

# **Merit System Protection Board Annual Report FY2007**

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**Charla Lambertsen, *Vice Chairperson***  
**Bruce E. Wood, *Associate Member***

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**June 30, 2007**



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**FY 2007**  
**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 2007 were:

Rodella E. Berry	-	Chairperson
Charla Lambertsen	-	Vice Chairperson
Bruce E. Wood	-	Associate Member

**DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD**

The duties of the Merit System Protection Board are contained in: 1) Article 4, *Merit System and Conflicts of Interest*, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County; 2) Chapter 33, Article II, *Merit System*, of the Montgomery County Code; and 3) Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005).

1. Section 404 of the Charter establishes the following duties for the Board:

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 commendations 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.

2. Section 33-7 of the Montgomery County Code defines the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the [B]oard 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 [B]oard granted herein shall be fully exercised by the [B]oard as needed to rectify personnel actions found to be improper. The [B]oard shall comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The [B]oard, 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 [B]oard shall conduct or authorize periodic audits of classification assignments made by the [C]hief [A]dministrative [O]fficer and of the general structure and internal consistency of the classification plan, and submit audit findings and recommendations to the [C]ounty [E]xecutive and [C]ounty [C]ouncil.

(d) *Personnel regulation review.* The [M]erit [S]ystem [P]rotection [B]oard shall meet and confer with the [C]hief [A]dministrative [O]fficer and employees and their organizations from time to time to review the need to amend these regulations.

(e) *Adjudication.* The [B]oard 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 [B]oard may from time to time prepare and recommend to the [C]ouncil modifications to the [C]ounty's system of retirement pay.

(g) *Personnel management oversight.* The [B]oard shall review and study the administration of the County classification and retirement plans and other

aspects of the merit system and transmit to the [C]hief [A]dministrative [O]fficer, [C]ounty [E]xecutive and the [C]ounty [C]ouncil its findings and recommendations. The [B]oard shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the [C]ounty [C]ouncil. All [C]ounty agencies, departments and offices and County employees and organizations thereof shall cooperate with the [B]oard 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 [B]oard 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 [B]oard shall convene at least annually a public forum on personnel management in the [C]ounty [G]overnment to examine the implementation of [C]harter requirements and the merit system law.

3. Section 35-20, of the Montgomery County Personnel Regulations states:

- (a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County 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 2007.

# **DISMISSAL**

## **Case No. 07-10**

### **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, Department of Correction and Rehabilitation's (DOCR's) Director to dismiss Appellant.

### **FINDINGS OF FACT**

Appellant is a Correctional Officer II at the Montgomery County Correctional Facility. On November 6, 2006, Appellant was working on shift three, which is from 2:30 p.m. to 11:00 p.m. Appellant was assigned as the pod officer to the W-1-6.<sup>1</sup> A pod is the housing area for approximately 64 male inmates. The pod is composed of various cells on the ground tier and on an upper tier. In addition to cells on the ground tier, there is a day area with sofas and televisions. The Console Center, which serves as the command post for the officer on duty, is also located on the ground tier. Typically, there are about 64 inmates in W-1-6. As the pod officer, Appellant was responsible for the immediate supervision, custody, safety, and control of all inmates in the pod.

Officers working in the Correctional Facility are equipped with a radio, which is normally worn on their uniform lapel and has a button that can be pushed to call for assistance from other Correctional Officers. In addition, officers wear a body alarm (also known as a man down alarm system) which is tracked by an infrared system. When the body alarm is activated, the Control Center operators in the Correctional Facility know where the individual officer is. The body alarm also allows officers to summon assistance when needed. The Console Center, located in the day area of each pod, has an emergency panic alarm button which can be activated should assistance be needed. The Correctional Facility's Warden testified that after a call for assistance goes out, the average response time for the first arrival of an officer is 11 seconds.

At approximately 9:00 p.m. on November 6, 2006, which is lock-in time for the inmates, Appellant made the announcement for all inmates to report to their cells. A nurse was present in the W-1-6 day area, completing a medication pass, i.e., handing out medication to some of the inmates. Inmate A who was already in Inmate A's cell, located on the upper tier of the pod, came downstairs to the day area despite the announcement to lock-in. Appellant and the inmate exchanged words.

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<sup>1</sup> W-1-6 indicates the West Housing Cluster, Level 1, pod 6. Pod 6, where Appellant was assigned, is a maximum security pod based on its inmate population.

At the time that Inmate A entered the day area, Appellant was at the Control Console, which has a panel that controls all the doors in the facility including the cell doors, as well as the alarms. It also has TV monitors to watch the inmates' activity in the pod. There is a green perimeter around the Control Console. Inmates are not allowed to enter the green perimeter as such conduct would allow them access to the Control Console. Inmate A did not impinge upon the green perimeter area but instead walked down the stairs, around the Control Console area and stood several feet in front of the Control Console while Inmate A exchanged words with Appellant.

There is some debate about what happened next. What the video tape<sup>2</sup> shows is that Appellant left the Control Console and walked over to where the inmate was standing. Appellant then reached out Appellant's arm, put Appellant's hand around the inmate's throat and pushed the inmate back. The inmate pushed back at Appellant several times and then backed away. At the time, there was another inmate present in the day area nearby and at least two other inmates at a distance. The video shows that Appellant continued forward towards the inmate as the inmate backed away and Appellant again reached out Appellant's arm to the inmate. The inmate grabbed Appellant's arm and pushed back, shoving Appellant in the chest. Appellant then attempted to kick the inmate. A fight ensued and Appellant knocked the inmate into a sofa several times. While this was occurring, several inmates continued to be present in the day area, and at least two inmates can be seen near the railing on the upper tier. The tape then shows the inmate being restrained by several officers.<sup>3</sup>

Appellant completed an Adjustment Report (DCA-71) on Inmate A. Appellant indicated that after the time for lock-in, the inmate who was in the inmate's cell returned back to the day area. According to Appellant, the inmate informed Appellant "Let me see what you can do. I ain't locking-in. I am standing right in front of the camera now." Appellant stated that Appellant walked towards the inmate and told the inmate again to go lock-in. Appellant stated that Appellant reached out Appellant's arm to lead the inmate in the direction to go back to the inmate's cell and the inmate proceeded to strike Appellant with the inmate's right fist on Appellant's chest. Appellant reported that Appellant then proceeded to put the inmate in restraint. Appellant indicated that the medical staff called for assistance and the inmate was totally restrained and escorted out of the pod.

The Warden reviewed the video tape of the incident between Appellant and the inmate and read Appellant's DCA-71. The Warden determined that a further investigation of the incident was warranted. On November 7, 2006, Appellant was placed on administrative leave with pay status, pending the completion of the investigation.

On November 8, 2006, Inmate A had an administrative hearing before an Adjustment Committee because the inmate had been charged with an altercation based on the DCA-71 submitted by Appellant. Captain B, Unit Commander, Montgomery County Correctional

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<sup>2</sup> The pod has a video camera which tapes what is occurring in the pod.

<sup>3</sup> According to testimony at the hearing, the nurse making the medication pass summoned assistance.



Facility, was a member of the Adjustment Committee. The Adjustment Committee submitted a Recommendation and Report of Administrative Action (Report), finding Inmate A guilty of several infractions. The Report stated that Inmate A indicated that Inmate A made a comment about Appellant at lock-in time. Specifically, Inmate A stated during Inmate A's hearing that another inmate went to Appellant and asked for a tray. According to Inmate A, Appellant called the inmate a name and Inmate A told the other inmate "Don't worry about it, Appellant's just mad because Appellant can't control Appellant's girl on the outside." Inmate A then reported that Appellant told Inmate A "I'll [expletive] you up in front of the camera." Inmate A indicated that Inmate A told Appellant Inmate A would fight Appellant. Inmate A stated that Appellant told Inmate A to come down to the day area after Inmate A made the comment about Appellant's girl. Inmate A indicated that Appellant put Appellant's hands around Inmate A's throat and Inmate A tried to push Appellant away. The Warden testified that the inmate's version of what occurred matched very closely to what was on the video tape. According to the Recommendation and Report of Administrative Action, another witness was called at the administrative hearing. The witness reported that Appellant told Inmate A to come downstairs. The witness also indicated that Appellant pushed Inmate A first.

Appellant was interviewed by Captain B on November 15, 2006. Present with Appellant was the Union Steward, Sergeant C. According to Captain B's report to the Warden, Appellant was informed by Captain B to be truthful during Appellant's interview and that any violations could lead to disciplinary action up to and including dismissal. Captain B reported that Captain B had Appellant read the DCA-71 that Appellant had submitted and then Captain B asked Appellant if it was accurate. Appellant indicated to Captain B that the report was accurate. According to Captain B's report, Appellant told Captain B that when Inmate A told Appellant that Inmate A was not locking-in, Appellant thought the inmate was joking and did not think the inmate was threatening.<sup>4</sup> Appellant reported to Captain B that only when the inmate walked toward Appellant and was in Appellant's face did Appellant believe there was a problem, at which point Appellant then attempted to push the inmate away. Appellant reported that Inmate A then hit Appellant in the chest area. Appellant also reported that Appellant heard the nurse call for assistance and Appellant tried to restrain the inmate who was swinging at Appellant. During the incident, Appellant reported that the inmate stated "Get off me – one day I'm going to whoop you." Appellant reported that Appellant replied "You can't even get loose of my grip and you say you are going to whoop me." At this juncture, Appellant indicated to Captain B that other officers arrived to assist in restraining the inmate.

On November 29, 2006, Captain B recommended to the Warden that based on Captain B's investigation into the November 6, 2006 incident Appellant had violated several regulations. Captain B stated that due to the seriousness of the violations, Captain B recommended Appellant's dismissal.

On November 30, 2006, Appellant was issued a Statement of Charges – Dismissal. On January 18, 2007, Appellant was issued a Notice of Disciplinary Action – Dismissal (NODA) signed by the Human Resource Manager on behalf of the DOCR Director, dismissing Appellant effective February 9, 2007. Because the Human Resource Manager lacked written delegated

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<sup>4</sup> Appellant testified to this at the hearing.

authority to sign on behalf of the DOCR Director,<sup>5</sup> an Amended Notice of Disciplinary Action – Dismissal was issued by the Department Director on April 5, 2007, dismissing Appellant effective April 27, 2007.<sup>6</sup> The NODA charged Appellant with violating an established policy or procedure, failure to perform Appellant’s duties in a competent or acceptable manner, knowingly making a false statement or report in the course of employment, negligence or carelessness in performing Appellant’s duties, and engaging in a physical altercation or assault on another while on duty on County Government property.<sup>7</sup>

### **POSITIONS OF THE PARTIES**

#### Appellant:

- The County failed to follow progressive discipline policies set forth in Section 33-2(b) & (c) of the personnel regulations.
- The penalty was too severe and not appropriate for the alleged infractions.
- The Department Director did not take into account other factors as required by Section 33-3(d).

#### County:

- There was no need for Appellant to leave the Console Center and confront the inmate.
- Appellant’s conduct toward the inmate was abusive and a flagrant violation of DOCR’s Use of Force policies.

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<sup>5</sup> In a recent appeal involving a disciplinary action at DOCR, the Board had the occasion to review the authority of the Human Resource Manager to impose disciplinary action on employees in lieu of the Department Director. See MSPB Case No. 07-05 (2007). Section 33-4(b) of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 10, 2002) delegates to the Department Director the authority to take disciplinary action. MCPR Section 33-4(c) provides that the Department Director may delegate the authority to take any type of disciplinary action to a lower level supervisor. Any such delegation must be in writing. In MSPB Case No. 07-05, the Board found that the DOCR Department Director failed to delegate the Department Director’s authority to take disciplinary action in writing to the Human Resource Manager and accordingly held that the disciplinary action at issue was null and void.

<sup>6</sup> Appellant was placed on administrative leave with pay for the period of time between the effective date of the original Notice of Disciplinary Action and the effective date of the Amended Notice of Disciplinary Action. The County submitted evidence at the hearing that Appellant was paid for the administrative leave.

<sup>7</sup> The County’s Statement of Charges and two Notices of Disciplinary Action were less than precise in laying out exactly what was the basis for each of the five charges against Appellant. The Board urges the County in the future to clearly set out the factual predicate supporting each charge separately rather than listing the charges together and then providing one long narrative.

- Appellant engaged in insulting and demeaning treatment when Appellant told the inmate that “You can’t even get loose of my grip and you say you are going to whoop me.”
- Appellant failed to submit an accurate report of what happened with the inmate and continued to provide false information when interviewed during the DOCR investigation.
- Appellant engaged in a physical altercation with the inmate.

### **APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations, 2001 (as amended December 10, 2002), *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;

...

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

...

(g) knowingly makes a false statement or report in the course of employment;

(h) is negligent or careless in performing duties;

...

(t) engages in a physical altercation or assaults another while on duty, on County Government property or in a County vehicle. . . .

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct, effective date 3-01-03,** which states in applicable part:

**I. SPECIAL ACTIVITIES**

It is essential that all personnel refrain from engaging in any activities which would adversely affect the security, safety, integrity or reputation of the Department of Correction and Rehabilitation, the County or its employees.

**IV. RELATIONSHIP OF PERSONNEL WITH INMATES/RESIDENTS/PARTICIPANTS:**

E. Personnel should treat inmates/residents/participants with respect, courtesy and fairness. Profane, demeaning, insulting and threatening language directed toward an inmate/resident/participant shall not be

tolerated. Personnel should never engage in an argument or shouting match with an inmate/resident/participant.

**VI. DEPARTMENT RULES FOR EMPLOYEES**

D. Specific Department Rules:

1. Conformance to Law:

Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public.

...

3. Use of Force:

Employees shall use force only in accordance with law and department procedures and shall not use more force than is necessary under the circumstances to control the situation or protect themselves and/or others from harm. No employee shall use force in a discriminatory manner.

4. Integrity of the Reporting System:

Employees shall submit all necessary reports in accordance with established department procedures. These reports shall be accurate, complete, and timely and shall be submitted before the end of the employee's tour of duty whenever possible. Unless an operational emergency o[r] injury precludes this, employees will be compensated for working beyond their scheduled shift to complete reports before leaving the facility.

...

9. Conduct Unbecoming:

- a. No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, dishonest or improper conduct.

- b. Examples of conduct unbecoming include falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, misuse of a police radio, and the failure to cooperate with an internal investigation.

10. Neglect of Duty/Unsatisfactory Performance:

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

...

14. Untruthful Statements:

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

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 1300-10, Use Of Force, Chemical Agents & Restraints, effective date June 10, 2006, which states in applicable part:**

**V. USE OF PHYSICAL FORCE – GUIDELINES**

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

...

- C.<sup>8</sup> 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. Inmates not involved in the incident should be removed from the immediate area and secured in their cells or some other area.

**Montgomery County Department of Correction and Rehabilitation,  
Montgomery County Correctional Facility (MCCF), Post Orders, effective date**

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<sup>8</sup> The County incorrectly cited this provision as 1300-10 A.

January 17, 2007, which states in applicable part:

**Duties of all Correctional Officers, MCCF Post Order No. 5**

**B. Supervision:**

One of the most important duties of a correctional officer is the supervision of inmates. Without adequate supervision, order is lost; inmates become unruly, difficult to control, and present a serious hazard to the security of the Montgomery County Correctional Facility . . . Although methods of supervision vary from person to person, the following guidelines are generally accepted as good inmate supervisory practices:

1. An officer shall place his/her hands on an inmate only during a frisk search, escort, or emergency situation. Placing one's hands on an inmate more than anything else provokes an inmate to violence.
- ...
3. Staff shall display professionalism and respect when dealing with inmates. Arguing or horse playing with inmates, threatening them or using profanity or derogatory terms towards them all detract from an officer's ability to maintain control and effective supervision.

**ISSUE**

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

**ANALYSIS AND CONCLUSIONS**

**The County Proved By A Preponderance Of The Evidence That Appellant Violated An Established Policy Or Procedure When Appellant Engaged In Insulting And Demeaning Treatment Of The Inmate.**

During the DOCR investigation into the incident between Appellant and Inmate A, Appellant reported that the inmate told Appellant "Get off me – one day I'm going to whoop you." Appellant told Captain B that Appellant replied to the inmate, "You can't even get loose of my grip and you say you are going to whoop me." The Standards of Conduct for a Correctional Officer require that inmates be treated with respect, courtesy and fairness. Demeaning and insulting language toward an inmate are proscribed. Likewise, Post Order No. 5 mandates that Correctional Officers display professionalism and respect when dealing with inmates. Therefore, the Board concludes that the County has proved this charge by a preponderance of the evidence.

