used because to contact the Deputy Warden prior to its use would have necessitated Appellant leaving the scene and returning to Appellant's office to call the Deputy Warden. As the officer in charge of the incident, Appellant believed it would have been irresponsible to leave the scene.

### **ISSUE**

Has the County proven, by a preponderance of the evidence, that the 5-day suspension of Appellant was reasonably justified and consistent with applicable law and regulatory provisions?

### **ANALYSIS AND CONCLUSIONS**

#### **The Regulations Vested Appellant With The Authority To Determine When To Use Physical Force, Including The Use Of The Taser.**

DCR's Taser Policy permits the Shift Supervisor to use the Taser in **any** situation deemed appropriate by the Shift Supervisor when lesser force options have been ineffective or are considered likely to be ineffective. As the record of evidence established, Appellant attempted to employ several lesser force options before using the Taser. For example, Appellant repeatedly urged the inmate to put down the trash can, and then later urged the inmate to put down the chair and cooperate. These verbal orders, however, went unheeded.

There is also evidence in the record that Appellant assembled nine other officers and ensured that the inmate could see at least some of them before Appellant used the Taser. Indeed, the Warden acknowledged that Appellant showed sufficient manpower to persuade the inmate to comply with Appellant's orders. However, the presence of this staff did not calm the situation.

Appellant also displayed the Taser to the inmate, clicking it so that a spark was discharged, and again warning the inmate of the consequences of failing to obey Appellant's orders. However, the inmate failed to respond.

The Board also notes that DCR's Use of Force Policy indicates that the use of



physical force is permitted among other things to move an inmate who refuses to cooperate and/or to conduct a frisk search of an unruly inmate. The Shift Supervisor is authorized under the Use of Force Policy to determine when physical force is needed. Thus, under both the Taser Policy and the Use of Force Policy, Appellant was authorized to determine when physical force, including the use of the Taser, was necessary.

While the Board may not agree that the use of the Taser was necessary in the situation described, as the Warden acknowledged, Appellant was never charged with the use of excessive force. Rather, Appellant was charged with violating policies and regulations. Specifically, the Warden testified that Appellant primarily violated section II.B.3 of the Use of Force Policy which indicates that,

[p]hysical force is used only after all other means to handle the situation have been exhausted. When at all possible, inmates should be persuaded to carry out instructions. Often times the show of sufficient manpower in itself is enough to persuade an individual to comply with given orders and instructions.

However, during the hearing, the Warden conceded that Appellant did try to persuade the inmate to carry out Appellant's instructions. The Warden also acknowledged that Appellant warned the inmate that Appellant would use the Taser on the inmate if the inmate did not obey Appellant's orders. And as previously noted, the Warden agreed that Appellant showed sufficient manpower to try and persuade the inmate to cooperate. Accordingly, the Board concludes that the County has not proven that Appellant violated the regulations when Appellant determined that the use of the Taser was necessary.

Moreover, even the DCR acknowledged that, while the Director viewed Appellant as making the wrong judgment call in the situation, "[a]ny situation in this world can be looked at differently." The Director went on to testify that "I'll tell you what can't be looked at differently. Failure to call the [D]eputy [W]arden; failure to prepare the unit; failure to grab the camera." The Board will address each of these alleged violations of the regulations below.

**The Failure Of The Officers To Use Cell Extraction Equipment Did Not Violate Any Regulation.**

Appellant testified that Appellant did not seek a confrontation between the inmate and the officers. Rather, Appellant planned to use the Taser to subdue the inmate so that the officers could restrain the inmate without any chance of harm to themselves. Accordingly, Appellant believed that use of the cell extraction equipment would not be necessary. Unfortunately, the officers did not follow the plan as explained to them by MCO J. Instead of awaiting the order to enter the multi-purpose room and restrain the inmate, the officers jumped the gun and rushed into the multi-purpose room after the Taser was discharged, despite the fact that the Taser had not subdued the inmate.

The County has failed to prove that Appellant's decision not to order the officers

to don cell extraction equipment violated any regulation. There is no provision in either the Use of Force Policy or the Taser Policy that requires cell extraction equipment be used when there is the use of physical force on an inmate. Accordingly, the Board finds that this charge is not sustained.

**Appellant's Failure To Ensure The Video Camera Was Used Did Not Violate The Regulation.**

Both the Use of Force Policy and the Taser Policy require the use of a video camera when force is used on an inmate. It is undisputed that Appellant sent Cpl. C to retrieve the video camera. However, Cpl. C was unable to find the key to open the box in which it was kept. Cpl. C informed Lt. H about this problem. Lt. H subsequently retrieved the camera but discovered it was not working. This fact was reported back to Appellant. Given that there was no other video camera available, Appellant was not at fault because the camera was not used. Accordingly, the Board finds that this charge is not sustained.

**Appellant Ensured That The Officers Present At The WQ Were Properly Briefed On How To Handle The Situation.**

There is ample evidence in the record that the officers present at the WQ were properly briefed by both MCO J and Appellant on how to handle the situation. MCO J briefed both the first and second teams that MCO J assembled. Appellant also briefed the teams before they restrained the inmate. Appellant even ordered one officer to put a can of pepper spray away. While it is unfortunate that the second team did not await the signal to enter the multi-purpose room, this failure was not due to the lack of a proper briefing. Accordingly, the Board finds that this charge is not sustained.

**Appellant Failed To Notify The Deputy Warden Before Using The Taser And There Was Time To Do So.**

The Taser Policy specifically provides that prior to using a Taser upon an inmate, the Deputy Warden "will be notified prior to utilization (if time allows), or immediately following the utilization." While it is possible to read the policy to permit the Taser user to notify the Deputy Warden either prior to or immediately after the Taser is used, the Board is of the opinion that the correct interpretation of the regulation is that the Deputy Warden is to be notified prior to the use so long as time allows.

In the instant case, there is evidence in the record that it took any where from 20-30 minutes to assemble the various officers and brief them before the Taser was used on the inmate. Appellant acknowledged that Appellant could have left the scene and gone to the Shift Supervisor's office to retrieve the Deputy Warden's phone number. Appellant indicated that Appellant did not do so as Appellant believed it would have been negligent as Appellant would have been removing the Taser from the scene and Appellant was the most senior person at the scene. However, the incoming Shift Supervisor, Lt. H, was also at the scene for approximately 15 minutes. Lt. H unlocked the box containing the video

camera but was unsuccessful in getting it to work. There is no reason why Lt. H could not have been sent back to the Shift Supervisor's office to retrieve the Deputy Warden's number and call the Deputy Warden so as to alert the Deputy Warden that the Taser was going to be used by Appellant, particularly given the fact that there was more than a sufficient force present on the scene.

Having found that there was sufficient time for the Appellant to arrange to have the Deputy Warden called, the Board finds that Appellant violated the Taser Policy when the Deputy Warden was not called prior to the utilization of the Taser. However, as previously noted, the Board views the Taser Policy as lacking clarity and open to a different interpretation. Additionally, the Board notes that this was the first time the Taser was used at the MCDC. The Board is also mindful that the Use of Force Policy vests the Shift Supervisor with complete authority to use Oleoresin Capsicum (i.e., pepper spray), which is on the same level as the Taser in DCR's Use of Force Continuum, without prior notification to the Deputy Warden. The Board urges DCR to clarify both the Use of Force Policy and the Taser Policy so that they are consistent and more specific.

Accordingly, while the Board finds that the Appellant violated the Taser Policy when Appellant failed to notify the Deputy Warden before using the Taser, the Board concludes that under the totality of circumstances, this sustained charge does not warrant a 5-day suspension. Rather, the Board concludes that the disciplinary action should be a written reprimand containing only the charge of violation of the Taser Policy for failure to notify the Deputy Warden prior to using the Taser.

### **ORDER**

On the basis of the above, the Board sustains the appeal and orders the County revoke the 5-day suspension and issue a written reprimand in its stead. The County is also ordered to make the Appellant whole for lost wages and benefits. As the Appellant's attorney filed a motion for attorney fees during the hearing and subsequently filed a memorandum in support of the motion, the County is ordered to respond to the motion for attorney fees within 10 days of the date of this decision.

# **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 2006, the Board issued the following decision on an appeal concerning the denial of employment.

# **EMPLOYMENT**

## **Case No. 06-02**

### **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, Planning Manager, to not select Appellant for the position of Senior Planning Specialist in the Office of the County Executive.

### **FINDINGS OF FACT**

In September 2005, Appellant applied for the position of Senior Planning Specialist (the working title of the position is Senior Planner/Pedestrian Coordinator). The vacancy announcement for the position indicated that the position:

is responsible for coordinating activities of the Executive Branch related to land use planning and coordinating the pedestrian safety efforts of the County. Land use planning duties include: reviewing Master Plans, Annual Growth Policy and amendments to the Zoning Ordinance and subdivision regulations; researching, analyzing, developing and modifying policies and legislation; coordinating with Executive [B]ranch agencies to develop policy positions regarding the planning process for the County Executive; responding to written/oral inquiries for the Executive [B]ranch related to planning issues. Pedestrian safety responsibilities include: working with the Police Department, the Department of Public Works and Transportation and other agencies in implementing recommendations made by the Blue Ribbon Committee on Pedestrian Safety; providing support to the Pedestrian Safety Advisory Committee; handling day-to-day inquiries on pedestrian safety issues; maintaining the Pedestrian Safety web page; developing pedestrian safety educational/outreach programs and materials, and attending community meetings/events to promote pedestrian safety awareness.

The minimum qualifications for the position were graduation from an accredited college or university with a Bachelor's degree in urban land use policy, planning, public administration or related field and five (5) years experience in planning/policy development. However, an equivalent combination of education and experience could be substituted. The announcement also listed four preferred criteria: 1) Experience utilizing principles and practices of the planning specialization appropriate to land use planning,<sup>1</sup>

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<sup>1</sup> This portion of the first ranking factor was weighted at 30%.

with a specialization in pedestrian safety issues;<sup>2</sup> 2) Experience identifying how communities, as a whole, and their component systems function and develop;<sup>3</sup> 3) Experience in researching, analyzing and developing policy and legislative initiatives;<sup>4</sup> 4) Experience in project management and supervision of technical studies.<sup>5</sup>

According to the Office of Human Resources (OHR), an extensive recruitment was done for this position. The aim was to attract Planners working in local government. Therefore, advertisements for the position were placed on the following websites: American Planning Association, National Capital Area American Planning Association, International City/County Management Association, and Maryland Association of Counties.

The applications received were rated using the preferred criteria by two subject matter experts, a Planner and a Pedestrian Safety Engineer. The score of the highest rated applicant was set at 100% and all candidate scores were divided by the high score to determine placement on the eligible list. Candidates receiving scores of 70% or higher were placed on the eligible list with a rating of “Well Qualified” and those with scores below 70% were placed on the eligible list with a rating of “Qualified”.

Appellant was originally rated at 69% and thus was given a rating of “Qualified”. Appellant contacted OHR to challenge Appellant’s rating of “Qualified”. In response to this challenge, the raters were asked to review Appellant’s application again, and they awarded Appellant an additional point for the rating factor concerning experience identifying how communities, as a whole, and their component systems function and develop. This additional point resulted in changing Appellant’s rating from 69% to 71%, and Appellant was placed in the “Well Qualified” category on the eligible list. There were eight other candidates in the “Well Qualified” category with scores from 77%-100%. Eight candidates were placed in the “Qualified” category on the eligible list, with scores of 7%-68%.

All candidates in the “Well Qualified” rating category were interviewed. There were three raters for the interview: an Assistant Chief Administrative Officer, formerly the head of Planning Implementation, a Lieutenant in the Special Operations Division of the Police Department specializing in pedestrian safety, and the supervisor of the position, a Planning Manager. By letter dated January 26, 2006, Appellant was notified that Appellant was not selected for the position.

The Selectee for the position, at the time of the selection, was a Senior Research

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<sup>2</sup> This portion of the first ranking factor was weighted at 10%.

<sup>3</sup> This ranking factor was weighted at 10%.

<sup>4</sup> This ranking factor was weighted at 25%.

<sup>5</sup> This ranking factor was weighted at 25%.

Planner with the Montgomery County Departments of Park and Planning. The Selectee had held this position for three years. Prior to that, the Selectee was a Community Planner, a Senior Planner, a General Planner, a County Planner and Senior County Planner and an Urban Planning Volunteer. Thus, based on the Selectee's resume, the Selectee had over 11 years of planning experience. The Selectee had a Bachelor's degree in General Studies and a Master's degree in Urban Planning.

Appellant's resume indicated that Appellant has held a variety of positions. Appellant is currently employed as a Survey Analyst. Prior to that position, Appellant was an Energy Information Specialist, an Accessibility Customer Service Representative, a Research Study Supervisor, a Project Manager (conducting quality analysis, evaluation of government contracts and staffing utilization), an Assistant Director of Field Operations (administering a field staff human resources department), an Assistant Sales/Circulation Manager, a Health Curriculum Projects Manager and a Research/Marketing Division Manager. Appellant's resume also indicated extensive volunteer work on behalf of pedestrian safety issues. Appellant's resume specified Appellant had a Bachelor's degree in Sociology and some graduate studies in Business Administration.

### **POSITIONS OF THE PARTIES**

#### **Appellant**

- Appellant was uniquely qualified for the position as Appellant has over 20 years experience dealing with pedestrian safety issues.
- Appellant's professional and volunteer skill sets were underrated or ignored as demonstrated by the fact that Appellant was originally rated as "Qualified" and, after challenging this rating, received a low "Well Qualified" rating.
- Appellant worked closely with the former Pedestrian Safety Coordinator, who recommended Appellant for the position.
- Management impermissibly shifted the primary focus of the position from pedestrian safety to planning and land use zoning, with pedestrian safety as a minor assignment.
- Appellant's rejection letter did not provide Appellant with appeal rights to the Board; it was only through Appellant's research that Appellant discovered Appellant had a right to appeal Appellant's nonselection to the Board.

#### **County**

- A major aspect of the position is utilizing principles and practices appropriate to land use planning. For this position, it was more important to have experience as a Planner than experience in pedestrian safety. Appellant lacks experience working as a Planner for a local government agency. The Selectee had a Master's degree in Planning in addition to work experience with several local government agencies.
- The personnel regulations provide management with discretion in making selections for positions. Management chose the individual they believed had the

best qualifications in terms of knowledge and experience to carry out the duties of the position.

- It is OHR's practice not to provide appeal information in letters informing applicants that they have not been selected for a position. However, this information is provided to any applicant who asks OHR about their rights with regard to a nonselection.

### **APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 7, *Appointments, Probationary Period, and Promotional Probationary Period***, which states in applicable part:

**7-1. Use of eligible list.** If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

- (a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

### **ISSUE**

Was the selection process violative of law, or regulation, or otherwise improper?

### **ANALYSIS AND CONCLUSIONS**

Appellant alleges that Appellant's volunteer and professional skills were underrated as demonstrated by the fact that Appellant was originally placed in the "Qualified" category. However, after Appellant challenged this placement, OHR asked the rating panel to review Appellant's application. Based on the panel's review, Appellant was placed in the "Well Qualified" category.

The MCPR provides that a selecting official may choose any individual from the highest rating category. Thus, management was free to select anyone in the "Well Qualified" category, including Appellant, as long as the selection process was consistent with law or regulation, or not otherwise improper. As to the former, the Appellant neither alleges, nor does it appear, that any aspects of the selection process were inconsistent with law or regulation. As to the latter, in assessing a challenge to a selection decision as arbitrary and capricious, the Board will not substitute its judgment for that of the selecting official unless the Appellant demonstrates that Appellant's qualifications were plainly superior to those of the selectee. Appellant has failed to do this.

It is clear from the weighting of the rating factors that the County chose to change



the emphasis of the vacant position from one dedicated to pedestrian safety to one focused primarily on land use planning. While Appellant is clearly unhappy about this change of focus, management has the right to determine what the job duties of a position should be. The Selectee clearly had extensive experience in land use planning. While the Selectee may not have had as extensive experience in pedestrian safety advocacy as Appellant, given that management chose to place the primary focus of the position on land use planning, the Selectee was well qualified for the position.

Appellant noted that Appellant was not given Appellant's appeal rights in the notification of Appellant's nonselection. OHR asserts that if it is questioned by a disappointed applicant about his/her rights, it informs the applicant of the right to file an appeal with the Board. While the Board is concerned that any non-selectee who questions OHR about his/her nonselection be advised of his/her appeal rights, and will so advise OHR to ensure that these rights are provided, we do not believe that the apparent failure to have done this in the instant case renders the nonselection improper, or requires further remedy.

### **ORDER**

Based on the above, the Board denies Appellant's appeal from Appellant's nonselection for the position of Senior Planning Specialist.

## **SHOW CAUSE ORDERS**

Pursuant to Section 34-9(a)(3) of the grievance procedure (as amended February 15, 2005), “[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level.” However, Section 34-9(a)(4) provides that “[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time.”

This year the Board received two appeals of grievances where there were no CAO decisions. In order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board in each case issued a Show Cause Order to the CAO. The Board ordered the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO’s response, as well as any opposition filed on behalf of the Appellant, the Board issues a decision.

During FY 2006, the Board issued the following Show Cause Order Decisions.

# **SHOW CAUSE ORDER DECISIONS**

## **Case No. 06-03**

### **DECISION ON SHOW CAUSE ORDER**

The Montgomery County Merit System Protection Board (Board or MSPB) received an appeal of these consolidated grievances on February 23, 2006. The Board noted that there has been no Chief Administrative Officer's (CAO's) decision in the consolidated grievances. Appellants asserted that the Board had jurisdiction over this appeal pursuant to Montgomery County Personnel Regulations (MCPR), 2001, Section 34-9(a)(4) (as amended February 15, 2005), as the Chief Administrative Officer (CAO) had failed to meet the time limits for processing the consolidated grievances as provided in the County's grievance procedures.