**The County Proved By A Preponderance Of The Evidence That Appellant Failed To Perform Appellant's Duties In A Competent And Acceptable Manner<sup>9</sup> When Appellant Left The Console Center And Used Force On An Inmate Who Did Not Present An Imminent Threat To Appellant's Safety.**

It is clear from the video tape that when Inmate A came down stairs into the day area Inmate A was located several feet from the Console Center where Appellant was. While the tape demonstrates that the inmate and Appellant were exchanging words, it is clear that, at the time Appellant chose to leave the Console Center and approach the inmate, the inmate posed no imminent threat to Appellant's safety. It is also clear from the video tape that Appellant was the aggressor in the situation when Appellant put Appellant's hand around the inmate's throat and pushed the inmate back. DOCR's regulation on the Use of Force makes clear that physical force is only to be used after all other means to handle the situation have been exhausted. Appellant had no valid reason for leaving the Console Center and approaching the inmate, much less using force on the inmate. Therefore, the Board concludes that County proved by a preponderance of the evidence that Appellant failed to perform Appellant's duties in a competent and acceptable manner when Appellant left the safety of the Console Center and proceeded to use force on the inmate.

**The County Proved By A Preponderance Of The Evidence That Appellant Knowingly Made A False Report In The Course Of Appellant's Employment.**

Appellant's Adjustment Report states that Appellant walked towards the inmate, "reached out my arm to lead [the inmate] in the direction [the inmate] is to go back to [the inmate's] room and [the inmate] proceeded to strike me with [the inmate's] right fist on my chest and continuing in an aggressive and intimidating manner towards me." Based on a review of the video tape of the incident, this is clearly false. Appellant was interviewed by Captain B during DOCR's investigation into the incident and was asked to read Appellant's Adjustment Report and indicate whether it was accurate. Appellant stated that it was. Again, based on a review of the video tape this was clearly false. Finally, Appellant told Captain B that although it may have looked as if Appellant was going toward the inmate when Appellant left the Console Center, Appellant was actually going toward Cell # 1 to check the locks. Appellant repeated this during the hearing. Based on a review of the video tape, this was clearly a false statement. Accordingly, the Board concludes that the County has proved this charge by a preponderance of the evidence.

**The County Proved By A Preponderance Of The Evidence That Appellant Engaged In A Physical Altercation With The Inmate While On Duty.**

The video tape clearly shows that after Appellant made initial physical contact with Inmate A, putting Appellant's hand around Inmate A's throat and pushing the inmate back,

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<sup>9</sup> The County also charged Appellant with negligent or careless performance of duties. The Board views this charge as nearly identical to the charge that Appellant failed to perform duties in a competent or acceptable manner and so has treated the two charges as one.



Appellant continued forward towards the inmate as the inmate backed away. Appellant again reached out Appellant's arm towards the inmate, who grabbed Appellant's arm and pushed Appellant back, shoving Appellant in the chest. Appellant then attempted to kick the inmate. Thereafter, a fight ensued during which Appellant knocked the inmate into a sofa several times. Based on this evidence, the Board concludes that the County proved by a preponderance of the evidence that Appellant engaged in a physical altercation with the inmate while on duty.

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

Having determined the County proved by a preponderance of the evidence that Appellant violated established policy or procedure, failed to perform Appellant's duties in a competent or acceptable manner, knowingly made a false report in the course of Appellant's employment, and engaged in a physical altercation with the inmate while on duty, the Board will address whether the penalty is appropriate.

The Board is well aware that termination is the ultimate penalty. Nevertheless, Appellant's conduct is extremely serious. Appellant was demeaning towards the prisoner. Appellant left the safety of the Console Center and used force on the inmate when there was no need to do so. Appellant repeatedly lied about the incident, first in Appellant's Adjustment Report, and then later during the DOCR investigation into the incident, and Appellant engaged in a physical altercation with the inmate. Correctional Officers are charged with responsibility for the safety of inmates. Rather than ensure Inmate A's safety, Appellant used unnecessary physical force on the inmate. This is simply not acceptable behavior for a Correctional Officer. Therefore, the Board finds that the penalty of dismissal is appropriate in this case.

**ORDER**

On the basis of the above, the Board denies the appeal of Appellant from Appellant's dismissal.

# **SUSPENSION**

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

### **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 Montgomery County, Maryland, Department of Correction and Rehabilitation's (DOCR's) Director, to suspend Appellant for a fifteen-day period

### **FINDINGS OF FACT**

Appellant is a Correctional Officer II (Private First Class) at the Montgomery County Detention Center (MCDC). As a Correctional Officer, Appellant is responsible for providing security, custody, care, order and discipline for a segment of the inmate population at MCDC. Appellant is a member of the bargaining unit covered by the Collective Bargaining Agreement between the Municipal and County Government Employees Organization (MCGEO or Union), Local 1994, AFL-CIO and the Montgomery County Government.

On August 18, 2006, Appellant was scheduled to work on shift one, which is from 10:30 p.m. to 7:00 a.m. Prior to commencing the shift, Appellant reported to shift change in the MCDC Assembly Room. Lieutenant (Lt.) A, the officer in charge on that date, was conducting shift change. Sergeant (Sgt.) B was assisting Lt. A. Lt. A and Sgt. B began inspecting the officers' uniforms. Lt. A noted that Appellant did not have on the duty belt (also referred to as a utility belt). When asked by Lt. A where the duty belt was, Appellant indicated it had been left in Appellant's car. Lt. A responded that previously Lt. A had talked to the officers about not having their belt at shift change – if anything happened they would not be prepared.<sup>1</sup> Appellant asked if Appellant should retrieve the belt from the car. Lt. A told Appellant to wait until shift change was completed to get the duty belt.

Subsequently, Appellant mumbled something under Appellant's breath and Lt. A told Appellant to keep any comments to Appellant's self. After uniform inspection, everyone was seated and Lt. A continued to conduct shift change by reading off the post assignments. A training sign-in sheet was passed around and Appellant, after signing it, tossed the sheet on

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<sup>1</sup> During the hearing, testimony established that Appellant was not the only one who reported without the duty belt to shift change. Corporal (Cpl.) C had also not worn the duty belt to shift change. After Lt. A questioned Appellant about the lack of the duty belt, Cpl. C indicated Cpl. C didn't have the duty belt as it was in the office. Lt. A testified that Cpl. C was allowed to walk across the room to get the duty belt from the office and that Lt. A subsequently talked to Cpl. C after shift change about it.

the table in front of Lt. A and again mumbled something<sup>2</sup> as Appellant returned to a seat. Lt. A decided that Appellant was being disruptive and told Appellant to leave the Assembly Room. Appellant responded by asking: “Why, what for, what did I do?” Lt. A again ordered Appellant to leave. Appellant continued to remain in the Assembly Room. Appellant asked Lt. A whether Appellant should go home. Lt. A told Appellant not to go home but to leave the Assembly Room and wait in Corridor Two. Appellant did not move. Sgt. B then told Appellant to “just leave” and Appellant finally left the Assembly Room. Thereafter, Lt. A went out to Corridor Two to discuss with Appellant Appellant’s behavior during shift change. Lt. A then returned to the Assembly Room to complete shift change.

Based on this incident, Lt. A subsequently recommended that Appellant be demoted for Appellant’s behavior during shift change. Ultimately, the MCDC Warden, after having various employees present during the shift change complete an Incident Report,<sup>3</sup> issued a Statement of Charges<sup>4</sup> for a 15-day suspension. The Statement of Charges noted that Appellant had previously received a Notice of Disciplinary Action, dated March 7, 2006, for a five-day reduction in annual leave for insubordination<sup>5</sup> and a Written Reprimand, dated December 2, 2005, for neglect of duty and insubordination.<sup>6</sup>

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<sup>2</sup> According to a Public Administrative Aide, who was present during the shift change, Appellant mumbled words to the effect: “Is this Lieutenant A’s rule?” The Public Administrative Aide testified that no one else could hear what Appellant said.

<sup>3</sup> An Incident Report is also referred to as a DCA-36.

<sup>4</sup> The Statement of Charges indicates that it was issued as required by Section 33-6(b) of the Montgomery County Personnel Regulations (MCPR or Personnel Regulations) and Article 28.4 of the Collective Bargaining Agreement between MCGEO and Montgomery County.

<sup>5</sup> The Notice of Disciplinary Action – Five Day Reduction in Annual Leave stated that originally Appellant had received a Statement of Charges for a 15-day suspension. It also noted that a pre-discipline settlement conference was held and the Union and County agreed therein that Appellant would receive a reduction in leave. Therefore, the Notice of Disciplinary Action issued on March 7, 2006 notified Appellant of the reasons which served as the basis for a 5-day suspension to be taken as a 5-day reduction in annual leave. The Notice of Disciplinary Action was signed by the DOCR Human Resources Manager for the Department Director.

<sup>6</sup> While the County submitted the Notice of Disciplinary Action for Five-Day Reduction in Annual Leave, it did not submit as evidence the Written Reprimand relied upon in the Statement of Charges and Notice of Disciplinary Action for the 15-day suspension. Instead, it submitted a Notice of Disciplinary Action, dated April 21, 2004, for a 2-day suspension based on Appellant’s violating an established policy or procedure and insubordinate behavior. This disciplinary action was never mentioned in either the Statement of Charges or the Notice of Disciplinary Action for the 15-day suspension at issue in this appeal.

Appellant was provided with the opportunity to respond to the charges. Subsequently, a Notice of Disciplinary Action, dated October 10, 2006, was issued to Appellant, imposing a 15-day suspension.<sup>7</sup>

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant was not the only person at Shift Change without a duty belt; however, Lt. A did not treat the other person the same as Appellant.
- Appellant did not throw the sign-in sheet at Lt. A.
- Appellant was confused when Lt. A told Appellant to leave roll call and asked if

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The County subsequently submitted evidence that a pre-discipline conference was held concerning a 3-day suspension involving Appellant on April 1, 2004. The Alternative Dispute Resolution Settlement Conference Intake Form (Intake Form) submitted as evidence indicated that in lieu of serving a 3-day suspension, Appellant's union representative on April 1, 2004 agreed to a 2-day forfeiture of annual leave. However, no Notice of Disciplinary Action imposing the 2-day forfeiture of leave was introduced into evidence.

Moreover, County Exhibit 12, Notice of Disciplinary Action – Two Day Suspension, dated April 21, 2004, from the Department Director to Appellant contradicts the Intake Form. County Exhibit 12 indicates that on April 1, 2004, Appellant attended a pre-disciplinary conference wherein all parties agreed that the proposed disciplinary action would be reduced from a 3-day suspension to a 2-day suspension. Contrary to normal County practice, the Notice of Disciplinary Action set no specific time for Appellant to serve the 2-day suspension. During the hearing, Appellant testified that he never served the 2-day suspension.

Based on the foregoing conflicting evidence introduced by the County, the Board finds that Appellant did not serve a 2-day suspension and apparently never received a 2-day forfeiture of annual leave as it appears that no Notice of Disciplinary Action, imposing a 2-day reduction in annual leave, was ever issued.

Therefore, for purposes of this Decision, the only disciplinary action entered into evidence which was imposed prior to the one which is the subject of this appeal was a Notice of Disciplinary Action – Five Day Reduction in Annual Leave issued by the Human Resources Manager for DOCR, on behalf of Department Director on March 7, 2006. As discussed in greater detail *infra*, the Human Resources Manager lacked the written authority to impose discipline, as required by the MCPR. Therefore, this disciplinary action is deemed null and void for the purpose of being relied upon to demonstrate progressive discipline.

<sup>7</sup> Although the Notice of Disciplinary Action indicated it was from the Department Director, it was actually signed by the Human Resources Manager.

Appellant was being sent home. Only then did Lt. A instruct Appellant to go to Corridor Two.

- The discipline imposed for this incident was too extreme.
- The Department failed to follow the Personnel Regulations and Collective Bargaining Agreement when imposing the suspension. Under the Montgomery County Personnel Regulations, the Department Director needed the Chief Administrative Officer's (CAO's) approval to impose more than a 10-day suspension. The Collective Bargaining Agreement which applies to Appellant requires the CAO's approval to impose more than a 5 work day suspension. The Department Director failed to get the CAO's approval before imposing the 15-day suspension.
- The Department Director did not sign the Notice of Disciplinary Action. Instead, it was signed by the Department's Human Resources Manager. The regulations require a written delegation from the Department Director before a supervisor may sign a Notice of Disciplinary Action and the Department Director admitted he did no written delegation.

County:

- The evidence demonstrates that Appellant was repeatedly insubordinate and disrespectful to Appellant's supervisor, Lt. A.
- The 15-day suspension was progressive in nature, as Appellant had previously had a 5-day reduction in annual leave and a 2-day reduction in annual leave for insubordination.
- A delegation of authority, signed on October 28, 1992, permits the Department Director to impose a 15-day suspension without CAO approval. The County Department/Agency Directors have administered the personnel system and the MCGEO contract for numerous years under this delegation of authority.

**APPLICABLE REGULATIONS AND CONTRACTUAL PROVISION**

**Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005), Section 33, Disciplinary Actions**, which states in applicable part:

...

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

...

(c) ***Forfeiture of annual leave or compensatory time.***

(1) A forfeiture of annual leave or compensatory time:

(A) is the removal of a specified number of hours from the annual leave or compensatory time balance of an employee.

(e) *Suspension.*

...

(2) A department director may not:

(A) suspend an employee for more than 10 days without the approval of the CAO; . . .

**33-4. Authority to take disciplinary action.**

...

(b) A department director may take any disciplinary action under these Regulations.

(c) A department director may delegate the authority to take any type of disciplinary action to a lower level supervisor. The delegation must be in writing.

**Section 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:

...

(d) violates an established policy or procedure;

...

(f) behaves insubordinately or fails to obey a lawful direction from a supervisor; . . .

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct, effective date 3-01-03,** which states in applicable part:

**VII. DEPARTMENT RULES FOR EMPLOYEES**

D. Specific Department Rules:

...

9. Conduct Unbecoming:

a. No employees shall commit any act which constitutes conduct unbecoming a department employee.

Conduct unbecoming includes, but is not limited to, any criminal, dishonest or improper conduct.

...

## VIII. ATTITUDE

An employee's attitude toward his/her job, supervisors, co-workers, inmates/residents/participants, and the department has a profound impact on the morale of both the staff and the inmates/residents/participants. Project a positive attitude. Communicate your concerns to your supervisor. Professionalism demands tact, courtesy, mutual respect, understanding and a willingness to make the effort to get along with others.

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Article 28, *Disciplinary Actions*, which states in applicable part:**

Article 28.2 Types of Disciplinary Actions

Disciplinary actions shall include but are not limited to:

...

(e) Suspension

- (1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct. A suspension shall not exceed 5 work days unless authorized by the Chief Administrative Officer. . . .

### ISSUE

Has the County proven, by a preponderance of the evidence, that the 15-day suspension of Appellant was reasonably justified and consistent with applicable law, regulatory and contractual provisions?

### ANALYSIS AND CONCLUSIONS

#### **The County Proved By A Preponderance Of The Evidence That Appellant Failed To Obey A Lawful Order.**

The preponderance of evidence demonstrates that Appellant failed to obey a lawful order by Appellant's supervisor, Lt. A, to leave the shift change. The County demonstrated

that Lt. A asked Appellant to leave the shift change on three separate occasions. Appellant argues that Appellant did not leave because Appellant was uncertain as to where Appellant should go. Lt. A admitted that Lt. A did not initially tell Appellant where Appellant was to go upon leaving shift change. Appellant indicates that Appellant was concerned that if Appellant left and went home Appellant would be charged with being absent without leave (AWOL) which is a serious offense. Even if the Board accepts Appellant's argument that there was some confusion with regard to the order received from Lt. A to leave shift change, this confusion was cleared up when Lt. A explicitly told Appellant where to go when Lt. A ordered Appellant to leave for the third time. Yet even after being told where to go, Appellant failed to leave. At this juncture, Appellant was clearly insubordinate. Appellant only left after Sgt. B instructed Appellant to leave. Therefore, the Board finds that the County proved that Appellant failed to obey a lawful order when Appellant did not leave the shift change after Lt. A instructed Appellant for a third time to leave and informed Appellant to go to Corridor Two.

**The County Failed To Prove That The 15-Day Suspension Was Consistent With Applicable Regulatory And Contractual Provisions.**

The Board views Appellant's failure to obey a lawful order as a serious matter. As a Correctional Officer, Appellant is a law enforcement officer and management is entitled to hold Appellant to a higher standard of conduct. The Board finds that it is essential that the County be able to rely on Appellant to carry out lawful orders.

However, the County committed several procedural errors in imposing the 15-day suspension as discussed infra. Therefore, the Board cannot affirm the 15-day suspension.