Given the extensive time the consolidated grievances leading to this appeal had been pending, the Board ordered the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the consolidated grievances to the CAO for a decision pursuant to Section 34-9(a)(4) of the grievance procedure. On March 15, 2006, the Director, Office of Human Resources (OHR), responded to the Board's Show Cause Order (County's Response). On March 28, 2006, Appellants' counsel filed a reply (Appellants' Reply) to the County's Response.<sup>1</sup>

### **FINDINGS OF FACT**

On July 5, 2005, one of Appellants' counsel filed grievances with OHR on behalf of eleven Lieutenants in the Department of Correction and Rehabilitation, alleging that the June 12, 2005 promotion of employees with the rank of Master Correctional Officer to the rank of Sergeant resulted in a ten percent pay increase for the new Sergeants. This pay increase purportedly improperly compressed the salary difference between them and Appellants.

In a cover letter accompanying the grievances, Appellants' counsel indicated that OHR had agreed to an extension until July 19, 2005 for the filing of multiple, related grievances for the eleven Lieutenants. Nevertheless, Appellants' counsel filed a "bare-bones" version of the grievances on July 5, 2005. On July 19, 2005, Appellants' counsel filed with OHR the Lieutenants' verification of the grievances filed on their behalf by

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<sup>1</sup> The Board notes that there was no service sheet on the Appellants' Reply indicating that a copy of the pleading was served on the County. The Board reminds the parties that pursuant to Section 35-5 of the MCPR, each party to an appeal must send a copy of every pleading filed with the Board to the other party and must note on every pleading filed with the Board that a copy was sent to the other party.

Appellants' counsel on July 5, 2005.

On August 8, 2005, OHR's Director notified the Appellants' counsel that the OHR Director was consolidating the eleven (11) grievances with three (3) additional grievances the OHR Director had received on the same matter (consolidated grievances). In a memorandum dated August 23, 2005, the OHR Director addressed the merits of the consolidated grievances. The OHR Director found that the establishment of a new Sergeant class which had the effect of narrowing the salary spread between the Lieutenants and the newly promoted Sergeants did not constitute a pay inequity and denied the relief requested. The OHR Director informed Appellants that they had 5 calendar days to appeal this decision to the CAO. The OHR Director also noted that since the consolidated grievances involved an OHR action, if the OHR Director's decision was appealed, the consolidated grievances would be assigned to a grievance fact finder outside the Office of Human Resources.

The County's Response indicates that OHR mailed a copy of the OHR Director's decision by first-class, postage prepaid to Appellants' counsel on August 23, 2005. Appellants' lead counsel asserts that counsel and the Appellants did not receive the OHR Director's Step 1 decision until September 14, 2005, after counsel's staff contacted OHR about the status of the decision. On September 20, 2005, Appellants appealed the OHR Director's decision to the CAO.

The parties agree that Appellants' counsel contacted OHR on December 6, 2005, to ascertain why no action had occurred on the consolidated grievances. According to the County's Response, Appellants' counsel was informed that the consolidated grievances were being held in abeyance pending resolution of Grievance A,<sup>2</sup> another set of consolidated grievances involving similar issues of alleged wage compression and pay inequity in the Sheriff's Office. At that time, both sides purportedly discussed the possibility of alternative dispute resolution (ADR).

On January 5, 2006, Appellants' counsel wrote the OHR Director and the Director, Department of Corrections and Rehabilitation (DCR), concerning the status of the consolidated grievances. Appellants' counsel asserted that counsel had been informed by OHR that a variety of ADR options were available but that the soonest any action could begin was late January. Accordingly, Appellants' counsel indicated counsel was waiving all ADR procedures and insisting on strict adherence to the timetables contained in the grievance procedure.

On January 25, 2006, Appellants' counsel again wrote both the OHR Director and

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<sup>2</sup> In Grievance A, the Board considered an appeal of a grievance decision by the CAO dismissing the 42 consolidated grievances as non-grievable because they involved allegations of wage compression and pay inequity in the Sheriff's Office. In a decision dated March 30, 2005, the Board reversed the CAO's determination that the consolidated grievances were non-grievable and remanded them back to the CAO for processing on the merits.

the DCR Director regarding the status of the consolidated grievances. Appellants' counsel asserts counsel has never received a response. Thereafter, Appellants' counsel filed the instant appeal with the Board. As previously noted, the Board issued a Show Cause Order to the CAO in order to determine whether it should assert jurisdiction at this time over the instant appeal or whether there was good cause shown to remand it to the CAO for a Step 3 fact-finding and decision.

### APPLICABLE REGULATIONS

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 34, *Grievance Procedure*, which states in applicable part:**

**34-3. Policy on grievances.**

(a) *Objectives.* The objectives of the grievance-resolution process are to:

...

(3) provide specific and reasonable time limits for each level or step in the review of a grievance.

(b) *Responsibilities of department directors and supervisors.* A department director or supervisor:

...

(3) must consider an employee's grievance fairly and promptly.

**34-9. Grievance procedure.**

(a) *Time limit for filing a grievance.*

...

(3) If the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level.

(4) If an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time.

(5) The parties to a grievance may agree to extend the time limits stated in the grievance procedure.

- (6) The OHR Director may extend the time limits stated in the grievance procedure for compelling reasons. The OHR Director must give the parties prompt notice of an extension.

**(b) *Technical and procedural review of grievances.***

...

- (5) The OHR Director must review the grievance and decide if the grievance:

- (A) presents an issue that is grievable under Section 34-4 . . . .

...

- (7) The OHR Director or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process.

**(c) *Consolidated grievances.***

- (1) The OHR Director may consolidate 2 or more grievances and process them together to save time.
- (2) OHR must give written notice to the employee or employees who filed the grievances that the grievances have been consolidated and will be processed together.

...

- (e) ***Steps of the grievance procedure.*** The following table shows the 4 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

<b>STEPS OF THE GRIEVANCE PROCEDURE</b>		
<b>Step</b>	<b>Individual</b>	<b>Responsibility of Individual*</b>
<b>1</b>	<b>Employee</b>	Present job-related problems to immediate supervisor.
		If unable to resolve the problem, submit a written grievance form to immediate supervisor within 20 calendar days.
		If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.

	<b>Supervisor</b>	Give the employee a written response within 7 calendar days after the written grievance is received.
2	<b>Employee</b>	If not satisfied with the supervisor's response, may file the grievance with the department director within 5 calendar days after the supervisor's response is received.
	<b>Department Director</b>	Meet with the employee, employee's representative, and other persons, as appropriate, to attempt to resolve the grievance.
		Give the employee a written response to the grievance within 15 calendar days after the grievance is received.
		If the grievance is based on an action taken or not taken by OHR, the OHR Director must give the employee a response within 15 calendar days after the grievance is received.
3	<b>Employee</b>	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department's response.
	<b>CAO's Designee</b>	Must meet with the employee, employee's representative, and department director's designee within 35 calendar days to resolve the grievance.
	<b>Employee and Dept. Director</b>	Present information, arguments, and documents to the CAO's designee to support their position.
	<b>CAO's Designee</b>	If unable to resolve the grievance, must prepare a report of grievance findings, allow the parties 10 calendar days to comment on the findings, incorporate the parties' comments, if any, and provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	<b>CAO</b>	Must give the employee and department a written decision within 30 calendar days after the parties' comments on the report of grievance findings are received or 30 days after the deadline for comments on the report of grievance findings has passed.

<b>4</b>	<b>Employee</b>	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	<b>MSPB</b>	Must review the employee's appeal under Section 35 of these Regulations.
<b>* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.</b>		

### **POSITIONS OF THE PARTIES**

#### County

- Before the OHR Director could deal with the substantive merits of the grievance, there were preliminary matters that needed to be addressed. Specifically, based on the Board's decision in Grievance A, which involved similar issues of alleged wage compression and pay inequity for management employees in the Sheriff's Office, the OHR Director had to determine whether the instant consolidated grievances were distinguishable from Grievance A with respect to the issue of grievability and whether OHR wished to put the grievability issue back before the Board for purposes of clarification.
- The OHR Director also had to consolidate the individual grievances filed by the Lieutenants and if an employee objected to the consolidation, the OHR Director would have to process the grievances separately.
- In any event, if the OHR Director failed to meet the time limits, the Appellants could raise the grievance to the next step.<sup>3</sup>
- When Appellants appealed the OHR Director's decision to the CAO on September 20, 2005, it was reasonable for the OHR Director to hold the consolidated grievances in abeyance while resolving Grievance A. The grievance regulations provide the OHR Director with the right to extend the time limits in the grievance procedure for "compelling reasons." Having a similar issue already scheduled for a hearing before an outside grievance fact finder is a compelling reason to hold the grievance in abeyance.
- The individual grievants in the instant appeal had initiated settlement discussions with OHR about the instant consolidated grievances beginning on January 19, 2006. It was reasonable for the OHR Director to delay engaging an outside fact finder for a Step 3 hearing while settlement discussions were proceeding. The OHR Director believed in good faith that the OHR Director could engage in direct negotiations with the eleven grievants.
- Just because the CAO failed to meet the time limits of the grievance procedure

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<sup>3</sup> In the County's Response, the OHR Director asserts that if the OHR Director failed to respond to the grievance within 15 days, then the Appellants could appeal to the CAO. The issue of how many days the OHR Director had to respond at Step 1 of the grievance procedure is discussed infra.



does not mean that the MSPB must accept the appeal. The MSPB may choose to remand the appeal and have the CAO respond within a specific time frame. This grievance can be better handled and an extensive factual record developed by an outside fact finder representing the CAO.