A. **The Department Director Failed To Sign The Notice Of Disciplinary Action And Did Not Provide A Written Delegation Of Authority To The Department's Human Resources Manager To Sign In The Director's Stead.**

MCPR Section 33-4 explicitly requires that any delegation of authority from a Department Director to take any type of disciplinary action must be in writing. While the Department Director asserts that the Department Director authorized the Human Resource Manager to sign the Notice of Disciplinary Action on the Department Director's behalf, the Department Director acknowledged that the Department Director has no document providing the Human Resource Manager<sup>8</sup> with such authority. Accordingly, the Board finds that the Notice of Disciplinary Action issued by the Human Resource Manager is null and void as the Human Resource Manager lacked the authority to issue it. Cf. Barcliff v. Department of the Navy, 62 M.S.P.R. 428 (1994) (wherein the U.S. Merit System Protection Board upheld the Administrative Judge's finding that an indefinite suspension was not null and void on the

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<sup>8</sup> Based on the record of evidence, the Board is unable to determine whether the Human Resource Manager is a supervisor – which is a prerequisite for receiving a delegation to impose discipline from a Department Director. See MCPR, 2001, Section 33-4(c) (as amended December 10, 2002).



ground that the individual who made the decision to suspend appellant's security clearance which led to the indefinite suspension was not properly authorized to make the decision. In upholding this finding, the Board specifically found that the commanding officer had properly delegated his authority to take such action); Smallwood v. Department of the Navy, 62 M.S.P.R. 221 (1994)(same).

B. The Department Director Did Not Get Approval From The Chief Administrative Officer, As Required By The Collective Bargaining Agreement, Prior To Imposing A 15-Day Suspension.

Near the close of the hearing in this matter, the County indicated it wanted to leave the record open concerning two issues: the issue raised concerning Section 33-3(e);<sup>9</sup> and whether Appellant served Appellant's two-day suspension. In response, the Board specifically indicated it was leaving the record open only as to one matter – the serving of the two-day suspension.<sup>10</sup> Subsequent to the hearing, the County filed a Post Hearing

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<sup>9</sup> As previously noted, this portion of the MCPR specifically provides that a Department Director cannot suspend an employee for more than 10 days without the approval of the CAO.

<sup>10</sup> The following is a quote from the hearing transcript at pages 154-56 on this matter:

CHAIRPERSON: Based on discussions with the Board, we will leave open the record only about whether or not the officer served Appellant's two day suspension. But, the regulations are what [they are] and so we would not accept further arguments on that. But, we will leave open whether or not did Appellant or did [Appellant] not because Appellant is saying Appellant never served the two day suspension. So, we will allow you to supplement whether or not Appellant did or Appellant did not. And, if we could have that within a week, I think that's sufficient enough time, five days, to supplement by going through the personnel records and finding out whether or not Appellant did serve those two days. And, we would accept that, but no other arguments after.

COUNTY'S ATTORNEY: Well, I would like to bring to the Board's attention then that there are some memos that are done, signed by the CAO delegating authority to administer personnel systems to the Office of Human Resources. And, these actions are approved through the Office of Human Resources and the County Attorney's office. There also is a section under Chapter 33 delegating to the [D]irector of [H]uman [R]esources the ability to administer the personnel system. And, I would submit to you that this action was approved by the CAO by virtue of the fact that the CAO has delegated the responsibility to the personnel officer, the [D]irector of the [O]ffice of [H]uman [R]esources under Chapter 33 and also through the approval process because it goes through the [O]ffice of [H]uman [R]esources.

Submission (Submission). In this Submission, the County inaccurately stated that the Board requested “the County to submit additional documentation concerning (1) imposing a suspension exceeding 5 work days against Appellant;<sup>11</sup> and (2) a 2 day suspension served by Appellant in April 2004.” The Board was clear that it would accept no further argument concerning Section 33-3e. Accordingly, the Board hereby strikes that portion of the County’s Post Hearing Submission which deals with this issue.

Moreover, it is the provisions of the Collective Bargaining Agreement which govern this matter, not the Personnel Regulations. See MCPR Section 2-9. The Collective Bargaining Agreement clearly states that the Chief Administrative Officer must authorize a

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CHAIRPERSON: We will look at the regulations.

COUNTY’S ATTORNEY: I think you’ve got to look at that one isolated section of the regulations, the context of Chapter 33 and the way it was – thank you.

<sup>11</sup> In support of the County’s theory that the Department Director had authority to impose greater than a 10-day suspension, the County submitted a Delegation of Authority (Delegation) from the CAO, dated October 28, 1992. Section 11 of the Delegation indicates that a suspension not to exceed 5 work days, as found in Personnel Regulation Section 27-3(d), is delegated to the Dept./Agency Head. The comment accompanying this Delegation states that the action is reviewed by the “Personnel Office for procedural compliance. See A[dministrative] P[rocedure] 4-10.”

Although the Board has decided to strike this submission by the County as discussed infra, it will take this opportunity to comment on the validity of this Delegation. The Board notes that the Montgomery County Personnel Regulations have been reissued twice since this Delegation took effect. The last issuance was in 2001, and was approved by the County Council. The 2001 issuance specifically superseded the 1994 Personnel Regulations and Administrative Procedure 4-10. Section 27 of the 2001 Personnel Regulations deals with the subject of promotion compensation. Authority to take disciplinary actions is currently found in Section 33. There is no provision in the current regulations for CAO approval to impose greater than a 5 work day suspension as cited in the Delegation; instead, as previously noted, Section 33-3(e) provides that the CAO’s approval is now needed for more than a 10-day suspension.

While it is true that the current Personnel Regulations permit the CAO to delegate authority in writing to implement “**these Regulations**,” see MCPR Section 2-4(b)(1)(A), the County has provided no evidence of a new delegation since the promulgation of these regulations. Moreover, if the 1992 Delegation were still in effect, there would be no need for Section 33-3(e). Accordingly, the Board finds that under the current Personnel Regulations there is no operable delegation from the CAO to the Department Director to impose more than a 10-day suspension.

suspension in excess of 5 work days. The County failed to demonstrate that it adhered to this provision. Nor has the County proven that the CAO has delegated the CAO's authority under this provision of the Collective Bargaining Agreement to the Department Director.<sup>12</sup>

**Given The Totality Of Circumstances In This Case, The Board Finds That A 5-Day Suspension Is Appropriate.**

As previous noted, Appellant's misconduct was serious. However, given the various procedural mistakes committed by the County in effecting Appellant's discipline, the Board cannot sustain a 15-day suspension. The Board notes that under the Collective Bargaining Agreement it is within the Department Director's authority to impose a 5 work day suspension on Appellant without the need to obtain CAO approval. Therefore, based on the gravity of Appellant's offense, as well as the fact that the County has failed to provide any evidence of prior viable discipline, the Board will order the Department Director to impose a 5 work day suspension.

**ORDER**

On the basis of the above, the Board sustains the appeal and orders the County to revoke Appellant's 15-day suspension. The Department Director is ordered to issue a 5 work day suspension based solely on Appellant's failure to obey a lawful order when Lt. A ordered Appellant to leave shift change and informed Appellant of where Appellant was to go. The County is also ordered to make the Appellant whole for lost wages and benefits for the ten days not sustained.

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<sup>12</sup> The Board notes that the instant Collective Bargaining Agreement went into effect in 1994, two years **after** the Delegation submitted by the County. If the Delegation was still operable and applied to the Collective Bargaining Agreement as claimed by the County, there would have been no need for the parties to have included Section 28.2(e)(1) in the Collective Bargaining Agreement.

## **Case No. 07-03**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Department of Correction and Rehabilitation's (DOCR's) Director to suspend Appellant for a three-day period.

### **FINDINGS OF FACT**

Appellant is a Correctional Officer III (Corporal) at the Montgomery County Detention Center. On June 4-5, 2006, Appellant was working on shift one, which is from 10:30 p.m. to 7:00 a.m. Appellant was assigned to the E wing with Corporal (Cpl.) D. The E wing is the housing area for the male inmates. E wing is composed of various cells, numbered 1-8 on the ground tier, with cells 9-14 on the top tier. Typically, there are about 80 inmates in E wing.

At approximately 5:50 a.m. on June 5, after breakfast, the two correctional officers in E wing were getting those inmates scheduled to go to court ready to go over to Receiving and Discharge (R&D) area, which is next to E wing. Appellant was in the E-2 area (i.e., near cell 2). An inmate was not properly dressed. Appellant asked the inmate to put on the proper dress or the inmate was to lock inside the inmate's cell. The inmate started shouting at Appellant: "Don't put your hands on me."

Cpl. D heard the yelling. When Cpl. D went to investigate what was happening, Cpl. D saw the inmate yelling at Appellant and noted that the inmate was in Appellant's face. As Cpl. D had been dealing with the inmate all night, Cpl. D believed Cpl. D could relate to the inmate and so went to assist Appellant with the inmate.

Upon arriving at the scene, Cpl. D began to tell the inmate to lock in when the inmate attacked Cpl. D. What happened next is a matter of dispute.<sup>1</sup> According to Cpl. D, the inmate hit Cpl. D and shoved Cpl. D into the wall and then into the metal bed frame.

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<sup>1</sup> According to Appellant's version of events, Cpl. D was never shoved into the wall and metal bed frame. Rather, Appellant claims the inmate pushed Cpl. D to the ground and Appellant pulled the inmate off of Cpl. D so that Cpl. D could stand up. Appellant asserts that at no time did Cpl. D have the inmate on the floor.

Appellant testified that subsequently Appellant was standing between the inmate's legs, trying to pull the inmate's arms away from Cpl. D's neck. Appellant stated that Appellant never disassociated from the confrontation. Rather, Appellant took Appellant's right hand off the inmate to call for assistance and twice called for aid. Appellant testified that while calling for aid, the inmate was hitting Appellant with the inmate's left arm and elbow.

Cpl. D testified that Cpl. D started fighting with the inmate, brought the inmate down to the floor and got on top of the inmate. Cpl. D then expected that Appellant would handcuff the inmate's hands. However, when Cpl. D looked to the right Cpl. D saw Appellant was too far from Cpl. D to cuff the inmate. Cpl. D testified that Cpl. D was shocked because Appellant was so far from where Cpl. D was struggling with the inmate.<sup>2</sup>

The inmate managed to get off the ground and put Cpl. D in a head lock and started choking Cpl. D's neck. At this point, Appellant called for assistance. Lieutenant A, Cpl. B and Cpl. C, who were in R&D, all responded to the call. Lieutenant A testified that Lieutenant A grabbed one arm of the inmate and Cpl. B grabbed the other arm to free Cpl. D. Cpl. C testified that Cpl. C grabbed the inmate's legs. The three officers managed to get the inmate on the floor and handcuff the inmate. In the process, Cpl. C testified that Cpl. C hurt Cpl. C's back. All three officers testified that at the time they entered into the struggle with the inmate, Appellant was not assisting but standing off to the side.<sup>3</sup>

Lieutenant A testified that Cpl. D was very upset about what had happened. Cpl. D told Lieutenant A that Appellant did not help Cpl. D. Lieutenant A decided to send Cpl. D to the conference room to write Cpl. D's report<sup>4</sup> because Cpl. D was so upset. Lieutenant A testified that Lieutenant A thought it was important to separate Cpl. D from Appellant while Cpl. D calmed down. Cpl. D subsequently received medical treatment as Cpl. D had been injured while fighting with the inmate.

Lieutenant A also asked Cpl. B and Cpl. C to prepare Incident Reports. Lieutenant A spoke with Appellant about what had happened. Appellant stated that Appellant had tried to assist by pulling the arms of the inmate away from Cpl. D but was pushed away by the inmate.<sup>5</sup> According to Appellant, that was why Appellant wasn't close to the struggle between the inmate and Cpl. D. Appellant was asked by Lieutenant A to prepare an Adjustment Report on the inmate for refusing to go into the inmate's cell.

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<sup>2</sup> Cpl. D estimated that Appellant was 25-30 feet away from Cpl. D, between cell 6 and 7.

<sup>3</sup> Cpl. B testified that Appellant was over in the area between cells 5 and 6, some 15 to 20 feet away, when Cpl. B arrived on scene. Cpl. C testified that Appellant was near cell 6. Lieutenant A testified that Lieutenant A saw Appellant standing over in front of cell 3 when Lieutenant A entered.

<sup>4</sup> The report, called an Incident Report, is also called a "36".

<sup>5</sup> Appellant testified that Appellant lost Appellant's identification (ID) badge while struggling with the inmate. Appellant subsequently found it once the inmate was cuffed and taken away. According to Appellant, the ID was on the floor where the inmate had been. Lieutenant A, Cpl. D, Cpl. B and Cpl. C all testified that they did not recall seeing Appellant's ID on the floor. Lieutenant A recalled Appellant subsequently telling Lieutenant A the clip was broken on the ID badge and asking whether Lieutenant A could give Appellant another one.

Lieutenant A determined to “write-up” Appellant for Appellant’s failure to render assistance. After conferring about the incident with other Lieutenants in the Detention Center, Lieutenant A recommended to the Warden that Appellant receive a 10-day suspension. The decision ultimately was made to give Appellant a 3-day suspension.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The statement in the Notice of Disciplinary Action which indicates that Cpl. D was shoved into the wall and metal bed frame by the inmate is incorrect. Rather, both individuals became entangled, the inmate pushed Cpl. D to the ground and Appellant pulled the inmate away from Cpl. D so that Cpl. D could stand up.
- The inmate was never held down to the floor by Cpl. D so as to be in a position to be handcuffed.
- During the struggle between Cpl. D and the inmate, Appellant was actively involved in attempting to save Appellant’s co-worker from injury. The fact that Appellant’s ID ended up under the inmate, indicates that Appellant was involved in the struggle.
- Although Appellant was one of the officers involved in the incident, Appellant was never asked about the allegations set forth in the Notice of Disciplinary Action.
- There has been a long pattern of harassment against Appellant by Cpl. B and Cpl. C.

#### **County:**

- The evidence demonstrates that Appellant walked away from the struggle between the inmate and Cpl. D, failed to handcuff the inmate, and failed to provide assistance to Appellant’s co-worker, when the co-worker was placed in a head lock by the inmate. Appellant did however call for assistance.
- The protocol for a Correctional Officer is to render assistance first and then call for help. This Appellant failed to do.
- No one at the scene of the incident except for Appellant recalls Appellant’s ID being under the inmate when the inmate was on the floor.

### **APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 33-5, Causes for disciplinary action**, which states in applicable part:

The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

...

- (e) violates an established policy or procedure;
- ...
- (f) fails to perform duties in a competent or acceptable manner;
- ...
- (i) is negligent or careless in performing duties; . . .

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct, effective date 3-01-03**, which states in applicable part:

**VIII. DEPARTMENT RULES FOR EMPLOYEES**

D. Specific Department Rules:

10. Neglect of Duty/Unsatisfactory Performance:

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

...

13. Mutual Protection:

A department employee shall promptly come to the aid of another employee who, when carrying out official duties, is in need of assistance.

**ISSUE**

Has the County proven, by a preponderance of the evidence, that the 3-day suspension of Appellant was reasonably justified and consistent with applicable law and regulatory provisions?

## ANALYSIS AND CONCLUSIONS

### The Protocol As To Whether An Officer Should First Call For Aid Or Render Assistance When A Co-Worker Is Engaged In A Struggle With An Inmate Is Unclear.

The County asserts that the protocol of the Department of Correction and Rehabilitation is for a Correctional Officer to render assistance to a co-worker and then call for aid. DOCR's Director testified that there was no option as to whether to render aid and then call for assistance or call first. The Director emphatically stated that aid to the co-worker should be first. Cpl. D also testified that an officer is to render assistance first and then call for aid. However, Cpl. B, who has been a Correctional Officer for nineteen years, testified that the protocol is to first call for help and then assist. Likewise, Appellant testified that Appellant was taught that the first thing to do is call for assistance.

It is evident that there is some misunderstanding about what the exact protocol is. The Board would urge the Department of Correction and Rehabilitation to ensure that all Correctional Officers have the same understanding as to what the correct protocol is.

### The County Proved By A Preponderance Of The Evidence That Appellant Failed To Assist Appellant's Co-Worker.

While the protocol to be followed when an officer is in a struggle with an inmate may be less than clear, what is clear is that an officer is expected to assist a co-worker. The preponderance of the testimony was that Appellant failed to do so. When Lieutenant A, Cpl. B and Cpl. C entered the E-2 area, they all testified that Appellant was standing away from where the struggle was and was not rendering assistance. Moreover, none of the officers recalled seeing Appellant's ID on the floor after the inmate was removed from area.

Lieutenant A, Cpl. B and Cpl. C also testified that Appellant did not assist them in subduing the inmate and freeing Cpl. D. Even if Appellant had to disengage from the struggle to call for help, Appellant has provided no rationale as to why Appellant did not reengage in assisting a fellow officer.

Appellant has asserted that Cpl. B and Cpl. C have been harassing Appellant and testified that Appellant spoke to Lieutenant A about this before the incident with inmate occurred. Lieutenant A acknowledged that Appellant did speak to Lieutenant A about Appellant's concerns. Appellant has implied that Cpl. B and Cpl. C have a vendetta against Appellant and therefore the facts concerning the incident with the inmate were distorted. However, Appellant has provided no reason as to why Lieutenant A would not testify truthfully concerning what Lieutenant A saw on June 5, when Lieutenant A entered the E-2 area.

Appellant also asserts that no one interviewed Appellant about the incident before bringing charges against Appellant. However, Lieutenant A testified that Lieutenant A spoke with Appellant about the incident and that Appellant told Lieutenant A Appellant



was pushed away by the inmate. Also, Appellant filled out the Adjustment Report wherein Appellant provided Appellant's version of what had occurred.

Even if the Board were to accept Appellant's claim that Appellant was pushed away by the inmate, Appellant should have reengaged in the struggle with the inmate to free the co-worker from being choked. Appellant did not do so; the preponderance of the evidence indicates that Appellant simply stood by and watched the other officers free Cpl. D. Therefore, the Board finds that the County has proved that Appellant failed to assist the co-worker as required by Departmental policy.

**Based On The Charge Sustained By The Board, The Penalty Of A 3-Day Suspension Is Appropriate.**

Having determined the County proved by a preponderance of the evidence that Appellant violated the Department of Correction and Rehabilitation's Standards of Conduct when Appellant failed to come to the aid of the co-worker, Cpl. D, who was in need of assistance, the Board will address whether the penalty is appropriate. The Board is well aware that a 3-day suspension for a Correctional Officer is a serious mark on the officer's record.

As DOCR's Director acknowledged, a suspension is a serious punishment in the employment field, as even though an individual can earn back the money lost through a suspension by working overtime, it still injures their record for the future as it is always there. Appellant states that Appellant hopes to spend thirty years working at the Detention Center and does not want the 3-day suspension on Appellant's record.

Nevertheless, Appellant's failure to come to the aid of the co-worker is extremely serious. The co-worker could have been seriously injured or even killed by the inmate who was choking the co-worker. As the County stated, Correctional Officers need to be able to rely on each other for assistance. Therefore, the Board finds that the penalty of a 3-day suspension is appropriate in this case.

**ORDER**

On the basis of the above, the Board denies the appeal of Appellant from the 3-day suspension.

# **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 2007, the Board issued the following decisions on appeals concerning the denial of employment.

# **EMPLOYMENT**

## **Case No. 07-09**

### **DECISION AND ORDER**

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

### **FINDINGS OF FACT**

Appellant applied for the position of Police Officer Candidate (Candidate) and was given a conditional offer of employment with the Montgomery County, Maryland Police Department. According to the class specification for the Candidate position, a Candidate position is an instructional-level position during which the incumbent undergoes formalized training in law enforcement methods and procedures both in the classroom and the field. The class specification also provides that a Candidate may be exposed to armed and dangerous persons as the Candidate works "on the job" as a Patrol Officer integrating what has been learned in the classroom to real life situations. The Candidate must have the ability to pursue, apprehend, and restrain suspects and defend oneself from physical attack. The Candidate also performs duties generally associated with journey level sworn officer positions. The class specification specifically requires the successful completion of a physical examination.

On August 20, 2006, Appellant was given an examination at the Montgomery County, Maryland, Occupational Medical Services (OMS). At that time, it was determined that Appellant was being treated for Type I Diabetes Mellitus. According to Dr. A, the Employee Medical Examiner for OMS, Appellant's medical condition can cause extremely erratic fluctuations in blood glucose levels (called hypoglycemia – low blood sugar and hyperglycemia – high blood sugar). These fluctuations can then result in the individual experiencing extreme fatigue, somnolence,<sup>1</sup> and disorientation. According to Dr. A, these symptoms are extremely dangerous particularly for a Police Officer charged with carrying a firearm and protecting civilians. Likewise, Dr. A has opined that these symptoms present an extreme danger to the Police Officer's coworkers and to the public the Police Officer is charged to protect.

In the information provided by Appellant's endocrinology (the medical specialty specific to treatment of diabetes mellitus) team as part of the pre-employment medical examination, Dr. A noted that there was a statement from Nurse Practitioner B that

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<sup>1</sup> Somnolence is defined as a state of drowsiness; sleepiness. See American Heritage Stedman's Medical Dictionary, 2<sup>nd</sup> ed. (2004).

Appellant had “erratic fasting blood glucose readings.” Therefore, Dr. A subsequently contacted Appellant’s endocrinology team. In particular, Dr. A was interested in obtaining information about Appellant’s blood glucose readings during physically demanding activities such as running for several blocks, running over inclines and uneven terrain and jumping rope as such activities correspond to physical activities likely to be demanded of a Police Officer on patrol.

Dr. A also discussed with Appellant’s endocrinologist, Dr. C, Dr. C’s written statement that Appellant “would likely be at increased risk for hypoglycemia during elements of training that are physically arduous, however, and may therefore need to take more frequent breaks to check Appellant’s blood sugars, and also have snacks or drinks on hand in case Appellant’s blood sugars do drop low.” Dr. A indicated that Dr. A explained to Dr. C that the foremost concern was for Appellant’s safety when Appellant completed instructional training and would be on the streets in field training. Dr. A specifically asked Dr. C whether Dr. C felt secure that Appellant could be involved in a foot chase with suspects (involving terrains such as back yards or parks with intermittent stops and starts), then draw Appellant’s firearm, and finally secure the situation either by physical restraint or the use of a firearm. Dr. C told Dr. A that Dr. C did not have that kind of information. Dr. C indicated Dr. C was willing to work with Appellant to obtain blood glucose monitoring information and assist Appellant with maintaining appropriate treatment of diabetes.

After Dr. A’s conversation with Dr. C, Dr. A received no additional clinical information. Accordingly, as the Police Officer Candidate Class was scheduled to begin in late January 2007, Dr. A, based on the information Dr. A had, determined on January 12, 2007 that Appellant was “Not Fit for Duty.” Dr. A states that this determination was based on a comprehensive medical evaluation to include Appellant’s pre-employment medical evaluation, review of Appellant’s medical records from 1999 to 2006, telephone conversations with Appellant’s primary care physician, Appellant’s endocrinologist and other specialists as appropriate, and a review of selected medical literature.

On January 19, 2007, the OHR Director notified Appellant that the OHR Director was withdrawing Appellant’s conditional offer of employment as a Police Officer Candidate because the medical examiner determined that Appellant was not medically able to perform the duties of the position. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**<sup>2</sup>

- Appellant’s doctor believes that Appellant is fully capable of performing the necessary duties of a Police Officer.

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<sup>2</sup> Appellant was provided the opportunity to file final comments with the Board after receiving the County’s response to Appellant’s appeal. No comments were received by the Board.

County:

- Based on the information provided to Dr. A, Dr. A could not conclude that Appellant could safely perform the arduous physical demands of the Police Officer Candidate position. Therefore, Appellant was determined to be “Not Fit for Duty.”

### **APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002), Section 8, *Medical Examinations and Reasonable Accommodation***, which states in applicable part:

#### **8-3. Medical requirements for employment.**

- (a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position.

...

#### **8-6. Required medical examinations of applicants; action based on results of required medical examinations.**

- (a) *Medical and physical requirements for job applicants.*
  - (1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class.

### **ISSUE**

Was the County justified in rescinding the conditional offer of employment made to Appellant?

### **ANALYSIS AND CONCLUSIONS**

It is undisputed that Appellant is under treatment for Type I Diabetes Mellitus. Based on the record of evidence before the Board, this medical condition causes extremely erratic fluctuations in blood glucose levels. Indeed, the Nurse Practitioner who is part of Appellant’s endocrinologist team had documented Appellant’s erratic fasting blood glucose readings in the medical notes sent to Dr. A. Blood glucose fluctuations can result in an individual experiencing extreme fatigue, somnolence and disorientation. Dr. A concluded that these symptoms would be extremely dangerous for a Police Officer charged with carrying a firearm and protecting the public. Moreover, the symptoms could present an extreme danger to the Police Officer’s coworkers and the public.

Although Appellant argues that Appellant's doctor believes that Appellant can perform the duties of a Police Officer, the record of evidence does not support this contention. According to Dr. A, Appellant's endocrinologist believed that Appellant would be at an increased risk for hypoglycemia during elements of training that were physically arduous. Dr. C indicated that to address this issue, Appellant would need to take more frequent breaks to check Appellant's blood sugars and also have snacks or drinks on hand if Appellant's blood sugars dropped. Dr. A pointed out to Dr. C that Dr. A's main concern was not Appellant's performance during instructional training but rather Appellant's ability to perform adequately during field training when Appellant would not be able to stop and take breaks and get snacks. After Dr. A outlined for Dr. C the types of physical activities that would be a part of the field training, such as a foot chase with suspects, Dr. C indicated to Dr. A that Dr. C did not have the information needed to feel secure that Appellant could complete these activities.

Therefore, based on the record of evidence before the Board, the Board finds that it was reasonable for Dr. A to conclude that because of the symptoms associated with erratic fluctuations in blood glucose levels caused by Type I Diabetes Mellitus, Appellant was not fit for duty as a Police Officer Candidate as Appellant would be unable to perform the essential duties of the position. Accordingly, the Board finds that the OHR Director was justified in rescinding Appellant's conditional offer of employment.

### **ORDER**

Based on the above, the Board denies Appellant's appeal of OHR's rescission of Appellant's conditional offer of employment as a Police Officer Candidate.

## **Case No. 07-11**

### **DECISION AND ORDER**

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

### **FINDINGS OF FACT**

Appellant applied for the position of Firefighter/Rescuer I (Recruit) and was given a conditional offer of employment with the Montgomery County, Maryland Fire and Rescue Service. According to the class specification for the Recruit position, a Recruit needs the ability to think clearly, respond immediately, and act quickly, calmly, and effectively in emergency situations. The class specification also provides that a Recruit needs to have the ability to drive some of the fire/rescue apparatus and equipment. The class specification specifically requires the successful completion of a physical examination.

On December 21, 2006, Appellant was given an examination at the Montgomery County, Maryland, Fire and Rescue Occupational Medical Service clinic. At that time, it was determined that Appellant was being treated for enuresis<sup>1</sup> Appellant was being given imipramine for this condition.

After Appellant's initial examination, medical records were requested from Appellant's treating urologist. The medical records received from Appellant's treating urologist indicated that Appellant had a long standing history of nocturnal enuresis. Attempts to control the enuresis with DDAVP (vasopressin) were unsuccessful. Appellant was then switched to Tofranil (imipramine) therapy of 50 mgm on July 31, 2006. Appellant subsequently reported to Appellant's urologist on December 22, 2006, that Appellant's medication was not working as well as it had in previous months and the imipramine regimen was increased to 75 mgm at bedtime.

Dr. A, a medical examiner for the Montgomery County, Maryland Fire and Rescue Service, reviewed the medical information provided by Appellant's urologist on January 25, 2007, and determined that Appellant was "Not Fit for Duty" as a Firefighter with Montgomery County. In making this determination, Dr. A utilized the medical standards embodied in the National Fire Protection Association (NFPA) 1582: Standard on Comprehensive Occupational Medical Program for Fire Departments (NFPA 1582), 2003 edition. NFPA 1582 medical standards, according to Dr. A, have been adopted by Montgomery County, Maryland for its Fire and Rescue Service. Dr. A stated that Appellant was disqualified under NFPA 1582, Section 6.22, Chemicals, Drugs and Medications, which indicates that an individual's medical condition shall be deemed a Category A medical condition if it requires chronic or frequent treatment with sedative-hypnotics or any chemical, drug, or medication that results in a person not being able to safely perform essential job tasks. Dr. A asserted that a Class A disqualification under NFPA 1582 medical standards is considered by NFPA to be an absolute bar to employment as a Firefighter.

Major side effects of imipramine, the drug Appellant is taking for Appellant's enuresis at bedtime each night, are sedation and postural hypotension according to Dr. A. Therefore, Dr. A concluded that Appellant would be unable to take Appellant's medication if Appellant was employed as a Firefighter because Appellant would need to remain alert and not sedated for periods of 24 hours or longer. Moreover, according to Dr. A, Appellant would be unable to safely drive a county vehicle if sedated due to the medication. Dr. A noted that the Fire and Rescue Service schedules each career Firefighter for 24-hour shifts and is not able to accommodate shorter work schedules. Based on this, Dr. A concluded that Appellant was ineligible for employment with the Fire and Rescue Service.

On January 31, 2007, the OHR Director notified Appellant that the OHR Director was withdrawing Appellant's conditional offer of employment as a Firefighter/Rescuer I (Recruit) because the medical examiner determined that Appellant was not medically able to perform the duties of the position. This appeal followed.

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<sup>1</sup> Enuresis is nocturnal incontinence.

**POSITIONS OF THE PARTIES**

**Appellant:**

- Appellant acknowledges that Appellant suffers from enuresis but states that Appellant is not suffering to the same extent as when examined by the County’s Fire and Rescue Occupational Medical Service, as Appellant’s imipramine has been increased to 75 mgm at bedtime.
- Appellant states that Appellant has been a volunteer firefighter at a municipal Fire Department for one and a half years. During that time, Appellant asserts that there has never been a recorded instance of Appellant’s problem. There are ways to ensure that Appellant does not encounter this problem, such a setting an alarm. Appellant notes that there have been many times calls have been dispatched for Appellant’s engine house during sleeping hours and Appellant has never had a problem waking up and doing the task at hand. Appellant also notes that while on Appellant’s imipramine regiment Appellant has spent three to four nights a week at Appellant’s volunteer fire house.
- Appellant states that Appellant understands the decision Dr. A made. Although Appellant does not agree with the decision, Appellant respects it. Appellant asserts that Appellant plans to have Appellant’s problem completely taken care of and reapply for the position of Firefighter Recruit and subsequently pass the pre-employment evaluation.

**County:**

- The continual use of imipramine, a sedating medication, renders Appellant unable to perform the essential duties of a County Firefighter. Appellant would be unable to drive safely a County vehicle if sedated due to Appellant’s medication.

**APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002), Section 8, *Medical Examinations and Reasonable Accommodation***, which states in applicable part:

**8-3. Medical requirements for employment.**

- (a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position.

...

**8-6. Required medical examinations of applicants; action based on results of required medical examinations.**



(b) *Medical and physical requirements for job applicants.*

- (1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class.

**ISSUE**

Was the County justified in rescinding the conditional offer of employment made to Appellant?

**ANALYSIS AND CONCLUSIONS**

It is undisputed that Appellant takes a medication for Appellant's condition which produces sedation. As a Firefighter, Appellant is required to be mentally alert when responding to a call and able to operate a vehicle. This Appellant cannot do if Appellant is sedated.

Appellant claims that Appellant has worked for a municipal Fire Department for one and a half years and never had a problem. Appellant indicates that Appellant sets an alarm if Appellant needs to wake up and that Appellant has been dispatched from Appellant's engine house during sleeping hours and never had a problem waking up and doing the task at hand. However, the Board notes that Appellant has only been on imipramine since July 2006. Moreover, Appellant had to have Appellant's dosage increased to 75 mgm regimen of imipramine on December 22, 2006 as the lower dosage was not working as well as it had in previous months. Thus, at the time that the medical examiner, Dr. A, made Dr. A's determination concerning Appellant, based on the medical records provided from February 1, 2006 through December 22, 2006, there was nothing to indicate that the higher level dosage, which Appellant had just begun to use, would not have a sedating effect on Appellant.

Therefore, based on the record of evidence before the Board, the Board finds that it was reasonable for Dr. A to conclude that because of the sedative effects of imipramine, Appellant was not fit for duty as a Firefighter, as the continual use of sedating medication would render Appellant unable to perform the essential duties of a County Firefighter. Accordingly, the Board finds that the OHR Director was justified in rescinding Appellant's conditional offer of employment.

**ORDER**

Based on the above, the Board denies Appellant's appeal of OHR's rescission of Appellant's conditional offer of employment as a Firefighter/Rescuer I (Recruit).

# **APPEALS PROCESS**

## **GRIEVANCES**

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

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

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

During fiscal year 2007, the Board issued the following decisions on appeals concerning grievance decisions.

# **TIMELINESS AND GRIEVABILITY**

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

### **DECISION ON APPELLANTS' AMENDED GRIEVANCE AND ON THE COUNTY'S MOTION TO JOIN NECESSARY PARTIES**

On May 25, 2006, Appellants filed an Amended Grievance Statement in this appeal. One amendment challenges how the County filled the positions of Correctional Supervisor – Sergeant, alleging that instead of promoting the Master Correctional Officers (MCOs) into the new Sergeant positions, the Office of Human Resources (OHR) Director should have done either a position reclassification (without an increase of annual pay) or an occupational class title change and grade reallocation (without an increase of annual pay). Appellants also challenged the bona fides of the competitive examination process through which all of the MCOs were promoted to the Correctional Supervisor – Sergeant positions. As relief, Appellants urged the Board to vacate the Correctional Supervisor – Sergeant competitive examination process. According to Appellants, such a course of action would result in the rescission of the 10% pay increase all MCOs received upon their promotion to Sergeant.

Another amendment added as one of the complaints in the grievance the promotion of four Supervisory Sergeants to Lieutenants. Appellants urged the Board to vacate the follow-on competitive examination process that resulted in selected Sergeants being promoted to Correctional Shift Commander – Lieutenant, Grade 24.

In response to Appellants' amendments, the County has filed a Motion to Join Necessary Parties. The County seeks to add forty-three current Sergeants and four Lieutenants as parties to the instant appeal. In addition, the County seeks to add the affected employees' union, Municipal and County Government Employees Organization, United Food and Commercial Workers, Local 1994 (MCGEO), as a party to the instant appeal.