### Appellants

- The OHR Director's initial response should have been filed on or before July 26, 2005 and he did not issue it until almost a month later on August 23, 2005.
- The appeal to the CAO was timely filed on September 20, 2005 and there should have been a Step 3 meeting with the CAO's designee by October 25, 2005. The County has provided no explanation as to why no contact with Appellants' representative was even attempted by that time. Instead, Appellants' representative had to contact OHR on December 6, 2005, to ascertain the status of the case.
- Appellants' representative repeatedly tried to have the County comply with the grievance procedures and the County provided no response.
- The County has conceded it engaged in extensive settlement discussions in January 2006 directly with the Appellants without notifying their counsel. This conduct constitutes bad faith and necessitates the Board taking jurisdiction and sanctioning the CAO's actions by an award of attorney's fees from July 19, 2005 to the present.

### ISSUE

Has the County shown good cause as to why it did not adhere to the time limits of the grievance procedure so that the Board should remand the case to the CAO for a decision prior to accepting the instant appeal?

### ANALYSIS AND CONCLUSIONS

#### **The County's Grievance Procedure Is Designed To Ensure Prompt And Fair Processing Of Grievances And Provides A 7-Day Time Limit For Response To A Step 1 Grievance.**

The Board notes that OHR significantly amended the County's grievance procedure on February 15, 2005. According to Section 34-3 of the MCPR, one of the objectives of the grievance-resolution process is to provide specific and reasonable time limits for each level or step in the review of a grievance. Supervisors and Department Directors are charged with considering an employee's grievance fairly and promptly.

The grievance process provides two mechanisms for extending its reasonable time limits. First, in accordance with Section 34-9, the parties may mutually agree to extend the time limits. The second provision permits the OHR Director to extend the time limits for "compelling reasons." However, if the OHR Director invokes this provision the OHR Director must give the parties prompt notice of such an extension. No where in the

MCPR is the term “compelling reasons” defined. The Merriam-Webster Collegiate Dictionary (10<sup>th</sup> ed.) defines the word “compelling” as “forceful”, “demanding attention”, and “convincing”. For purposes of interpreting this provision, the Board finds that a “compelling reason” must be one that demands attention because of its novelty as opposed to a reason that could have been anticipated.

Under the County’s grievance procedure, there are four (4) steps. Step 1 requires that the grievance, if based on an action taken by the OHR Director, be submitted to the OHR Director as was the case in the instant appeal. The OHR Director gives the grievant a written response.

If the grievant is not satisfied with the response, the grievant has 5 calendar days to raise the grievance to Step 2. Step 2 of the grievance procedure requires the Department Director to meet with the grievant. The procedure for Step 2 indicates that if the grievance is based on an action taken by OHR, the OHR Director must give the grievant a response within 15 calendar days after the grievance is received.

If not satisfied with the Department Director’s response (or the OHR Director’s response, as applicable), the grievant has 10 calendar days to file the grievance at Step 3 with the CAO. At Step 3, if the OHR Director issued the decision on the grievance at the Step 2 level, the CAO must appoint a designee who is not a subordinate of the OHR Director to conduct the Step 3 grievance meeting and, after the meeting, prepare a report of grievance findings for the parties. After providing the parties with an opportunity to review the report of grievance findings and submit comments, the CAO must issue a written decision within 30 calendar days from the deadline date for the parties’ comments on the grievance findings.

If the grievant is not satisfied with the CAO’s decision, the grievant has 10 working days to submit a grievance to the MSPB. This constitutes Step 4 of the grievance procedure.

The Board notes that in the instant case, in the Step 1 response, the OHR Director gave the Appellants the right to file directly with the CAO. Thus, the OHR Director permitted them to bypass Step 2. Given that at Step 2, the Appellants would have had to submit the grievance to the OHR Director again for a response from the OHR Director which would have been redundant, the Board agrees that the correct procedure was to move the grievance to Step 3 for fact finding by someone outside OHR.

While giving the Appellants the right to bypass Step 2, the OHR Director only permitted them the 5 calendar days for appeal to the CAO as specified in Step 1 as opposed to the 10 calendar days for appeal specified in Step 2. Accordingly, the Board concludes that the OHR Director cannot now argue that the OHR Director had 15 calendar days (as opposed to 7 calendar days) to respond to the July 5, 2005 grievances of the eleven Lieutenants.

## **The County Has Failed To Show Good Cause In The Instant Case.**

### 1. **The County Has Failed To Show Good Cause For The Late Response To The Step 1 Grievance.**

The eleven grievances were originally filed on July 5, 2005. The OHR Director notified the parties the OHR Director was consolidating the grievances over a month later on August 8, 2005. On August 23, 2005, the OHR Director issued the Step 1 decision. The County asserts that the failure of the OHR Director to respond within the time limits, i.e., within 7 calendar days from the date the grievances were filed, was due to the fact that the OHR Director had to deal with certain preliminary issues prior to addressing the substantive merits of the instant case.

According to the County, the first preliminary issue that needed to be addressed was whether the instant grievance was distinguishable from Grievance A with respect to grievability. Therefore, the OHR Director had to consult with the County Attorney's Office. As acknowledged in the County's Response, Grievance A involved "similar issues of alleged wage compression and pay inequity for management employees in the Sheriff's Office." The Board does not see any discernable difference between the basic allegations in the instant case and those in Grievance A that would require over a month's review of the grievance. Furthermore, the grievance regulations specifically provide that the OHR Director or the CAO may reconsider the issue of grievability at any stage of the process. Therefore, the Board finds that the need to review the instant grievance in light of the Board's decision in Grievance A, which was issued over three months prior to the filing of the instant consolidated grievances, does not constitute a "compelling reason" for the OHR Director to extend the time limits in the grievance procedure.<sup>4</sup>

The County also argues that the OHR Director had to consolidate the grievances. Under the grievance procedure, if an employee objects to the consolidation, the OHR Director must process the grievances separately. The record of evidence demonstrates that the OHR Director notified the parties of the consolidation over a month after the grievances were filed. Nowhere in the grievance procedure is there a provision which permits a grievance time limit to be extended because the OHR Director chooses to consolidate grievances. Nor has the County provided any explanation as to why it took a month simply to decide to consolidate similar grievances. Indeed the purpose cited in the regulations for consolidation is to save time. The Board does not view the need to consolidate grievances as a "compelling reason" for extending the time limits of the grievance procedure. Moreover, even if the OHR Director believed in good faith that consolidation constituted a "compelling reason" for extending the time limits, the OHR Director failed to promptly notify the parties of this determination to extend the time

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<sup>4</sup> In order to invoke the "compelling reason" exception to the time limits, the OHR Director is required to promptly notify the parties of the decision to do so. In the instant case, the OHR Director failed to provide any notice that the OHR Director was invoking this exception.

limits as required by the grievance regulation.

Based on the foregoing, the Board finds that the OHR Director lacked any compelling reason for extending the time limits for issuing a Step 1 grievance decision. Nor is there any evidence in the record demonstrating that the parties mutually agreed to an extension of the time limits. Accordingly, any such grievance decision should have been issued by July 26, 2005.

2. The County Has Failed To Show Good Cause For Failing To Hold A Step 3 Grievance Meeting Within 35 Calendar Days After The Grievance Was Appealed To The CAO.

The County provides no rationale as to why it failed to contact the Appellants' representative within 35 days of the Step 3 filing to schedule a grievance meeting. This is simply not acceptable. As previously noted, if the OHR Director chooses to extend the time limits of the grievance procedure because of a "compelling reason", the OHR Director must promptly notify the parties of such an extension. The grievance procedure specifically provides that a department director must consider an employee's grievance fairly and promptly. All grievants are entitled to timely information from OHR regarding the status of their grievance. OHR does not have the right to simply "sit" on a grievance, decide it is not going to process it, and then wait until contacted to inform the grievants of its decision.

Moreover, the Board does not agree with the rationale for holding the instant grievances in abeyance, i.e., because the County was processing a similar case, Grievance A. The processing of a similar case is simply not a "compelling" reason for delaying the processing of the instant consolidated grievances.

The County also argues that as it began settlement discussions on January 19, 2006, directly with the Appellants, without the knowledge of their representative, it was reasonable for the OHR Director to delay engaging the services of an outside fact finder for a Step 3 fact finding.<sup>5</sup> While in certain circumstances where both parties are engaged in settlement negotiations it may be proper to extend the time limits for the grievance process, the process for doing so is set forth in Section 34-9(a)(5) of the grievance procedure. Specifically, both parties may agree to extend the time limits. This did not occur in this case. Therefore, the Board finds there was no justification for the OHR Director to decide unilaterally to delay the processing of the instant set of consolidated grievances.

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<sup>5</sup> The Board will not address at this time the issue raised by Appellants' counsel regarding the OHR Director's direct dealings with the Appellants in lieu of through their counsel.

3. The County Has Failed To Establish Good Cause For The Board To Remand The Grievance To The CAO For A Step 3 Decision.

As pointed out by the County, the grievance regulations provide that if an employee files an appeal with the Board because the CAO has failed to issue a timely written response, the Board may choose not to process the appeal. Instead the Board may remand it back and provide the CAO with the opportunity to respond to the grievance within a specified period. The Board agrees with the County's assertion that normally a grievance as complex as the instant one is better handled by the development of an extensive factual record by an outside fact finder and then a decision by the CAO before the Board deals with it on appeal.