Appellants were provided with the right to respond to the County's Motion but failed to do so.

### **FINDINGS OF FACT**

OHR established the new class of Correctional Supervisor – Sergeant, Grade 22, effective April 17, 2005, in the Department of Correction and Rehabilitation (DOCR). A total of 44 Sergeant positions were created. Subsequently, DOCR held a competitive promotional process to fill the new Sergeant positions. All 44 Master Correctional Officers, Grade 19, applied for the vacant positions. On June 12, 2005, DOCR promoted 44 MCOs to the rank of Sergeant and provided them with a 10% increase in salary.

Thereafter, DOCR promoted four of the new Sergeants to the rank of Lieutenant, Grade C1.<sup>1</sup> Sergeant A, Sergeant B and Sergeant C were promoted effective November 13, 2005 and Sergeant D was promoted effective March 5, 2006.

The County asserts in its Response that the four newly promoted Lieutenants received a 10% increase in pay upon promotion as it has been the County's practice since 2001 to grant a 10% increase in salary when an employee receives a promotion of 2 or more grades.

### **APPLICABLE REGULATION**

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

#### **34-9. Grievance procedure.**

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

(1) A grievance may be dismissed by the OHR Director if it is not filed within 20 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; . . .

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- As previously noted, Appellants filed no opposition to the County's motion.

#### **County:**

- The County argues that based on case law, it is necessary to join the forty-seven employees because their rights or employment could be adversely affected by the Board's decision in the instant appeal.
- The County notes that MCGEO, Local 1994, is the exclusive representative of the majority of the affected County employees and should be joined as a party because any change involving a contract right would constitute an unfair practice.

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<sup>1</sup> The Board takes official notice of the fact that effective FY 06 the County has established a separate pay scale for Correctional Management. Instead of the position of Lieutenant being a Grade 24 it is now Grade C1 on the Uniformed Correctional Management Salary Schedule.

## ISSUES

1. Has the County shown good cause to join the forty-seven employees as parties to the instant case?
2. Has the County shown good cause to join MCGEO as a party to this case?

## ANALYSIS AND CONCLUSIONS

### There Is No Need To Join The Forty-Seven (47) Employees As Parties.

- A. That Portion Of The Amended Grievance Challenging The Promotional Process That Led To The Promotion Of 44 MCOs To The Rank Of Sergeant Is Untimely.

While the Board agreed to allow Appellants to amend their grievance, the Board never agreed to allow the Appellants to add what would otherwise constitute untimely allegations. In Appellants' original Grievance Statement, filed with their grievances on July 5, 2005, Appellants indicated that they were "adversely affected by the improper, inequitable, and/or unfair application of compensation policy, including the improper application of [their] salary." The Grievance Statement also indicated that

[t]his Grievance stems from, *inter alia*, the June 12, 2005 promotion of employees with a rank of MCO to a rank of Sergeant. The newly promoted Sergeants received a ten percent (10%) pay increase and, by way of the June 12 promotion, were given the same number of promotions leading up to their promotion as Sergeant as Grievant and/or other Lieutenants had leading up to a promotion as Lieutenant. The salaries, therefore, as compared between Grievant and the newly promoted Sergeants are improperly compressed. Moreover, when the newly promoted Sergeants are promoted to the rank of Lieutenant, they will receive another ten percent (10%) pay increase, so that many Sergeants will have greater salaries than Lieutenants. It is estimated that as a result of the June 12 Sergeant promotions, sixty-five percent (65%) of the Sergeants stand to have greater salaries than thirty-one percent (31%) of the Lieutenants.

Thus, it is clear from the foregoing statement that, as of July 5, 2005, Appellants were on notice about the competitive promotion process that led to the promotion of the 44 MCOs. However, they chose not to grieve that process at the time. Rather, they grieved the resulting pay compression. Therefore, the Board finds that the portion of the Amended Grievance that seeks to challenge the promotional process<sup>2</sup> leading to the MCOs being

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<sup>2</sup> Based on the same reasoning, the Board finds those portions of the Amended Grievance which seek to argue that OHR should have reclassified the MCOs to the rank of Sergeant or OHR should have implemented an occupational class title change and grade

promoted to Sergeants is untimely and is therefore dismissed.

- B. That Portion Of The Amended Grievance That Challenges The Promotional Process That Elevated 4 Sergeants To Lieutenants Is Untimely.

As previously noted three Sergeants, Sergeant A, Sergeant B and Sergeant C, were all promoted to the rank of Lieutenant on November 13, 2005. Sergeant D was promoted to the rank of Lieutenant on March 5, 2006. All four of these promotions occurred more than 20 calendar days before Appellants filed their amendment to their consolidated grievance on May 25, 2006. Accordingly, the Board finds that the portion of the amended grievance that seeks to challenge the promotional process that led to the elevation of four Sergeants to the rank of Lieutenant is untimely.

**There Is No Need To Join MCGEO As A Party.**

The only rationale that the County gave for joining MCGEO as a party to the instant appeal is that it is the exclusive representative for the Sergeants at DOCR. As the Board has determined not to join any of the Sergeants to the instant appeal, there is no need to join MCGEO.

**ORDER**

On the basis of the above, the Board finds that the County has failed to show good cause as to why the 47 DOCR employees should be joined as parties to the instant appeal. Likewise the Board finds that the County has failed to show good cause as to why MCGEO should be joined as a party. Therefore, the Board denies the County's Motion to Join Parties.

Consistent with its determinations in this Decision, the Board hereby dismisses that portion of the Amended Grievance which seeks to challenge the promotional process which led to the promotion of 44 MCOs to the rank of Sergeant on June 12, 2005. The Board is also dismissing those portions of the Amended Grievance which seek to argue that the MCOs should have been reclassified to the rank of Sergeant or OHR should have implemented an occupational class title change and grade reallocation to elevate the MCOs to the rank of Sergeant.

Likewise, the Board hereby dismisses that portion of the Amended Grievance which seeks to challenge the promotional process that led to the elevation of four Sergeants to the rank of Lieutenant. The Board will however consider the issue of how the setting of base pay for the four newly promoted Lieutenants may have exacerbated the alleged pay compression of the Appellants.

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reallocation to elevate the MCOs to the rank of Sergeant are untimely filed and will be dismissed.

# **PAY COMPRESSION**

## **CASE NO. 06-03**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the appeal of the Appellants' consolidated grievances concerning alleged pay compression.

### **FINDINGS OF FACT**

#### **Background**

By memorandum dated June 30, 2003, the Municipal and County Employees Organization, United Food and Commercial Workers, Local 1994 (MCGEO or union) requested the Office of Human Resources (OHR) conduct a complete grade level review of the Correctional Officer occupation in light of the transition to the new Montgomery County Correctional Facility. At the time of the request, the Correctional Officer occupation consisted of three non-supervisory classes (Correctional Officers I, II & III), one lead work class (Master Correctional Officers), and two supervisory classes (Correctional Shift Commanders, also known as Lieutenants, and Correctional Team Leaders, also known as Captains). The Master Correctional Officer (MCO) class was assigned to Grade 19 and the Lieutenant class was assigned to Grade 22.

OHR conducted the study and proposed the creation of a new class – Correctional Supervisor – Sergeant, assigned to Grade 22. It also recommended that the Lieutenant class be assigned to Grade 24. In a memorandum dated January 12, 2005, OHR forwarded to the Board for its review the new occupational class of Correctional Supervisor – Sergeant.<sup>1</sup> OHR subsequently informed the Board that a total of 42 new MCO positions would be created and that the MCO class would continue to exist only for the current employees, if any, who did not advance to the Sergeant class and would be abolished when no longer populated.<sup>2</sup> By memorandum dated March 31, 2005, the Board indicated to OHR that it had no objection to the establishment of the new class, but requested that OHR

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<sup>1</sup> Pursuant to Section 9-3(b)(3) of the Montgomery County Personnel Regulations, 2001, as a rule the OHR Director must notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the new class.

<sup>2</sup> In its Response, the County states that “[a]lthough there was much discussion about abolishing the MCO class, MCO remains a part of the County’s classification system.” The Board is at a loss to explain this statement given the fact that the OHR Director affirmatively assured the Board that the MCO class would be abolished once it was no longer populated.

report back to the Board once it had accomplished the promised actions set forth in its correspondence to the Board. OHR never provided any report to the Board as requested.

In a memorandum dated April 14, 2005, the OHR Director informed the Director of the Department of Correction and Rehabilitation (DOCR) and the President of MCGEO that the OHR Director was establishing the new class of Correctional Supervisor – Sergeant, Grade 22, and reallocating the position of Correctional Shift Commander – Lieutenant from Grade 22 to Grade 24. The effective date of this decision was April 17, 2005.

The County subsequently created 44 Sergeant positions. DOCR conducted a promotional process and the entire class of Master Correctional Officers applied and were selected for the Sergeant positions. On June 12, 2005, DOCR promoted the MCOs to the rank of Sergeant. As the new Sergeant class was more than two grades above the MCO class, pursuant to a provision of the union contract, all selectees received a 10% increase in salary.

On June 28, 2005, the Montgomery County Council adopted Resolution No. 15-1063, which had been recommended by the Chief Administrative Officer (CAO). The purpose of the resolution was the approval of a separate salary schedule for uniformed correctional managers at the ranks of Lieutenant and Captain.<sup>3</sup> The CAO's recommendation was based on "consideration of salary increases given to County correctional officers under the current collective bargaining agreement and is intended to establish, retroactive to January 9, 2005, compensation standards comparable to other County public safety managers."

Thereafter, DOCR promoted four of the new Sergeants to the rank of Lieutenant, Grade C1. Ms. A, Mr. B and Mr. C were promoted effective November 13, 2005, and Mr. D was promoted effective March 5, 2006. According to the County, each of these employees received a 10% increase upon promotion to the rank of Lieutenant. The County acknowledges that based on these promotions some of the more senior Lieutenants are making less than some newer Lieutenants. The County states that previously MCOs moved to the rank of Lieutenant and received a 10% raise. The more senior Lieutenants did not go through the additional rank of Sergeant and thus did not receive the Sergeant pay increase granted to the four recently promoted Lieutenants. To address the "perceived" inequities, the County proposes adjusting the Lieutenants' pay based on a \$100 minimum separation based on seniority as set forth in Exhibit 17 to its Response.<sup>4</sup> The County states that this proposal would provide a more balanced pay symmetry within the Lieutenant class.

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<sup>3</sup> Under the new salary schedule, instead of the position of Lieutenant being a Grade 24 it is now designated as Grade C1.

<sup>4</sup> The County asserts in its Supplemental Response that it has an established practice of rectifying pay inequities that involve less senior employees having a higher base salary than other similarly situated employees.



## Procedural History

On July 5, 2005, Appellants' counsel filed grievances with OHR on behalf of eleven Lieutenants in DOCR, over the June 12, 2005 promotion of employees with the rank of MCO to the newly created rank of Sergeant. Appellants alleged that the 10% pay increase provided to the Sergeants upon promotion purportedly improperly compressed the salary difference between them and Appellants.

On August 8, 2005, OHR's Director notified the Appellants' counsel that the OHR Director was consolidating their eleven grievances with three 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 Appellants subsequently 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 X,<sup>5</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, DOCR, concerning the status of the consolidated grievances. Appellants' counsel asserted that Appellants' 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 Appellants' 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 the DOCR Director regarding the status of the consolidated grievances. Appellants' counsel asserted that Appellants' counsel never received a response. Thereafter, Appellant's counsel

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<sup>5</sup> In grievance X, 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.

filed the instant appeal with the Board. 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.<sup>6</sup>

The County filed its response to the Board's Show Cause Order and Appellants' counsel filed a reply. The Board determined that the County had failed to show good cause for its total inaction on the consolidated grievances. Because of the seriousness of the violations of the grievance procedure by the County, the Board concluded it should assert jurisdiction. The Board granted Appellants' request to file an amendment to their original consolidated grievances.

On May 25, 2006, Appellants filed an Amended Grievance adding additional allegations. The Board subsequently dismissed portions of the Amended Grievance based on untimeliness. Specifically, the Board dismissed those portions of the Amended Grievance which sought to challenge the process by which the MCOs were promoted to Sergeants and the process by which four Sergeants were promoted to the rank of Lieutenant. The Board indicated that although it was dismissing the challenge to the promotional process it would consider the issue of how the setting of base pay for the four newly promoted Lieutenants may have exacerbated the alleged pay compression of the Appellants.

Appellants subsequently requested reconsideration and the County filed an opposition. The Board affirmed its initial determination to dismiss portions of the Amended Grievance as untimely.

### **APPLICABLE LAW AND REGULATIONS**

**Montgomery County Charter, Article 4, Section 401, Merit System**, which states in applicable part:

The merit system shall provide the means to recruit, select, develop and maintain an effective, nonpartisan, and responsive work force with personnel actions based on demonstrated merit and fitness. Salaries and wages of all classified employees in the merit system shall be determined pursuant to a uniformed salary plan.

**Montgomery County Code, Section 33-5(b), Merit system principles**, which states in applicable part:

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<sup>6</sup> Pursuant to Section 34-9(a)(3) of the grievance procedure, "[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."

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

**Montgomery County Code, Section 33-11, Classification; salary and wage plans**, which states in applicable part:

(b) *Uniform salary plan.*

- (1) The uniform salary plan consists of:

. . .

- (F) a general salary schedule for all other employees.<sup>7</sup>

. . .

- (10) The Chief Administrative Officer must ensure that all occupational classes that require comparable experience and have comparable duties, experience and authority are paid comparable salaries that reflect the relative value of the services performed, . . .

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

**34-9. Grievance procedure.**

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

- (1) A grievance may be dismissed by the OHR Director if it is not filed within 20 calendar days after:

- (A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; . . .

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<sup>7</sup> The Board notes that this portion of the Code was amended by Expedited Bill No. 12-05, which added a salary schedule for uniformed correctional managers to the MCPR and established factors on which the CAO must base any recommended amendment to the salary schedule. This modification of the Code became effective on July 10, 2005, **5 days after** the consolidated grievances were filed. Therefore, the changes have no bearing on the instant appeal. However, the actual creation of a new uniformed correctional manager salary schedule occurred on June 28, 2005, **prior** to the filing of the instant consolidated grievances.

**(d) *Burden of proof.***

- (1) The County has the burden of proof in a grievance on:
  - (A) a recovery of an overpayment to an employee or recovery of an employee debt to the County under Section 10;
  - (B) a delay of service increment under Section 12;
  - (C) an involuntary or coerced resignation under Section 28;
  - (D) a termination under Section 29;
  - (E) a demotion or termination due to RIF under Section 30;
  - (F) an involuntary demotion under Section 31; and
  - (G) a disciplinary action under Section 33.
- (2) The grievant has the burden of proof in a grievance on any other issue.

**POSITIONS OF THE PARTIES<sup>8</sup>**

Appellants

- Most of the pay compression experienced by current Lieutenants stems from the fact that the County has been behind the labor market for many years. An OHR memorandum, dated October 17, 1988, found that Montgomery County's entry level for Correctional Officer classes ranked 6<sup>th</sup> of 9 jurisdictions surveyed.
- In FY 03, employees in the bargaining unit received a 3.75% wage adjustment while Lieutenants received a 2.00% wage adjustment. Thus, lower graded, less senior employees received a 1.75% greater increase in salary than higher graded, more senior Lieutenants.
- By adding the rank of Sergeant between the ranks of MCO and Lieutenant, the County provided the opportunity for MCOs to obtain an additional 10% pay increase not accorded to those employees previously promoted from MCO to Lieutenant. This means that when the newly promoted Sergeants become Lieutenants and receive another 10% pay raise, they will have greater salaries than many of the current incumbent Lieutenants.

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<sup>8</sup> The Board has previously dealt with certain positions of the parties in its decisions on both parties' Motions for Reconsideration and its decision on the County's Motion to Join Necessary Parties. The Board will not reiterate those positions in this Decision.

- The County impermissibly sat on the consolidated grievances and consciously refused to process them. Moreover, the OHR Director engaged in extensive settlement negotiations with Appellants without notifying their counsel of the negotiations. Such bad faith on the part of the County warrants an award of sanctions against the County.

### County

- The Board was provided with the opportunity to review and comment prior to the County creating the Sergeant class. As the overseer of the County's merit system, the Board was aware of the alternatives available for filling the new class and supported OHR's recommendation.
- The County acknowledges that previously MCOs moved directly to Lieutenant and received a 10% increase. The more senior Lieutenants did not go through the additional Sergeant rank and thus did not receive the Sergeant pay increase before being promoted to Lieutenants. To correct the perceived inequities, the County recommends adjusting the Lieutenants' pay based on a \$100 minimum separation based on seniority. This proposal would provide a more balanced pay symmetry within the Lieutenant class.
- Appellants' counsel alleges without substantiation that the County wrongfully attempted to negotiate a settlement with Appellants' counsel's clients. Appellants approached the Director of OHR about settling this dispute and the County Attorney's Office was not involved in these settlement discussions.

### ISSUE

Does the alleged pay compression which occurred when the new occupational class of Correctional Supervisor – Sergeant was filled and subsequent Sergeants promoted to the rank of Lieutenant violate applicable law or regulation?

### ANALYSIS AND CONCLUSIONS

#### **The Board Will Not Address Issues Of Alleged Pay Compression Which Predate The Filing Of The Consolidated Grievances.**

Appellants have submitted a report indicating that most of the alleged pay compression experienced by current Lieutenants stems from the fact that the County has lagged behind the labor market for some years. For example, it cites a 1988 study indicating that Montgomery County lagged behind several other neighboring jurisdictions. It also notes that in FY 03, employees in the bargaining unit received a 3.75% raise while the Lieutenants received a 2% raise. The report goes on to state that higher pay adjustments within the bargaining unit are a common cause of compression on management positions outside the bargaining unit.<sup>9</sup> The report then recommends that the

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<sup>9</sup> The Board notes that similar pay policy differences occur in the Federal Government. For example, for years the Federal Government has capped the pay of its Senior Executives while granting cost-of-living adjustments to their subordinates.

Board provide various retroactive adjustments to the Appellants, including a 10% within-grade adjustment to any Lieutenant who did not receive such an adjustment retroactive to December 4, 1988. It also urges a 1.75% increase, retroactive to FY 03, to alleviate the compression caused by the higher pay increase for ranks below the Lieutenant level.

The Board will not address such issues as they predate the filing of the consolidated grievances. Pursuant to the grievance procedure, a grievance must be filed within 20 calendar days of when the employee knew or should have known of the occurrence of the action on which the grievance is based. There is no contention by the Appellants that they did not know about these actions within 20 days of when they took place. Thus, the Board will only consider matters which occurred within 20 calendar days before the Appellants filed their consolidated grievances on July 5, 2005.

**The Board Rejects The County's Assertion That It Has An Obligation To Instruct OHR On How To Fill Positions.**

The County argues that when the Board indicated to OHR that it had no objection to the creation of the Sergeant class, the Board could have recommended a reclassification of the MCOs or a class title change/and grade reallocation. The County states that as the overseer of the County's merit system, the Board was aware of the theoretical alternatives and supported OHR's recommendation. The County, however, does not point to any law or regulation to back its argument.

The Board totally rejects the County's argument. The Board approved the creation of the Sergeant class, with a caveat that OHR report back to it when certain actions it had promised to do were accomplished. The Board never approved how OHR was going to fill the Sergeant positions.

The Board is required by regulation to review all new occupational classes. No where in law or regulation is the Board empowered to instruct OHR on how any new occupational class is to be filled.

**Although The County Indicates There Are Perceived Inequities With Regard To Appellants' Pay, The Board Finds That The Pay Compression Alleged Does Not Violate Any Law Or Regulation.**

Pursuant to MCPR, Section 34-9(d)(2), Appellants bear the burden of proof in this matter. In their consolidated grievance, Appellants cite to Section 401 of the Charter of Montgomery County for support. However, that section simply provides that all salaries will be determined pursuant to a uniformed plan. Appellants do not explain how this law has been violated. As of June 28, 2005, Appellants have been on a uniform plan for correctional management. Prior to that, they were on a uniformed salary schedule applicable to all employees not on their own specific plan.

Appellants also cite to Section 33-5 of County Code which provides that merit system employees are to be provided compensation which is consistent with standard comparability with other public agencies and the private sector. As previously noted, on

June 28, 2005, the Montgomery County Council adopted Resolution No. 15-1063, which established a separate salary schedule for uniformed correctional managers at the ranks of Lieutenant and Captain. The CAO recommended this change to the Council based on “consideration of salary increases given to County correctional officers under the current collective bargaining agreement and is intended to establish, retroactive to January 9, 2005, compensation standards comparable to other County public safety managers.” While Appellants are not happy with the new salary schedule established, they have failed to show that it violates Section 33-5 of the County Code. Specifically, Section 33-5 requires that compensation be consistent with standard comparability with other public agencies and the private sector. It does not require that compensation be identical. There is no requirement contained in applicable law or regulation that unrepresented employees receive identical benefits as those received by represented employees as a result of collective bargaining.

Section 33-11(b)(10) of the Code requires that the CAO ensure all occupational classing involving comparable duties are paid comparable salaries that reflect the relative value of the services performed. Again, it does require that compensation be identical.

The Board is cognizant of the fact that the County has indicated it is aware of “perceived” inequalities and proposed a solution.<sup>10</sup> However, the Board lacks the authority to grant Appellants relief, absent a showing that their salary is somehow violative of law or regulation. This the Appellants have failed to do. The Board has carefully reviewed the various portions of the County Code and MCPR bearing on the instant case and cannot find how the pay compression alleged violates any provision of applicable law or regulation. Therefore, the Board will not sustain the Appellants’ consolidated grievances.

**The Board Has Determined That The County Should Be Sanctioned For Its Conduct In This Case.**

At the time Appellants filed their Reply to the County’s Response to the Board’s Show Cause Order, they sought sanctions based on the bad faith shown in the handling of their consolidated grievances.<sup>11</sup> At the time the Board issued its Decision on Show Cause Order, it indicated it was deferring any decision on the request for attorney fees as a sanction for the County’s conduct.

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<sup>10</sup> The Board notes that the County has asserted that in “public safety occupations, the County has an established practice of rectifying pay inequities that involve less senior employees having a higher base salary than other similarly situated employees.” Based on this assertion, the Board is at a loss to explain why the County has not acted to rectify the perceived inequities it indicates exist. Nothing in this decision is meant to estop the County from moving forward to adopt its proposed solution.

<sup>11</sup> In support of this request for sanctions against the County, Appellants’ counsel submitted a client ledger for the period July 31, 2005 until the date of Appellants’ counsel’s Reply to the County’s Response to the Board’s Show Cause Order. Appellants’ counsel’s fees for the period were \$2,502.50.

In its Decision on Show Cause Order, the Board stated:

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.

The Board holds OHR responsible for the serious violations of the grievance procedure. OHR ignored the provisions of the grievance procedure and failed to ensure that the consolidated grievances were addressed in a timely manner.

At the time of its Show Cause Decision, the Board also declined to address the issue raised by Appellants’ counsel regarding the OHR Director’s direct dealings with the Appellants in lieu of through their counsel. Specifically, the OHR Director acknowledged that even though the OHR Director was aware that Appellants were represented by counsel, the OHR Director entered into direct negotiations with Appellants without the knowledge of their counsel. According to the County’s Response, submitted by the OHR Director, “[the OHR Director] was of the view, held in good faith, that [the OHR Director] could engage in direct negotiations with the eleven Grievants if they initiated the discussions.”

The Board will now address this matter. The Board notes that the County has filed as an exhibit a letter from the County Attorney to Appellants’ counsel indicating that no one in the County Attorney’s office acted inappropriately in this matter. Significantly, the County Attorney stated:

The Director of OHR communicated with me regarding your clients’ interest in settling the matter and I discussed possible settlement options with [the OHR Director], . . . As some of the employees in [sic] group were supposedly not represented while others were represented by you, I advised the [D]irector that I could not communicate with any employee who was represented without consent of counsel. When the OHR [D]irector determined that the employees [the OHR Director] was to meet with were still represented, [the OHR Director] met with them and no lawyer from this office participated.

. . .

We also recognize that represented persons who are acting without their attorney’s knowledge or involvement must be counseled to seek advice before giving up any legal right or acting in such a manner as to affect their legal position in an ongoing dispute. In short, this office cannot counsel our client to take advantage of the other party based on that party’s decision to forego using its attorney in negotiations. Similarly, this office cannot



counsel our client to use communications with a represented person to obtain privileged information.

The Board finds that it was totally inappropriate for the OHR Director to engage in settlement negotiations directly with Appellants after the OHR Director determined they were still represented by counsel. If the Appellants had been represented by the union, the OHR Director would have been guilty of an unfair labor practice in conducting direct dealings with them without their representative present. The OHR Director, as the head of human resources, should serve as a role model for others. Instead, it appears, as the County Attorney aptly put it, that the OHR Director attempted “to take advantage of the other party based on that party’s decision to forego using its attorney in negotiations.”

Accordingly, based on the foregoing, the Board will sanction the County for the manner in which it handled the processing of the consolidated grievances. The County is ordered to pay Appellants’ counsel \$2,502.50 in attorney fees.<sup>12</sup>

**ORDER**

Based on the above, the Board denies Appellants’ consolidated grievances.

The Board orders the County to pay \$2,502.50 to Appellants as a sanction for its conduct in this case.

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<sup>12</sup> As this is a sanction not an award of attorney fees, the Board does not need to consider the factors for an award of attorney fees found at Section 33-14(c)(9) of the County Code. Rather, the Board is awarding these fees pursuant to its authority under Section 33-14(c)(8) and/or (c)(10) of the Code.

# **GRIEVABILITY**

## **Case No. 06-04**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Chief Administrative Officer (CAO) to deny on the merits Appellant's grievance with respect to Appellant's placement on sick leave restriction.<sup>1</sup>

### **FINDINGS OF FACT**

Appellant is a Senior Information Technology Specialist. At all times relevant to this appeal, Appellant was employed by the Department of Technology Services (DTS). On February 6, 2004, Appellant's Division Chief sent an e-mail to Appellant, indicating that it had come to the Division Chief's attention that Appellant refused to provide help desk support at the Board of Elections on primary day, March 2, 2004. Appellant's Division Chief indicated in the e-mail that the Division Chief had learned that Appellant would be scheduling a doctor's appointment to avoid the required duties. The Division Chief informed Appellant that Appellant would be detailed to the Board of Elections on March 2, 2004 to provide the required support.

Appellant responded by e-mail dated February 6, 2004, to the Division Chief. Appellant indicated Appellant already had doctors' appointments scheduled for March 2, 2004. Appellant also stated that Appellant had previously discussed with Appellant's supervisor about not working the election and wanted to know why it was an issue now. Appellant noted Appellant's long hours of work on the election project without a vacation and the fact that on the previous primary and general election days Appellant had worked 22 and 20 hour days respectively.

Appellant received Appellant's semi-annual performance evaluation on February 24, 2004. During the evaluation, Appellant's supervisor did not mention anything related to Appellant's use of sick leave, nor did the supervisor indicate that Appellant's absences were impacting Appellant's job performance and Appellant's projects were behind schedule.

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<sup>1</sup> Appellant first came before this Board with regard to the instant grievance on December 22, 2004. In the original appeal, Appellant challenged the decision by the CAO to dismiss Appellant's grievance as untimely in part and moot in part. In a Decision dated April 4, 2005, the Board affirmed the dismissal of portions of the grievance as untimely but remanded that portion of the grievance dealing with the placement on sick leave restriction for a decision on the merits. The Board is concerned that it took the Office of Human Resources (OHR) almost an entire year to issue a Step 3 Decision after the remand.

However, on February 25, 2004, Appellant's supervisor issued Appellant a memorandum, subject: Leave Restriction. In this memorandum Appellant was informed that there had been 11 occurrences of unscheduled absences over the last eight months totaling 102 hours. The memorandum also stated that several projects had fallen behind schedule and Appellant's attendance was one of the contributing factors. The memorandum also informed Appellant that beginning March 1, 2004, Appellant would be required to request all leave in advance, in writing. If Appellant took unscheduled leave, Appellant would be required to provide a medical certificate from a licensed physician upon Appellant's return to work. Failure to provide a medical certificate would result in Appellant being placed on leave without pay. The leave restriction would end on June 1, 2004 at which time Appellant would meet with Appellant's supervisor to evaluate Appellant's attendance. The memorandum indicated that Appellant could respond. According to Appellant, when Appellant's supervisor handed Appellant the sick leave restriction memorandum, Appellant's supervisor told Appellant that it was because Appellant refused to work the election that Appellant was being placed on the restriction. Appellant's supervisor states that the sick leave memorandum was based solely on Appellant's unscheduled absences and there was no retaliatory motive.

On March 15, 2004, Appellant filed a grievance alleging that several incidents constituted retaliation and harassment by DTS against Appellant for not volunteering to perform certain assignments, namely providing technical support for the primary election and handling of the Department of Liquor Control's ERD system project. The issue germane to this instant appeal is Appellant's placement on the sick leave restriction. As relief, Appellant sought, as applicable to the instant case, the lifting of Appellant's sick leave restriction.

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

Between March 1, 2004 and June 1, 2004, Appellant's leave records indicate that Appellant took a total of 158 hours of sick leave (of which 110 hours were charged to family sick leave). The sick leave restriction was lifted on June 1, 2004, because Appellant had either scheduled Appellant's absences in advance or supplied a doctor's certificate.

Appellant appealed the Division Chief's grievance response to the CAO. As previously noted, the CAO dismissed the grievance, finding several parts of the grievance were untimely. The CAO found that the placement on sick leave restriction was moot as the sick leave restriction expired on June 1, 2004.

Appellant appealed to the Board on December 22, 2004. As previously noted, the Board determined that the sick leave restriction was not moot and remanded the matter to the CAO for a Step 3 decision.

Over six months after the Board's remand, a Step 3 fact-finding meeting was held on October 20, 2005. During the Step 3 fact-finding meeting, Appellant indicated Appellant had in fact been sick with a gastrointestinal condition which caused the absences noted in the sick leave restriction and Appellant would have provided a doctor's note if requested to do so.

On March 15, 2006, the CAO issued a Step 3 decision, denying Appellant's grievance.

This appeal followed.

### **APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002), Section 17, Sick Leave**, which states in applicable part:

#### **17-9. Sick leave restriction.**

- (a) Before placing an employee on sick leave restriction, the supervisor must give the employee written notice and an opportunity to respond to the notice.

### **POSITIONS OF THE PARTIES**

#### **County:**

- The County acted consistent with MCPR Section 17-9 when it issued the sick leave restriction. Appellant was given 2 to 3 working days to respond which is sufficient time.
- Appellant's supervisor had a reasonable basis in fact for suspecting that Appellant was misusing or abusing Appellant's sick leave.
- The County's action in placing Appellant on sick leave restriction for three months was not retaliatory in nature.
- The CAO's designee, who conducted the Step 3 meeting, made written findings of fact on behalf of the CAO. As Appellant did not comment on the proposed findings of fact, Appellant cannot now argue that simply because the CAO did not personally attend the Step 3 meeting, the CAO could not make a determination regarding credibility.

#### **Appellant:**

- The County did not comply with MCPR Section 17-9, which requires a two-step process. First, an employee is to be given a written notice of the sick leave restriction and the opportunity to reply. Only after the employee is given a reasonable opportunity to reply, may the County actually impose the sick leave restriction. In the sick leave restriction notice provided to Appellant, the

- determination had already been made by the County as the notice affirmatively told Appellant that Appellant's sick leave restriction would begin on March 1, 2004.
- The leave restriction imposed by the February 25, 2004 memorandum went beyond what was authorized by Section 17-9. Section 17-9 allows the County to require a doctor's certificate to justify the use of sick leave, if the sick leave is not scheduled and approved in advance. However, the leave restriction issued to Appellant required that Appellant request all leave, not just sick leave, in advance in writing.
  - The Chief Administrative Officer, who did not attend the Step 3 grievance meeting, failed to resolve the direct conflict between Appellant's version of events and Appellant's supervisor's version.
  - Appellant is entitled to a hearing in connection with this appeal pursuant to Section 33-2 of the Montgomery County Code as there are disputed issues of fact.
  - The sick leave restriction should be struck from Appellant's record and Appellant should be awarded attorney's fees and other appropriate relief.

### ISSUE

Was the sick leave restriction reasonably justified and consistent with applicable regulatory provisions?

### ANALYSIS AND CONCLUSIONS

We agree with Appellant that placing an employee on sick leave restriction is a two-step process. The regulation requires that **before** the employee is placed on sick leave restriction, the employee is to be given a written notice and opportunity to respond. Only after being given this opportunity to respond may the County then place the employee on sick leave restriction. The County, however, in its notice to Appellant indicated it had already made the decision to place Appellant on sick leave restriction without even having heard any response Appellant might have otherwise made.

The Board finds that the opportunity to respond provided for in Section 17-9 is a significant part of the leave restriction process. This is particularly true as the sick leave regulation does not impose on a supervisor the requirement to counsel an employee on suspected misuse or abuse of sick leave before placing an employee on sick leave restriction. As noted by Appellant in the March 15, 2004 grievance, prior to receiving the February 25, 2004 sick leave restriction, Appellant's management had never discussed with Appellant Appellant's sick leave use or ever intimated that Appellant was suspected of sick leave abuse. When Appellant received Appellant's semi-annual performance evaluation on February 24, 2004, Appellant's supervisor did not mention anything relating to Appellant's use of sick leave, nor did Appellant's supervisor mention that Appellant's projects were behind schedule and Appellant's absences were impacting Appellant's job performance. Had management complied with Section 17-9 of the sick leave regulation and given Appellant a meaningful opportunity to reply before deciding to impose the sick leave restriction, Appellant would have had the chance to explain to management that Appellant was experiencing health problems and could supply a doctor's certificate if needed. Such an explanation would have served to negate the need to put Appellant on sick leave restriction.