However, in the instant case the seriousness of the violations of the grievance procedure cannot be overlooked by the Board. It is unacceptable to fail to adhere to the time limits of the grievance procedure absent compelling reasons not present in the instant case. It is also unacceptable to fail to notify the grievants for months regarding the status of their consolidated grievances and to simply "sit" on them because another, similar set of consolidated grievances are being processed. Accordingly, the Board has determined to assert jurisdiction over the instant appeal and will not remand it back to the CAO.

**ORDER**

On the basis of the above, the Board finds it has jurisdiction over the instant appeal. Accordingly, the Board sets the following time limits:

1. Appellants have **7 calendar days from receipt of this Decision** to file any amendments to their consolidated grievance.<sup>6</sup> Appellants shall file an original and three (3) copies of any amendment(s).
2. The County has **20 calendar days from receipt of Appellants' amendment(s)** to file any documentation related to the appeal that it wishes the Board to consider. The County shall file an original and three (3) copies of any documentation with the Board. If Appellants elect not to file any amendments, the County has **20 calendar days from receipt of this Decision** to file its documentation.

The Board will defer at this time any decision on Appellants' representative's request for attorney fees as a sanction for the County's conduct.

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<sup>6</sup> In Appellants' Reply, they asked for the right to amend their consolidated grievances.

## **CASE NO. 06-05**

### **DECISION ON SHOW CAUSE ORDER**

The Montgomery County Merit System Protection Board (Board or MSPB) received an appeal of a grievance on April 4, 2006. The Board noted that there had been no Chief Administrative Officer's (CAO's) decision on the grievance. Appellant asserted that the Board has jurisdiction over this appeal pursuant to Montgomery County Personnel Regulations, 2001, Section 34-9(a)(4) and Section 34-5 (as amended February 15, 2005), as the County had failed to meet the time limits for processing Appellant's grievance as provided in the County's grievance procedure.

Given the extensive time the grievance leading to this appeal had been pending, the Board ordered the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the Board should remand the grievance to the CAO for a decision pursuant to Section 34-9(a)(4) of the grievance procedure. On April 20, 2006, the County responded to the Board's Show Cause Order (County's Response). On April 27, 2006, Appellant's counsel filed a reply (Appellant's Reply) to the County's Response. On May 1, 2006, the County filed a Sur-Reply to the Appellant's Reply.

### **FINDINGS OF FACT**

On December 22, 2005, Appellant's counsel filed a grievance with the Department of Correction and Rehabilitation (DCR) on behalf of Appellant,<sup>1</sup> alleging that in retaliation for filing a grievance in December 2004 over a 5-day suspension, which was subsequently mitigated by the Board to a written reprimand, Appellant was assigned to the midnight shift in lieu of the 3:00 p.m.-11:00 p.m. shift to which Appellant had been assigned for the last five years. In addition, the grievance asserted that DCR neglected to advise Appellant of an open promotion for which Appellant was eligible.

As acknowledged by the County in the County's Response, the Deputy Warden had until December 29, 2005, to respond to the grievance. The Deputy Warden failed to respond at all.

In a letter dated February 22, 2006, Appellant's counsel wrote to both the Director, DCR, and the Director, OHR, regarding the fact that no response to the grievance had been received. Appellant's counsel requested that the grievance be forwarded through the chain of command until someone responded. In the County's Response, it is contended that the Department Director had 15 calendar days to respond to the February 22, 2006 letter. However, once again, the County acknowledges there was no response.

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<sup>1</sup> The certificate of service accompanying the grievance indicates a copy of the grievance was delivered to the Office of Human Resources (OHR) on the same date.

According to the County's Response, the CAO obtained jurisdiction over Appellant's grievance on March 10, after the Department Director failed to respond to the grievance at Step 2 within 15 calendar days. The County asserted that, on March 13, 2006, within three days of the CAO having obtained jurisdiction, a staff member of the Office of Human Resources informed Appellant's counsel that the staff member had been assigned as the CAO's designee to handle the grievance at Step 3 of the grievance procedure. Appellant's counsel adamantly denied that the staff member contacted counsel's office.

In a Sur-Reply, the County states that it was mistaken in asserting that it called Appellant's counsel on March 13, 2006. Instead, based on phone records submitted as part of the Sur-Reply, the County now asserts that the staff member called Appellant's counsel on March 3, 2006, and left a message with counsel's secretary.<sup>2</sup> The County indicates in its Sur-Reply that Appellant's counsel contacted the staff member on March 6, 2006. During their conversation on March 6, the staff member states that the staff member told Appellant the staff member had been assigned as the CAO's designee for the instant case.<sup>3</sup>

The County indicates that a Step 3 meeting was subsequently scheduled for April 12, 2006. Appellant's counsel indicates that, as of the date counsel filed the instant appeal with the Board, no such meeting had been arranged. However, according to Appellant's counsel, a meeting was arranged at some point without consultation with Appellant's counsel.

On April 4, 2006, Appellant filed the instant appeal. On April 5, 2006, the Board issued a Show Cause Order to the CAO in order to determine if it should assert jurisdiction at this time over the instant appeal or whether there was good cause shown to remand it to the CAO for a Step 3 fact-finding and decision. In response to the Show Cause Order, the CAO's designee cancelled the Step 3 meeting.

### **APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II. Merit System, Section 33-12(b), provides in applicable part that**

[t]he County Executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures

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<sup>2</sup> The Board notes that based on this revision of the County's timeline of events, OHR attempted to contact Appellant's counsel about who was the CAO's designee for Step 3 of the grievance procedure while the grievance was still pending at the Step 2 level.

<sup>3</sup> The staff member is unsure whether the staff member told Appellant's counsel that a Step 3 meeting would be scheduled during this conversation which purportedly lasted 30 seconds.

which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 34, *Grievance Procedure***, which states in applicable part:

**34-3. Policy on grievances.**

(a) ***Objectives.*** The objectives of the grievance-resolution process are to:

- (1) resolve grievances at the lowest level and provide an opportunity for resolution at each step;
- (2) provide for review and resolution of grievances by the immediate supervisor, department director, and CAO; and
- (3) provide specific and reasonable time limits for each level or step in the review of a grievance.

(b) ***Responsibilities of department directors and supervisors.*** A department director or supervisor:

...

- (3) must consider an employee's grievance fairly and promptly.

**34-9. Grievance procedure.**

(a) ***Time limit for filing a grievance.***

...

- (3) If the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level.
- (4) If an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time.
- (5) The parties to a grievance may agree to extend the time limits stated in the grievance procedure.
- (6) The OHR Director may extend the time limits stated in the



grievance procedure for compelling reasons. The OHR Director must give the parties prompt notice of an extension.

(e) *Steps of the grievance procedure.* The following table shows the 4 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

<b>STEPS OF THE GRIEVANCE PROCEDURE</b>			
<b>Step</b>	<b>Individual</b>	<b>Responsibility of Individual*</b>	
<b>1</b>	<b>Employee</b>	Present job-related problems to immediate supervisor.	
		If unable to resolve the problem, submit a written grievance form to immediate supervisor within 20 calendar days.	
		If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.	
	<b>Supervisor</b>	Give the employee a written response within 7 calendar days after the written grievance is received.	
<b>2</b>	<b>Employee</b>	If not satisfied with the supervisor's response, may file the grievance with the department director within 5 calendar days after the supervisor's response is received.	
		<b>Department Director</b>	Meet with the employee, employee's representative, and other persons, as appropriate, to attempt to resolve the grievance.
		Give the employee a written response to the grievance within 15 calendar days after the grievance is received	
		If the grievance is based on an action taken or not taken by OHR, the OHR Director must give the employee a response within 15 calendar days after the grievance is received.	
<b>3</b>	<b>Employee</b>	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department's response.	
	<b>CAO's Designee</b>	Must meet with the employee, employee's representative, and department director's designee within 35 calendar days to resolve the grievance.	

	<b>Employee and Dept. Director</b>	Present information, arguments, and documents to the CAO's designee to support their position.
	<b>CAO's Designee</b>	If unable to resolve the grievance, must prepare a report of grievance findings, allow the parties 10 calendar days to comment on the findings, incorporate the parties' comments, if any, and provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	<b>CAO</b>	Must give the employee and department a written decision within 30 calendar days after the parties' comments on the report of grievance findings are received or 30 days after the deadline for comments on the report of grievance findings has passed.
<b>4</b>	<b>Employee</b>	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	<b>MSPB</b>	Must review the employee's appeal under Section 35 of these Regulations.
* <b>At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.</b>		

### POSITIONS OF THE PARTIES

#### County

- The Appellant's appeal to the Department Director on February 22, 2006, concerning the Deputy Warden's failure to respond was untimely.
- In the February 22, 2006 letter appealing the non-response by the Deputy Warden, the Grievant only gave the Department Director 10 calendar days to respond before the Grievant would file an appeal with the MSPB. This was an impermissible rewriting of the grievance regulations which provides the Department Director with 15 calendar days to respond.
- While supervisors and Department Directors are encouraged to promptly respond to grievances, the grievance regulations recognize that a response within the specified time limits is directory rather than mandatory. The regulations do not provide any penalty for a Department Director's failure to make a timely response.
- The February 22, 2006 letter cannot be considered an appeal to the CAO as the Grievant could not appeal to the CAO until after the 15 calendar day time frame for the Department Director to respond had passed.
- Within three days after the CAO obtained jurisdiction of the grievance, the CAO's representative contacted Grievant's counsel to schedule a Step 3

meeting. The Step 3 meeting, scheduled for April 12, 2006, satisfied the requirement under the grievance procedure to hold a Step 3 meeting within 35 days from receipt of the grievance at Step 3.

- No useful purpose would be served by the MSPB resolving this case directly without the benefit of a Step 3 meeting and a decision by the CAO.

### Appellant

- This appeal was filed because of the total inaction and silence of the County in responding to Appellant's grievance. It appears that the County's method of handling grievances is simply to allow them to die a death of administrative neglect.
- The burden should not be placed on the Grievant to press the Grievant's supervisors for a response to the grievance as it may be counterproductive and is at least a reasonably intimidating undertaking.

### ISSUE

Has the County shown good cause as to why it did not adhere to the time limits of the grievance procedure so that the Board should remand the case to the CAO for a decision prior to accepting the instant appeal?

### ANALYSIS AND CONCLUSIONS

#### **The County Has Failed To Show Good Cause For Why It Did Not Adhere To The Time Limits Of The Grievance Procedure So As To Warrant The Board Remanding This Matter To The CAO Prior To Accepting This Appeal.**

1. The Language Of The Grievance Procedure Which Provides That A Supervisor And A Department Director Respond To A Grievance Within A Set Time Limit Is Mandatory Not Directory As There Is A Consequence For Failure To Adhere To The Time Limit.

The grievance procedure requires that both Department Directors and supervisors "must consider a grievance fairly and promptly." The County spends much time arguing that the specified time limits within the grievance procedure are directory in nature rather than mandatory. It asserts that the regulations do not provide any penalty for a supervisor's failure to provide a timely response.<sup>4</sup> The Board disagrees.

If a provision is mandatory in nature, it requires that something that shall be done must be done. If a provision is directory in nature, it exhorts the doing of a thing without

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<sup>4</sup> The County does state that "[b]ecause the CAO is charged with ensuring that supervisors respond timely to grievances, discipline imposed against a supervisor for not timely responding is a proper sanction, but within the discretion of the CAO,..." County Response at 3 n.1.

requiring it. See, e.g., In re: Abigail, 138 Md. App. 570 (Ct. Sp. App. 2001). In Mary Handley v. Ocean Downs, 151 Md. App. 615 (Ct. Sp. App. 2003), the Court of Special Appeals held that “[t]o overcome the presumption that the use of ‘must’ makes an enactment mandatory, courts will also look to whether the enactment provides a sanction for noncompliance. The lack of any sanction in the statute or provision tends to militate towards a finding that the statute or provision is directory.” 151 Md. App. at 631 (quoting Columbia Rd. Citizen’s Ass’n v. Montgomery County, 98 Md. App. 695, 701 (1994) (emphasis and citation omitted)).

In the County’s grievance procedure there is a sanction for management’s failure to respond timely to a grievance. Specifically, such a failure allows the grievant to raise the grievance to the next higher level of the grievance procedure.

Moreover, if the County had intended the time limits to be directory and not mandatory, it would not have included two exceptions to meeting the time limits. Specifically, Section 34-9(5) permits the extension of the time limits stated in the grievance procedure if the parties agree. In addition, Section 34-9(a)(6) provides that the OHR Director may extend the time limits stated in the grievance procedure for compelling reasons. If the time limits were merely directory in nature, the County would have no need to justify a delay by demonstrating that it had either the grievant’s consent or a compelling reason. Therefore, the Board finds that the language of the grievance procedure requiring a response from management within the specified time limits is mandatory in nature.

2. Both The Supervisor And The Department Director Failed To Fulfill Their Responsibilities To Respond To The Grievance As Mandated By The Grievance Procedure.

The County’s merit system law requires that the County Executive establish a grievance procedure which seeks to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. The grievance procedure established in Section 34 of the MCPR is designed to meet this mandate. However, in order for the mandate to be met, management must adhere to the requirements of the grievance procedure as opposed to ignoring them.

As the County readily admits, Appellant’s immediate supervisor, the Deputy Warden, failed to respond at all to the grievance. This is simply not acceptable. As a manager, the Deputy Warden has a responsibility to adhere to the County’s administrative grievance procedure. If the Deputy Warden needed an extension of time to respond, the grievance procedure provides two methods for obtaining an extension. However, to fail to respond at all renders the grievance procedure meaningless in contravention of the intent of the County’s merit system law.

The County also acknowledges that the Department Director failed to respond at all to the grievance. Thus, the Department Director, like the Deputy Warden, was derelict in the Department Director’s duty under the grievance procedure. The County

provides no reason for the Department Director's total failure to respond although the County does acknowledge that the CAO is charged with ensuring that supervisors respond timely to grievances.

The County argues that OHR acted properly and diligently in scheduling a timely Step 3 grievance meeting. While it appears that OHR did meet the time limits under the grievance procedure for the scheduling of the Step 3 meeting,<sup>5</sup> OHR should have intervened sooner in the processing of this grievance. The Board finds that when OHR was put on notice by the Appellant's February 22, 2006 letter that management had failed to respond at Step 1 of the grievance procedure, it was incumbent upon OHR to ensure that the CAO was made aware of the situation. Such due diligence on the part of OHR would have ensured that the CAO could fulfill the CAO's responsibility to make sure that management would timely respond at the Step 2 stage. Instead, OHR permitted the Department Director to evade the Department Director's responsibility without any apparent sanction. This is not acceptable. The Board expects OHR to be more proactive in ensuring timely responses to grievances by management at all steps of the grievance procedure.

3. The February 22, 2006 Letter,<sup>6</sup> Which Served To Raise Grievance From Step 1 To Step 2, Was Timely.

The County argues that in the absence of a timely response by the Deputy Warden to the grievance at Step 1, it was incumbent upon the Appellant to have appealed to the Department Director within a reasonable time period following the supervisor's failure to respond. Because the Appellant failed to act for over seven weeks, the County argues that the appeal to the Department Director was untimely. The Board rejects this argument.

The grievance regulations indicate that if a supervisor does not respond within the time limit, the employee **may** file the grievance at the next higher level. Thus, there is no requirement in the regulations for the employee to raise the grievance to the next higher

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<sup>5</sup> Indeed, as previously noted, based on the County's Sur-Reply, OHR made contact with Appellant's counsel while the grievance was still pending at Step 2 awaiting a decision by the Department Director.

<sup>6</sup> The County asserts that the February 22 letter impermissibly attempted to rewrite the grievance regulations by imposing a 10-day time limit for a response to the grievance when, in fact, the department director had 15 days to respond. As previously noted, at Step 2 of the grievance procedure, the department director is provided with 15 calendar days to respond.

While the February 22 letter did state that the Appellant would file with the Board if the grievance was not responded to within 10 days, the Appellant waited in vain for more than 15 calendar days for a response before filing with the Board. Accordingly, the Board finds the County's argument moot.

level; rather, it is left to the employee's discretion. The employee has every right to wait for the supervisor to meet the supervisor's responsibility under the regulations to provide a written response to the employee. Moreover, as the County itself acknowledges, the grievance regulations are silent as to how much time a grievant has to raise a grievance to the next level. The Board will not arbitrarily impose a time limit on the employee to act when the employee's supervisors have been negligent in meeting their responsibilities under the grievance procedure.

Based on the foregoing findings and conclusions, the Board finds that the County has not shown good cause as to why it did not adhere to the mandatory time limits of the grievance regulations so as to warrant the Board returning the appeal to the Appellant and asking the CAO to respond to the grievance within a specific time period.

**The Board Will Retain Jurisdiction Over The Instant Appeal But Will Remand It To The CAO For Issuance Of A Step 3 Decision Within 60 Days Of The Date Of This Decision.**

The gravamen of the Appellant's grievance is that Appellant has been retaliated against by management for filing an appeal with the Board over Appellant's 5-day suspension. The Board considers this a very serious allegation, which if true needs to be dealt with immediately. Under the County's merit system law, employees have the right to file an appeal challenging a disciplinary action and must be able to do so without fear of retaliation should they prevail.

Notwithstanding our finding that the County has failed to show good cause for a remand, it is the Board's view that the CAO, who has the authority to impose discipline on supervisors should the CAO uncover wrongdoing, is in the best position to investigate this allegation promptly and provide the Board with the CAO's findings and conclusions. Therefore, despite the fact that two levels of management have been derelict in their responsibilities with regard to the processing of Appellant's grievance, the Board will remand the grievance directly to the CAO for processing at Step 3 of the grievance procedure. The Board will, however, maintain jurisdiction over the appeal to ensure expeditious processing of this matter. The CAO will be given 60 days to complete the Step 3 process and issue the Appellant a report of grievance findings. A copy of this report will also be issued to the Board simultaneously with the Appellant. Should this deadline not be met, the Board will consider a request for sanctions by Appellant.