## ORDER

On the basis of the above, the Board finds that the County failed to adhere to the provisions of Section 17-9 of the Montgomery County Personnel Regulations in placing Appellant on sick leave.<sup>2</sup> The County is ordered to expunge the sick leave restriction from Appellant's record.

In as much as Appellant prevailed, the Board authorizes a request for attorney fees. The Appellant must submit a detailed request for attorney fees to the Board, with a copy to the County Attorney, within **ten (10) calendar days** from receipt of this Decision. The County Attorney shall have **ten (10) calendar days** from receipt of the request to file a response. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, Section 33-14(c)(9).

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<sup>2</sup> Having found that the imposition of the sick leave restriction was inconsistent with the applicable regulation, the Board need not address whether the sick leave restriction was imposed in retaliation for Appellant's refusal to work on the election.

Likewise, the Board need not address Appellant's argument that Appellant is entitled to a hearing as a matter of law.

# **TIMELINESS**

## **Case No. 07-01**

### **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's Director, Office of Human Resources (OHR), to dismiss Appellant's grievance as untimely.

### **FINDINGS OF FACT**

Appellant serves as an Operations Manager with the Emergency Communication Center of the Police Department. Appellant indicates that in the course of performing Appellant's duties over the years, Appellant has conducted disciplinary investigations, referred complaints to the Internal Affairs Division, and assisted in investigations. Appellant also asserts that Appellant has represented the Department of Police in Internal Investigative Review panels and made recommendations regarding disciplinary action.

Appellant alleges that over the course of a number of years Appellant has been the target of repeated instances of false allegations, distorted representations, and discriminatory practice initiated by subordinate employees who also serve as shop stewards for the Municipal and County Government Employees Organization, United Food and Commercial Workers, Local AFL-CIO (MCGEO).<sup>1</sup> Appellant states that these allegations have been made in an attempt to intimidate and harass Appellant in the performance of Appellant's duties. According to Appellant, there have been several formal investigations and countless informal investigations into Appellant's conduct and behavior based on these allegations. Appellant asserts that recently the attacks have become more hostile.

On March 3, 2005, Mr. A, a MCGEO shop steward, filed a complaint with Internal Affairs,<sup>2</sup> indicating that Appellant had submitted improper time sheets for two pay periods. The complaint indicated that the matter should be resolved by termination and criminal prosecution for theft over \$500. By memorandum dated June 2, 2005, Captain B, Director, Internal Affairs Division, notified Appellant that the complaint was closed administratively. Appellant states that Appellant was neither interviewed nor advised of the complaint by Internal Affairs until after it was closed. Internal Affairs informed Appellant that the investigation into the complaint would be eligible for expungement in three years.

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<sup>1</sup> While Appellant has provided information regarding incidents dating back to 1998, the Board will only address those incidents that occurred in the more recent past in this decision.

<sup>2</sup> The complaint cited Ms. D, also a shop steward, as a witness.

Subsequently, on August 4, 2005, Appellant wrote the Chief of Police regarding the internal investigation. In the memorandum, Appellant alleged that the two shop stewards conspired to initiate an internal investigation against Appellant based on false allegations. Appellant indicated that Appellant believed these allegations were based on the shop stewards' personal animus towards Appellant in Appellant's professional capacity. Appellant wanted the two shop stewards to be held accountable for their actions. Appellant also requested that the investigation be expunged immediately or that it be placed in a limited access status.

On September 29, 2005, Assistant Chief of Police, Mr. C, responded to Appellant indicating that access to the internal investigation file would be only on a "need to know" basis. Mr. C stated that with regard to Appellant's request that the two employees who made the complaint be held accountable, it would be difficult to determine whether an allegation of wrongdoing was an untruthful statement. Mr. C also stated it would be unfair to prohibit an employee from filing a complaint against another employee sometime in the future.

On March 6, 2006, MCGEO filed a charge of prohibited practice based on Appellant's alleged conduct towards shop steward Ms. D. Specifically, MCGEO claimed that on January 5, 2006, Appellant verbally berated Ms. D because Ms. D was a shop steward. By memorandum dated March 22, 2006, MCGEO's Field Service Coordinator, Ms. E, provided union members with a copy of the alleged unfair labor practice (ULP) charge regarding Appellant's behavior. Ms. E indicated in her cover memorandum that Appellant's behavior was completely unacceptable and would not be tolerated by the union. She also stated that the union would update union members as the ULP went through the process.

On March 29, 2006, Mr. A sent an e-mail to Internal Affairs complaining about Appellant's outburst on the floor, involving Ms. D on January 5, 2006. Appellant indicates that an informal inquiry regarding this complaint was made to Appellant's supervisor. According to Appellant, Appellant's supervisor verified that the complaint lacked merit.

In a letter to the Chief Administrative Officer, dated April 20, 2006, the President of MCGEO, Mr. F, requested that Appellant be immediately removed from supervising any MCGEO bargaining unit employee. Mr. F indicated in his letter that the union had filed a request for an investigation into Appellant's "abusive conduct" pursuant to Article 52 of the collective bargaining agreement<sup>3</sup> and had also filed an ULP charge which was being

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<sup>3</sup> Article 52 of the collective bargaining agreement between MCGEO and Montgomery County provides that

[i]f the Union believes that a supervisory employee has engaged in abusive or intimidating behavior toward a unit member, the Union may file a confidential complaint with the Office of Human Resources. The Office of Human Resources will conduct a confidential investigation of the complaint, to be completed within 90 days.



held in abeyance pending the results of the Article 52 investigation.

On April 25, 2006, Appellant e-mailed Appellant's supervisor, Ms. G, regarding the prohibited practice charge (also referred to as the ULP charge) which had been mailed to every MCGEO member assigned to the Communications Division. According to Appellant, Appellant had recently obtained a copy of this prohibited practice complaint. Appellant informed Ms. G about Appellant's concern that the two shop stewards – i.e., Ms. D and Mr. A – could make untruthful statements and false charges against Appellant without being held accountable. Appellant stated to Appellant's supervisor that Appellant viewed the false allegations "as a form of retaliation, harassment and intimidation for the manner in which [Appellant] exercise[s] [Appellant's] role as a Manager in the Communications Division." Appellant went on to assert that these two shop stewards had created "a hostile work environment" for Appellant based on "the false charges and pattern of exaggerated accusations." In concluding the e-mail, Appellant stated:

I am requesting the protection of my employer, Montgomery County Government through you, from the on-going harassment that I am experiencing because it is my right to do so, and your responsibility to provide it. Please advise me what action, if any, you will be taking to address this matter. Thank You.

Ms. G subsequently told Appellant that Appellant's e-mail had been forwarded to Mr. C for response.

On April 27, 2006, Ms. G informed Appellant to expect a call from Mr. H in OHR to set up a meeting because he was conducting the Article 52 investigation. Appellant asserts that Appellant met with Mr. H after midnight on April 27, 2006. Appellant states that this was the first contact that Appellant had with anyone from the County to inform Appellant of the allegations lodged against Appellant by MCGEO. Appellant was allowed by Mr. H to read the file, which included the April 20, 2006 letter from Mr. F to the CAO, but was not allowed to make a copy of the file.

In an e-mail to Mr. H, dated May 2, 2006, subject: Article 52 Investigation, Appellant stated that Appellant had subsequently received a copy of the letter to the CAO from Mr. F dated April 20, 2006, seeking Appellant's removal from supervision of any MCGEO bargaining unit employee. Appellant also indicated that Appellant had just learned that the letter had also been mass mailed to all MCGEO bargaining unit employees in the Emergency Communications Division. Appellant indicated Appellant's concern that although Appellant was the subject of the Article 52 investigation, Mr. H had stated that Appellant would not be notified of the outcome of the investigation.

By e-mail dated May 12, 2006,<sup>4</sup> Mr. C responded to Appellant's April 25<sup>th</sup> e-mail to

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<sup>4</sup> Appellant indicates Appellant only received the e-mail on May 17, 2006, when Appellant returned to work.

Ms. G. In his response, Mr. C indicated that he could not prevent any other employee from making a complaint against Appellant. Appellant responded to Mr. C's e-mail, stating that Appellant wanted him to hold people accountable for making false statements against Appellant. Appellant noted that Appellant had been involved in processes where employees had been fired for making false statements. Appellant indicated Appellant would be filing a grievance in an attempt to have these concerns appropriately addressed.

On May 30, 2006, Appellant filed a grievance with OHR.<sup>5</sup> In the grievance, Appellant alleged that Appellant had been subjected to harassment, false and distorted allegations, and discriminatory practices initiated by subordinate employees who serve as shop stewards for MCGEO as well as by MCGEO President, Mr. F. As relief Appellant requested that management initiate an investigation into Appellant's allegations and take the necessary steps to hold employees accountable for making false statements and engaging in retaliatory and discriminatory practices against Appellant. Appellant also requested that the Department provide training to its executives in the recognition and eradication of harassment and discriminatory practices.

By memorandum dated June 2, 2006, the OHR Director determined that Appellant's grievance was not timely. The OHR Director indicated that all of the cited incidents giving rise to the grievance predated the grievance by well over 20 days. The OHR Director noted the letter from MCGEO President, Mr. F, was dated April 20, 2006. The OHR Director also cited the fact that the request for the Article 52 investigation from MCGEO was dated February 10, 2006. Finally, the OHR Director noted that the unfair labor practice that MCGEO filed against Appellant was dated March 6, 2006.

The OHR Director informed Appellant that Appellant had until June 16, 2006, to provide the OHR Director with any additional information or arguments Appellant wished the OHR Director to consider regarding the issue of timeliness. On June 13, 2006, Appellant requested an extension of time to provide additional information and it was granted. On June 28, 2006, Appellant provided an additional response, indicating that Appellant began the process of utilizing the grievance procedure by sending an e-mail to Appellant's immediate supervisor, Ms. G, on April 25, 2006, informing her of the history of allegations and misrepresentations lodged against Appellant by the union. Appellant stated that the union's conduct had been continuous over a period of time. Appellant asserted that what began as isolated incidents against Appellant over a period of time had, due to their repetition, become harassment.

By memorandum dated July 7, the OHR Director issued a final decision, finding that Appellant's grievance was untimely.<sup>6</sup> This appeal followed.

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<sup>5</sup> Appellant explained to Mr. H when Appellant hand-delivered the grievance to OHR, that Appellant's supervisor, Ms. G, was on vacation but would receive the grievance when Ms. G returned.

<sup>6</sup> In the final decision, the OHR Director indicated that because the OHR Director had determined that the grievance was untimely, the OHR Director did not need to decide whether the subject matter of the grievance, i.e., harassment and false allegations lodged by

## POSITIONS OF THE PARTIES

### Appellant:

- Appellant began the process of utilizing the grievance procedure by sending an e-mail to Appellant's immediate supervisor informing Appellant's immediate supervisor of the history of allegations and misrepresentations lodged against Appellant by Mr. F, Ms. D, and Mr. A. Appellant had recently obtained a copy of the ULP which had been massed mailed to every MCGEO member working in the Emergency Communications Center.
- In accordance with the grievance procedure, Appellant waited for a response from Mr. C, to determine whether the problem could be resolved. Upon receiving the response from Mr. C, Appellant filed the grievance within 20 calendar days.
- Appellant was unaware of several of the communications referenced in the OHR Director's final grievance decision, such as the April 20, 2006 letter from Mr. F to the CAO, until Appellant met with the OHR representative on April 28, 2006. Appellant had no way of knowing about these documents at the time they were written.
- The harassment Appellant has endured began as isolated incidents that would not have constituted harassment without the crucial link of repetition and time. The documentation provided by Appellant clearly shows repeated attacks in the form of false allegations of wrongdoing.

### County:

- All of the cited incidents in Appellant's grievance predated the filing of the grievance on May 30, 2006 by well over 20 days.
- With regard to Appellant's argument that the incidents recounted in Appellant's grievance began as isolated incidents that would not constitute harassment without the crucial link of repetition and accumulation over time, the Board's decision in MSPB Case No. 04-06, rejecting a continuing violation theory, should control in this case.

## APPLICABLE REGULATION

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

- 34-4. *Reasons for filing a grievance.*** An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

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subordinate employees in their role as MCGEO shop stewards as well as by the MCGEO President, is grievable. The County, in its response to this appeal, also indicated that it was unnecessary to determine whether the subject matter of the grievance is grievable given the fact that the grievance was untimely.

...

- (b) improper or unfair act by a supervisor or other employee, which may include coercion, restraint, retaliation, harassment, or intimidation; ...

...

**34-9. Grievance procedure.**

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

- (1) A grievance may be dismissed by the OHR Director if it is not filed within 20 calendar days after:

- (A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; . . .

...

- (e) *Steps of the grievance procedure.* The following table shows the . . . 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>
1	Employee	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.
	Supervisor	Give the employee a written response within 7 calendar days after the written grievance is received.

**ISSUES**

1. Was Appellant’s grievance timely filed?
2. If timely filed, is the subject matter of Appellant’s grievance grievable?

## ANALYSIS AND CONCLUSIONS

### Appellant's Grievance Was Timely Filed.

The record of evidence establishes that there has been an on-going pattern of complaints by MCGEO shop stewards and more recently a complaint by the MCGEO President concerning Appellant. The record also establishes that Appellant has repeatedly sought the assistance of Appellant's management chain regarding what Appellant views as false statements and retaliatory practices by MCGEO against Appellant for exercising Appellant's management duties.

On April 25, 2006, Appellant raised Appellant's concern over the MCGEO ULP charge which had been mass mailed to all union members in the Emergency Communications Center to Appellant's immediate supervisor. Appellant asserts that Appellant had just recently obtained a copy of that letter.<sup>7</sup> The letter was based entirely on a verbal exchange that Appellant had with Ms. D on January 5, 2006. Appellant informed Appellant's supervisor that the letter was factually inaccurate and defamatory. Appellant also informed Appellant's supervisor about the history of allegations and misrepresentations lodged against Appellant by MCGEO. Appellant asserted in Appellant's e-mail to Appellant's supervisor that the pattern of false allegations over the years had created a hostile work environment for Appellant and requested that management take action on this matter.

The record of evidence before the Board establishes that Appellant was informed by Appellant's supervisor, Ms. G, that Appellant would receive a response to Appellant's April 25<sup>th</sup> e-mail from Mr. C. Mr. C sent an e-mail response to Appellant on May 12, 2006. Appellant, not satisfied with the response, file a written grievance on May 30, 2006. Thus, Appellant filed the grievance 18 days after Mr. C sent his e-mail.

Pursuant to the grievance regulations, Appellant was required to present Appellant's job-related problem informally to Appellant's immediate supervisor. The Board finds Appellant did this when Appellant sent the April 25, 2006 e-mail to Appellant's immediate supervisor. The regulations also provide that if an employee is not able to resolve the problem, the employee must file a written grievance within 20 calendar days. As Appellant's supervisor informed Appellant that Mr. C would be responding to Appellant's e-mail, Appellant had every right to wait until he responded before filing the grievance. The Board finds that Appellant timely filed the grievance within 20 calendar days from the date Appellant received Mr. C's response.

The OHR Director, in determining that Appellant's grievance was untimely filed, stated that all of the cited incidents giving rise to Appellant's grievance predated the May 30 filing by well over 20 days. The OHR Director cited the following incidents: the April 20, 2006 MCGEO letter to the CAO; the February 10, 2006, request by MCGEO for

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<sup>7</sup> Appellant asserts in the appeal that Appellant did not have access to this ULP document until the informal grapevine provided Appellant with a copy. Appellant also avers without contradiction by the County that, as of April 25, 2006, the County had failed to inform Appellant about the ULP allegation.

an Article 52 investigation; and the March 6, 2006 ULP charge. While it is true that all of these documents are dated well before the May 30, 2006 grievance filing, the question before the Board is not the date of the documents but the date on which Appellant knew or should have known about the documents.

The County argues that based on the e-mail that Appellant sent to Mr. H on May 2, 2006, Appellant was aware of the documents more than 20 days before filing Appellant's grievance. While this is true, what is also true is that the April 20, 2006 MCGEO letter and the February 10, 2006 request for an Article 52 investigation all involve the same event cited in the March 6, 2006 ULP charge. As previously stated, the Board has determined that Appellant's grievance concerning the ULP charge was timely filed. The Board finds it was reasonable for Appellant to await the response from Mr. C regarding the ULP incident before filing a written grievance concerning all three documents which deal with the same event. Had Mr. C granted Appellant's request to take action to protect Appellant from harassment by initiating an investigation into the allegations made against Appellant, such action would also have addressed Appellant's concerns regarding the April 20, 2006 MCGEO letter to the CAO and the February 10, 2006 request by MCGEO for an Article 52 investigation.<sup>8</sup> Therefore, the Board finds that Appellant's grievance, which was timely filed, encompasses not only the ULP charge but also the April 20, 2006 MCGEO letter to the CAO and the February 10, 2005 request by MCGEO for an Article 52 investigation.