**ORDER**

On the basis of the above, the Board finds the County has failed to show good cause for the Board not to process the appeal. Accordingly, the Board concludes that it has jurisdiction over this appeal and remands this matter to the CAO for processing in accordance with Step 3 of the grievance procedure. The CAO has **60 days from the date of this Order** to issue a report of grievance findings to the Appellant, with a copy served on the Board. If the Appellant is dissatisfied with the report, Appellant is ordered to notify the Board and the Board will continue the processing of Appellant's appeal.

# **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 goes on to instruct 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 appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance 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 2006.

# **ATTORNEY FEE DECISIONS**

## **Case No. 04-15**

### **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 Appellant's case.

Appellant has submitted a request for attorney fees and costs in the amount of \$18,423.00, and expenses in the amount of \$18.00. 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. Set forth below is a discussion of the issues of this case and the Board's determinations.

### **The Parties' Positions On The Amount Of Attorney Fees And Costs In The Instant Case**

The Board's decision on the merits of the instant case, dated May 17, 2005, granted Appellant's appeal from the decision of the Montgomery County, Maryland, Fire Chief to demote Appellant for a 12-month period. 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-referenced Board Decision and Order, Appellant's attorney filed a Motion for Award of Attorneys' Fees and Costs and Memorandum of Points and Authorities in Support Thereof (Appellant's Motion) in the amount of \$18,423.00, and expenses in the amount of \$18.00. As noted in Appellant's Motion, Appellant had counsel other than Appellant's current attorney at the start of the appeal proceedings before the Board. See Appellant's Motion at 9, n.1. Appellant's current attorney does not seek attorney fees for Appellant based on legal work performed prior to Appellant's current attorney's entry of appearance before the Board. See Appellant's Motion at 9, n.1.

Appellant's current attorney's claimed fees are based on 53.40 hours of work at an hourly rate of \$345.00 per hour for work performed in 2004 and 2005. Appellant's current attorney indicates that \$345.00 is the current *Laffey* rate for an attorney of her education and experience. See Appellant's Motion, Ex. D. Appellant's current attorney claims that her usual and customary hourly rate is \$330.00 per hour. See Appellant's Motion, Ex. B at 7. However, the Appellant's current attorney's retainer agreement with Appellant provided for services at a reduced hourly rate of \$325.00 per hour. See Appellant's Motion, Ex. B at 7, Ex. J at 2.

The County responded to Appellant's current attorney's request, taking issue with



the number of hours claimed. The County does not object to the 40.20 hours expended in trial work and preparation performed between October 25, 2004 and March 14, 2005. However, the County objects to Appellant's current attorney's request for an additional 12.00 hours performed during the period June 3-13, 2005 preparing a memorandum for attorney fees. The County also objects to Appellant's current attorney's claim of an additional 1.20 hours for telephone conferences after the MSPB hearing.

The County also challenges Appellant's current attorney's request for \$345.00 per hour, noting that it exceeds the customary hourly rate at which the Board reimburses counsel in similar personnel cases. The County states that, in a recent Board decision, MSPB Case No. 00-09 (2004), the Board awarded attorney fees at the hourly rate of \$175.00. The County requests the Board apply the \$175.00 hourly rate in the instant case. Based on 40.2 hours of legal work at an hourly rate of \$175.00, the County argues that the Board should find \$7,035.00 a reasonable attorney fee in this case. The County does not object to Appellant's current attorney's request for \$18.00 in costs.

### **Appropriate Reimbursement Formula**

The *Laffey* rate claimed by Appellant's current attorney is actually based on a matrix of hourly rates for attorneys of varying experience levels prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. See Appellant's Motion, Ex. D. The matrix is based on the hourly rates for attorneys allowed by the Federal District Court of the District of Columbia in *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The matrix's rates for subsequent years are determined by adding the cost of living for the Washington, D.C. area to the applicable rate for the prior year. See Appellant's Motion, Ex. D. While the *Laffey* rate may be binding in the federal district court, the County is correct in asserting that it has no controlling precedence over the Board. In MSPB Case No. 98-02 (1998) (wherein Appellant's current attorney was the appellant's counsel), *rev'd on other grounds*, Civ. No. 188676 (Cir. Ct. for Montgomery County, MD, Jan. 22, 1999), the Board specifically rejected the use of the *Laffey* matrix.

Montgomery County Code, Section 33-14, *Hearing Authority of the Board*, in providing remedial authority, states 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). See also *Montgomery County, Maryland v. Jamsa*, 153 Md. App. 346, 355 (Ct. Spec. App. 2003) (the court, in discussing Section 33-14(c)(9), which authorizes the Board to pay "all or part" of an employee's reasonable attorney's fees, noted that "[t]he County Council did not mandate that the Board award attorney's fees; it authorized the Board to do so.").

The County is correct in noting that recent Board precedent has been to award an hourly rate of \$175.00. See, for example, MSPB Case No. 05-04 (2005); MSPB Case No. 00-09. In determining the appropriate hourly rate in the instant case, the Board has considered among other things the nature and complexity of the case (the Board does not

believe that the instant case was either novel or complex as asserted by Appellant's current attorney), the tasks necessary in presenting the case, and the customary fees charged in these type of cases, along with awards the Board has made in similar cases and determined that an hourly rate of \$175.00 is appropriate. Accordingly, Appellant's allowed attorney fees are to be reimbursed at an hourly rate of \$175.00.

With regard to the number of hours to be reimbursed, Appellant's current attorney seeks 40.20 hours for trial work and preparation. Upon a review of the bill, and noting the concurrence of the County, the Board concludes that it will grant reimbursement for the 40.20 hours.

Appellant's current attorney also seeks reimbursement for 12.00 hours expended in preparing a memorandum for attorney fees. The County objects to any reimbursement for this time. The County notes that the Board had granted Appellant the right to request attorney fees in its original decision in this case. The County argues there was no need for a 26-page memorandum discussing the *Laffey* matrix and numerous federal cases that have no controlling precedence over the Board. Finally, the County points out that the 26-page memorandum is quite similar to one which Appellant's current attorney filed in another case. Accordingly, the County argues that to reimburse Appellant's current attorney for this time would result in Appellant's current attorney receiving a windfall.

In the Board's view, the Board has the discretion to order reimbursement for the time reasonably required in preparing the application for attorney fees. However, consistent with the specific factors listed in Section 33-14(c) of the Code, the policy of this Board is that such an award is only appropriate "to accomplish the remedial objectives" of the Code. As the Board instructed in MSPB Case No. 98-02, the Board believes that the factors listed in Section 33-14(c) normally require a short and simple application for attorney fees. Extensive applications for attorney fees are normally not required, nor encouraged. Consistent with this policy, the Board over the past year has awarded fees for 1.25 hours for preparation of an attorney fee request (see MSPB Case No. 04-10 (2004) and 1.75 hours for preparation of an attorney fee request (see MSPB Case No. 05-04 (2005)). The Board will direct payment for more than a few hours of 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. See, e.g., MSPB Case No. 00-09 (2004) (wherein the Board authorized an award of 3.75 hours for preparation of the fee petition as the litigation lasted six years and involved several phases).

In the instant case, it is evident that there are no unusual circumstances requiring an extensive explanation of the specific Code factors in the attorney fee application. The Board agrees with the County that there was no need for a memorandum arguing for fees based on the *Laffey* matrix, especially given the fact that the Board has previously rejected this approach. The Board also agrees with the County's argument that awarding Appellant's current attorney fees for 12.00 hours for preparation of the fee petition would be a windfall in this case and not serve the "remedial objectives" of the Code. Accordingly, as it is not mandated that the Board award attorney's fees, 153 Md. App. at 355, the claim for 12.00

hours for preparing the application for attorney fees is denied. Rather, based on its recent past practice, the Board will order reimbursement for 2.00 hours for the preparation of the attorney fee request.

Finally, Appellant's current attorney seeks reimbursement for 1.20 hours expended after the conclusion of the hearing on telephone calls and an e-mail. The County opposes any reimbursement for this time. The Board, as a matter of policy, will not reimburse for attorney fees billed for work occurring after the Board's hearing (except in unusual circumstances not present in the instant case) as such work does not serve the "remedial objectives" of the Code. Therefore, the claim for 1.20 hours is denied in its entirety.

Appellant's current attorney has also requested \$18.00 in costs. The Board has reviewed this claim, and noting that the County does not object to this request, the Board will award \$18.00 in costs.

### **ORDER**

Based on the above, the Board concludes that 42.20 hours of attorney fees are allowable at an hourly rate of \$175.00, for a total of \$7,385.00, plus costs of \$18.00 for a total reimbursement of fees and costs of \$7,403.00. Accordingly, the County is hereby ordered to reimburse the Appellant for attorney fees and costs in the amount of \$7,403.00.

## **Case No. 05-05**

### **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 Appellant's case.

Appellant has submitted a request for attorney fees and costs in the amount of \$7,040.00, and costs in the amount of \$288.28. The County has filed a response raising issue with respect to the total amount of attorney fees requested. Specifically, the County maintained that because Appellant only partially prevailed, the amount of attorney fees sought by Appellant should be limited to half of what was requested. Set forth below is a discussion of the issues in this case and the Board's determinations.

The Board's decision on the merits of the instant case, dated May 17, 2005, granted Appellant's appeal from the decision of the Montgomery County, Maryland, Department of Correction and Rehabilitation's (DCR's) Director to suspend Appellant for a 5-day period. In the Notice of Disciplinary Action, the County set forth several charges upon which the discipline was based. The Board sustained one of the charges. In lieu of the suspension, the Board ordered that the Director issue a written reprimand to

Appellant and make Appellant whole for lost wages and benefits. As Appellant's attorney filed a motion for attorney fees during the hearing and subsequently filed a memorandum in support of the motion, the Board directed the County to respond to the motion for attorney fees. The County responded on August 1, 2005.

### **Positions Of The Parties And Analysis And Conclusions**

In support of Appellant's motion for attorney fees, Appellant's counsel filed a Client Ledger reflecting the amounts billed by Appellant's law firm. As reflected in the Client Ledger, Appellant had two attorneys handling Appellant's case – Mr. A, who was lead counsel, and Mr. B, who did not make any presentation before the Board on behalf of Appellant. The Client Ledger reflected a billing rate for Mr. A of \$175.00 per hour. The billing rate reflected for Mr. B (with certain exceptions discussed below) was \$150.00. The Client Ledger reflected a total of \$7,040.00 in attorney fees and \$288.28 in costs.

In the County's response to the motion for attorney fees, the County stated that Appellant's Client Ledger indicated that 21.2 hours were billed at \$175.00 per hour and 24.5 hours were billed at \$150.00. The County claimed that, based on this analysis of the Client Ledger, the actual attorney fees should be \$7,385.00 (not including costs) and asserted that Appellant's legal expense calculation of \$7,328.28 (which includes both attorney fees and costs) constituted a clerical error.

While the Board agrees with the County that there appear to be clerical errors in the Client Ledger, the Board disagrees with the County as to the nature of the errors. The Client Ledger reflected a total of 20.5 hours for Mr. A at \$175.00 per hour. The Board notes that, in addition, .7 hours of Mr. B's time was billed at \$175.00 per hour (see Client Ledger entries for 1/19/2005, 6/07/2005, and 6/08/2005). Thus, the County is correct in stating that 21.2 hours were billed at \$175.00 per hour for a total of \$3,710.00. The Board also notes that the Client Ledger reflected 22.2 hours billed at a rate of \$150.00 for a total of \$3,330.00. (The Board does not know how the County arrived at 24.5 hours). Adding the number of hours billed at \$175.00 in the Client Ledger together with the number of hours billed at \$150.00, the amount comes to \$7,040.00 as originally claimed by Appellant for attorney fees. When expenses of \$288.28 are added in, the total amount is \$7,328.28 as claimed by Appellant.

However, the Board believes that it was a clerical error for Mr. B's time to be billed at \$175.00 per hour, particularly given the fact that, on June 7, 2005, when .3 hours of his time was billed at this rate, there were also billing entries of .2 hours, .6 hours and .7 hours of Mr. B's time at \$150.00 per hour. The apparent clerical errors resulted in Mr. B's time being incorrectly billed at \$25.00 more per hour, i.e., at \$175.00 instead of \$150.00. This resulted in an overcharge of \$17.50 (i.e., \$25.00 x .7 hours). Accordingly, the Board finds that the attorney fees claimed by Appellant in the instant case should be adjusted from \$7,040.00 to \$7,022.50. When expenses are added in, Appellant's claim would be for \$7,310.78.

## **Appropriate Reimbursement Formula**

Montgomery County Code, Section 33-14, *Hearing Authority of the Board*, in providing the Board with remedial authority, empowers the Board in subsection (c) to “[o]rder the County to reimburse or pay all or part of the employee’s reasonable attorney fees” (emphasis added). See also *Montgomery County, Maryland v. Jamsa*, 153 Md. App. 346, 355, 836 A.2d 745, 750 (Ct. Spec. App. 2003) (the court, in discussing Section 33-14(c)(9), which authorizes the Board to pay “all or part” of an employee’s reasonable attorney’s fees, noted that “[t]he County Council did not mandate that the Board award attorney’s fees; it authorized the Board to do so.”).

In determining what constitutes a reasonable fee, the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code § 33-14(c)(9). After consideration of the foregoing factors, the Board’s findings are set forth below.

### A. The Appropriate Hourly Rate

As previously noted, Appellant received the services of two attorneys. Mr. A, the lead counsel, had his time billed at the rate of \$175.00 per hour. Mr. B (with certain exceptions) had his time billed at the rate of \$150.00 per hour. According to the submission by Mr. A, his time is charged at a rate of \$275.00 per hour for members of the public at large, but it is charged at a reduced rate of \$175.00 per hour for County employees in light of the fact that they are public servants. Mr. A, lead counsel, has practiced before this Board and it is aware of his experience, reputation and ability. The Board has considered the nature and complexity of the case, the experience of counsel, the tasks necessary in presenting the case, and the customary fees charged in these type cases and finds that \$175.00 an hour for Mr. A’s services is reasonable under the Code’s factors.

However, the Board does not view \$150.00 as reasonable for Mr. B’s services. The Board is not at all familiar with the experience, reputation and ability of Mr. B. Mr. B, although present at the hearing and pre-hearing conference, did not present any of the case. Indeed, in a submission to the Board, it was noted that “[t]he presence of Mr. [B]

during the trial was for his acclimation to such proceedings.” No time was charged for Mr. B’s attendance at the hearing or pre-hearing. Thus, it would appear that this case was a developmental assignment for Mr. B. The Board finds nothing in the record to support as reasonable an hourly rate of \$150.00 for Mr. B’s time.

The Board has reviewed the Client Ledger submitted to determine if Appellant is seeking attorney fees for legal work, in the strict sense, or rather for time spent in investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. It is the Board’s position that such work should command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

In reviewing the Client Ledger submitted, the Board notes that Mr. B spent time on activities that could readily have been performed by a non-attorney. For example, he billed for delivering documents (see entries for 1/20/2005, 3/14/2005, 5/27/2005, and 6/2/2005), working on a procurement request (see entries for 01/20/2005, 1/21/2005, and 4/1/2005) and obtaining criminal files from the District Court and reviewing them (see entry for 01/24/05). Accordingly, after a review of the record before the Board, including the fact that this appears to have been a developmental assignment, and application of the Code’s factors, the Board has determined that Mr. B’s time should be reimbursed at the rate of \$90.00 an hour.

B. The Amount of Time Billed

As previously indicated, Mr. A billed 20.5 hours and Mr. B billed 22.9 hours, for a total of 43.4 hours expended by counsel. As the County’s counsel noted in her submission, the Board has previously accepted 40 hours as adequate time to prepare a defense and attend a trial in similar disciplinary matters.

However, if more than one attorney is involved as is the case here, the Board will scrutinize the fee petition for duplication of effort along with the proper utilization of time. The time of two lawyers in a hearing room or conference when one would do will be discounted by the Board. Having reviewed the bill submitted, the Board notes approvingly that Appellant does not seek compensation for the time spent by Mr. B attending the hearing as well as the pre-hearing conference with Mr. A, the lead counsel.

The County asserted that it has been the Board’s practice to only grant part of the fees claimed in cases where the appellant has only partially prevailed. See, for example, MSPB Case No. 05-04 (2005) (reducing the attorney fees claimed by 50% because the appellant only partially prevailed); MSPB Case No. 03-05 (2003) (same); MSPB Case No. 02-07 (2002) (same). Therefore, the County has suggested that Appellant’s fees be cut in half. Appellant countered that, if the Board makes a partial award, it should be for three-quarters of the charged amount or at least \$5,538.75, as the Board only upheld one of four charges brought against Appellant.

In the instant case, while Appellant did succeed in getting the 5-day suspension

overturned, the Board nevertheless found that Appellant violated a DCR regulation and ordered a written reprimand be imposed instead. Accordingly, after consideration of the Code's factors, the Board has determined to reduce the number of hours claimed by 50%. Therefore, Mr. A will be compensated for 10.25 hours and Mr. B for 11.45 hours.

C. Costs Claimed

Appellant has also requested \$288.28 in costs. The Board has reviewed this claim, and noting that the County does not object to this request, the Board will award \$288.28 in costs.

**ORDER**

Based on the above, the Board concludes that 10.25 hours of Mr. A's time are allowable at an hourly rate of \$175.00, for a total of \$1,793.75 and that 11.45 hours of Mr. B's time is allowable at an hourly rate of \$90.00, for a total of \$1,030.50. In addition, \$288.28 in costs will be reimbursed. Therefore, Appellant will be reimbursed for a total of \$3,112.53. Accordingly, the County is hereby ordered to reimburse the Appellant for attorney fees and costs in the amount of \$3,112.53.

# 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 . .

..

Pursuant to the above-referenced provision of the Code, Section 9-3(b)(3) of the Montgomery County Personnel Regulations, 2001 (as amended July 12, 2005), 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 06, the Board reviewed and where appropriate provided comments on the following new class creations:

- 1) Print Shop Foreman, Grade 20;
- 2) Government Records Warehouse Clerk, Grade 26;
- 3) Legislative Senior Aide II, Grade 22;
- 4) Legislative Senior Aide III, Grade 26;
- 5) Library Aide, Grade 8;
- 6) Public Safety Communications Shift Operations Manager, Grade 24;
- 7) Information Technology Project Manager, Grade 30; and
- 8) Public Information Specialist, Grade 24.