**The Subject Matter of Appellant's Grievance Is Grievable.**

The OHR Director indicated in the OHR Director's grievance decision that because the OHR Director had determined that Appellant's grievance should be dismissed because it was untimely, it was unnecessary for the OHR Director to decide whether the subject matter of the grievance, harassment and false allegations lodged by subordinate employees in their role as MCGEO shop stewards as well as by the MCGEO President, is grievable. Because the Board is concerned about the inordinate delay in the processing of Appellant's grievance based on its dismissal for untimeliness, the Board has determined to *sua sponte* address whether the subject matter of the grievance is grievable.

The Board is at a loss to explain why the OHR Director would believe that a supervisory employee could not grieve harassment and false allegations by subordinate employees simply because they are acting in their role as MCGEO shop stewards and/or MCGEO President. Just because these individuals are union officials does not permit them to continually lodge false allegations against a County supervisor as alleged by Appellant. Nothing in the grievance regulation precludes a supervisor from grieving harassment by a subordinate.

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<sup>8</sup> While it is true that Appellant had known prior to Mr. C's May 12, 2006 e-mail to Appellant of a problem with Department management being reluctant to take actions in response to Appellant's complaints about alleged MCGEO harassment, Appellant's grievance at issue in the instant case concerned a new specific problem, the ULP and its distribution to MCGEO members in the Emergency Communication Center.

Significantly, however, the Board finds that OHR has mischaracterized the gravamen of the grievance. The grievance is about Appellant's management's failure to protect Appellant against alleged harassment and its failure to initiate an investigation into what Appellant regards as false statements. Appellant wants management to hold employees accountable if they have made false statements against Appellant. Appellant believes Appellant is being unfairly treated by management because Appellant's management refuses to take action to investigate the union's treatment of Appellant.<sup>9</sup> The Board finds that this is a proper subject matter for a grievance.

### **ORDER**

Based on the above, the Board hereby grants Appellant's appeal and remands this matter to the County for a decision on the merits on Appellant's grievance.

To ensure that Appellant's grievance is processed in a timely manner, the Board hereby sets the following time limits:

1. A response to Appellant's grievance shall be issued by Appellant's immediate supervisor within 7 calendar days from the date of this decision.
2. If the Appellant chooses to raise the grievance to Step 2 of the grievance procedure, Appellant shall do so by filing the grievance with Appellant's Department Director within 5 calendar days after Appellant receives Appellant's immediate supervisor's Step 1 response.
3. The Department Director is ordered to provide a written response to Appellant's grievance within 15 calendar days after the grievance is received at the Step 2 level.
4. If Appellant is not satisfied with the Department Director's response, Appellant may file the grievance with the CAO within 10 calendar days after Appellant receives the Department Director's response.
5. If Appellant raises the grievance to Step 3, the CAO's designee will meet with Appellant within 35 calendar days after the grievance is received to resolve it.
6. If the CAO's designee is unable to resolve the grievance, a report of grievance findings will be issued within 10 calendar days from the date of the Step 3 meeting.
7. Appellant and management shall have 10 calendar days to respond to the report of grievance findings.
8. The CAO will issue a written decision within 30 calendar days after the parties' comments on the report of grievance findings are received or 30 calendar days after the deadline for comments on the report of grievance findings has passed.

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<sup>9</sup> Appellant's request for relief in the grievance specifically asks that Appellant's employer initiate an investigation into Appellant's allegations. It also request that additional training be provided to executive management members of the Department of Police in the identification, recognition, and eradication of harassment and discriminatory practices.

9. If Appellant is not satisfied with the CAO's response, Appellant may resubmit the appeal to the Board within 10 working days after Appellant receives the CAO's response.
10. Should the County fail to meet any of the deadlines set above, Appellant shall have the right to refile the appeal immediately with the Board.



## **SHOW CAUSE ORDERS**

The County's grievance process contains a sanction if management fails to meet the time limits therein. 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 2007, the Board issued the following Show Cause Order Decisions.

# **SHOW CAUSE ORDER DECISIONS**

## **Case No. 07-16**

### **SHOW CAUSE ORDER DECISION**

The Montgomery County Merit System Protection Board (Board) received an appeal of the instant grievance on May 30, 2007. The Board noted that there had been no Chief Administrative Officer's (CAO's) decision on the grievance. Appellant asserted that the Board had 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 the grievance as provided in the County's grievance procedure.

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 June 18, 2007, the County responded back to the Board's Show Cause Order (County Response).

### **FINDINGS OF FACT**

The County states that Appellant filed two grievances. The first grievance was filed on March 12, 2007 (Grievance 1), and the second was filed on March 16, 2007 (Grievance 2). The subject matter of Grievance 1 was the written notification received by Appellant that a decision had been made to delay Appellant's increment and correspondingly reassign Appellant's increment date. According to the County's Response, the Office of Human Resources (OHR) received Grievance 1 within several days after Appellant filed it with the Department of Health and Human Services (DHHS). Grievance 1 was preliminarily denied by the OHR Director based on a lack of timeliness.<sup>1</sup> Appellant was given until April 17, 2007, to respond to this denial. On April 16, 2007, Appellant delivered to OHR a request for reconsideration of the OHR Director's preliminary decision.<sup>2</sup> Appellant explained in

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<sup>1</sup> The OHR Director found that Appellant received notification about the delay in Appellant's increment on January 3, 2007. Appellant was scheduled for annual leave from January 12, 2007 through February 9, 2007. Therefore, the date for challenging the delayed increment was extended until February 20, 2007. Subsequently, Appellant's leave was extended through February 17, 2007. Because Appellant was deemed to be in an absent without leave (AWOL) status from February 18, 2007 through March 3, 2007, the OHR Director concluded that Appellant only had until February 25, 2007 to file the grievance.

<sup>2</sup> The subject of the memorandum to the OHR Director from Grievant was "Request for reconsideration of Preliminary decision". The first line of the Reconsideration memorandum began: "In your letter dated March 28, 2007 denying the filing of my Grievance as not being timely, . . ."

the request why Appellant had been unable to return to work before March 5, 2007. On April 23, 2007, the OHR Director issued a grievance determination, finding that Grievance 1 had been timely filed. On May 14, 2007, OHR sent Appellant a memorandum indicating that a Step 3 meeting would be scheduled on Appellant's grievance and, if Appellant had any questions, Appellant should contact a staff member in OHR.

In the meantime, Grievance 2 was processed at DHHS up through Step 2 of the grievance procedure. The subject matter of Grievance 2 was the allegation that Appellant was improperly placed in an AWOL status between February 20, 2007 and March 2, 2007 by Appellant's supervisor. On April 2, 2007, Appellant's Director, DHHS, issued a grievance response, denying Grievance 2. On April 16, 2007, Appellant sent a memorandum to the CAO raising the grievance to Step 3 of the grievance procedure by seeking reconsideration of the denial of the grievance by Appellant's department head, and also alleging that Appellant's Department Director violated Step 2 of the administrative grievance procedure by refusing to meet with Appellant to resolve the grievance.<sup>3</sup> Appellant states that Appellant provided a copy of Appellant's Step 3 grievance to OHR.<sup>4</sup> Significantly, in the County Response, OHR acknowledges that on the date of April 16, 2007, it received the memorandum addressed to the CAO.

On May 7, 2007, Appellant sent a second memorandum to the CAO. Appellant indicated that Appellant had previously sent a memorandum (a copy of which Appellant attached to this second memorandum) to the CAO challenging the DHHS Director's decision to deny Appellant's grievance. Appellant noted that the Director's decision was predicated on the fact that Appellant should have returned to work on February 20, 2007. Appellant stated in the May 7 memorandum that, on April 23, 2007, the OHR Director had determined that Appellant's other grievance, filed on March 12, 2007, was timely filed. Appellant maintained that the decision by the OHR Director legitimized Appellant's resumption of work on March 5, 2007, and rendered moot the DHHS Director's decision to deny Appellant leave which was currently on appeal to the CAO. Accordingly, Appellant requested an immediate decision from the CAO reversing the earlier decision of the DHHS Director. OHR indicates it received a copy of the May 7, 2007 memorandum.

On May 16, 2007, Appellant met with the OHR staff member. In the course of this meeting, Appellant discussed Grievance 2. The OHR staff member was unaware of Grievance 2 and, because the staff person who maintains the administrative records for the section was on leave,<sup>5</sup> asked Appellant to provide OHR with a copy of Grievance 2.

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<sup>3</sup> The subject of the memorandum to the Chief Administrative Officer from Appellant was "Appeal of grievance response by Department Director".

<sup>4</sup> To support Appellant's assertion, Appellant has presented a date-stamped receipt given to Appellant by the OHR receptionist on April 16, 2007. The receipt indicates "grievance file."

<sup>5</sup> The County Response indicated that based on a follow-up discussion with the administrative staff person, the OHR staff member determined that OHR had no record of receiving Grievance 2.

Appellant, on May 17, 2007, brought another copy of the grievance to OHR.

On May 25, 2007, Appellant sent an e-mail to OHR, noting that it had been 41 days since Appellant filed the Step 3 grievance with the CAO and asking why OHR had not adhered to the requirement in the administrative grievance procedure that a meeting be held with Appellant within 35 calendar days of receipt of Appellant's grievance. OHR responded back that the subject grievance was received on May 17, 2007 (the date that Appellant provided a second copy of the grievance to OHR), and therefore OHR still had time to hold the required meeting. On May 25, 2007, Appellant wrote back to OHR that it was wrong to start counting the 35 days from May 17, 2007 instead of April 16, 2007.

Appellant then filed Appellant's grievance with the Board on May 30, 2007. On June 11, 2007, 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.

### **APPLICABLE LAW AND REGULATIONS**

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

#### **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>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.
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

### **POSITIONS OF THE PARTIES**

County:

- OHR did not receive a copy of Grievance 2 until Appellant delivered it on May 17, 2007.
- Because there is a tangential relationship between Grievance 1 and Grievance 2, it was not readily apparent that Appellant had filed a second grievance. Only after the OHR staff member's discussion with Appellant, on May 16, 2007, did OHR become aware of a second grievance.
- Based on OHR's receipt of Grievance 2 on May 17, 2007, it had not failed, as of the date of the filing of this appeal, to satisfy the requirement under the grievance procedure to hold a Step 3 meeting within 35 days from receipt of the grievance at Step 3.

- The documentation submitted by Appellant, which indicates that Appellant did hand-deliver some document identified as a “Grievance File” to OHR on April 16, 2007, is not sufficient to support the proposition that OHR received Appellant’s Grievance 2 on April 16, 2007.

Appellant:

- Appellant has presented evidence that Appellant delivered a “Grievance File” to OHR on April 16, 2007.
- At the very least, OHR acknowledges that it received two memoranda on April 16, 2007 from Appellant – one addressed to the OHR Director and the other addressed to the CAO. As the subject matter line of each memorandum is different, OHR should have been on notice that the two memoranda dealt with different grievances.
- As a grievant is held to the time limits in the grievance procedure and may have the grievance denied based solely on the failure to meet those time limits, OHR should be held to the same standard.

**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.**

OHR’s basic contention is that it never received a copy of Grievance 2 until May 17, 2007, after Appellant informed OHR that Appellant had filed two grievances. Accordingly, OHR maintains that the time for setting the Step 3 grievance meeting begins to run from May 17, 2007, the date it received a copy of Grievance 2. The Board rejects this contention.

Significantly, OHR acknowledges that it received on April 16, 2007, the memorandum Appellant addressed to the CAO. This memorandum clearly stated that Appellant was appealing the determination of Appellant’s Director to deny the grievance. The memorandum also noted that Appellant’s Department Director violated Step 2 of the grievance procedure by refusing to meet with Appellant. Finally, the memorandum specifically requested a meeting within 35 days of receipt of the appeal in accordance with Step 3 of the administrative grievance procedure.

OHR also acknowledges receipt on April 16, 2007 of a memorandum addressed to the OHR Director, seeking reconsideration of the OHR Director’s preliminary decision that Appellant’s March 12, 2007 grievance was untimely filed. The County argues that because

there is a tangential relationship between Grievance 1 and Grievance 2, it was not readily apparent to OHR that Appellant had filed a second grievance. However, a simple reading of both April 16 memoranda indicates that they are dealing with different grievances. Therefore, the Board finds that OHR was on notice on April 16, 2007 that there was a second grievance, and that it had been appealed to Step 3 of the administrative grievance procedure.<sup>6</sup>

The administrative grievance procedure states that an employee may grieve a Department Director's response at Step 2 of the grievance procedure by filing a grievance with the CAO (which is to be submitted to OHR). Appellant submitted the Step 3 appeal to the CAO (through OHR) on April 16, 2007. The grievance procedure also specifies that a Step 3 meeting must be held within 35 days after the Step 3 grievance is filed. As of the date of Appellant's appeal, some 44 days after Appellant filed the Step 3 grievance, no meeting had been held. Therefore, the Board concludes that OHR has failed to adhere to the time frames of the grievance procedure and has not shown good cause as to why it failed to adhere to the time frames.

**The Board Will Retain Jurisdiction Over The Instant Appeal But Will Remand It To The CAO For Issuance Of A Step 3 Decision Within 30 Days Of The Date Of This Decision.**

Notwithstanding our finding that the County has failed to show good cause for a remand, it is the Board's view that the CAO is in the best position to determine this matter. Accordingly, 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 15 days to have a designee meet with Appellant and a total of 30 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.

**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 but return it to the Appellant. The Board concludes that it has jurisdiction over the instant appeal. The Board remands this matter to the CAO for processing in accordance with Step 3 of the grievance procedure. The CAO (or a designee) has **15 days from the date of this Order** to hold a meeting with Appellant and **30 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 the appeal.

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<sup>6</sup> The determination that OHR was on notice about Grievance 2 before May 16, 2007, when Appellant had a discussion with the OHR staff member, is reinforced by OHR's acknowledgement that it received a copy of Appellant's May 7, 2007 memorandum to the CAO. In that memorandum, Appellant clearly addresses the fact that Appellant had filed two grievances.

## **Case No. 07-10**

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

The Montgomery County Merit System Protection Board (MSPB or Board) received an appeal in this case on February 7, 2007. The appeal involved Appellant's dismissal from employment as a Correctional Officer II with the Department of Correction and Rehabilitation (DOCR), effective February 9, 2007. The Notice of Disciplinary Action – Dismissal (NODA) was signed by the Human Resources Manager for DOCR.

In a recent appeal involving a disciplinary action at DOCR, the Board had the occasion to review the authority of the Human Resources Manager to impose disciplinary action on employees in lieu of the Department Director. See MSPB Case No. 07-05 (2007). Section 33-4(b) of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 10, 2002) delegates to the Department Director the authority to take disciplinary action. MCPR Section 33-4(c) provides that the Department Director may delegate the authority to take any type of disciplinary action to a lower level supervisor. Any such delegation must be in writing. In MSPB Case No. 07-05, the Board found that DOCR Department Director failed to delegate the Department Director's authority to take disciplinary action in writing to the Human Resources Manager and accordingly held that the disciplinary action at issue was null and void.

Based on its decision in MSPB Case No. 07-05, the Board determined to require the County to provide a statement of such good cause as exists for why the MSPB should not determine that the Notice of Disciplinary Action – Dismissal in this case was null and void, which would divest the Board of jurisdiction over this appeal. On April 5, 2007, the County filed a response to the Board's Show Cause Order. On April 12, 2007, the County filed a supplement to its response.<sup>1</sup> On April 9, 2007, Appellant filed an Opposition to County Response to Show Cause Order. In that Opposition, Appellant asked for additional time to file further pleadings on this issue. The Board granted Appellant until April 19, 2007 to file any additional pleadings. Appellant did not file any further pleadings.

### **FINDINGS OF FACT**

As previously noted, an Amended Notice of Disciplinary Action – Dismissal, was issued on April 5, 2007. The Amended Notice provided for a new effective date for Appellant's dismissal – April 27, 2007. According to the Amended Notice, Appellant would be placed on administrative leave with pay for the period of time between the effective date of the original Notice of Disciplinary Action and the effective date of the Amended Notice of Disciplinary Action. The PAF submitted by the County indicates an amended dismissal date of April 27, 2007.

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<sup>1</sup> The County supplemented the record in this case by filing an Amended Notice of Disciplinary Action, dated April 5, 2007, which was signed by the Department Director. The County also submitted a Personnel Action Form (PAF), which amended Appellant's dismissal date to April 27, 2007.



## APPLICABLE REGULATION

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 33, *Disciplinary Actions***, which states in applicable part:

### **33-4. Authority to take disciplinary action.**

...

- (b) A department director may take any disciplinary action under these Regulations.
- (c) A department director may delegate the authority to take any type of disciplinary action to a lower level supervisor. The delegation must be in writing.

...

### **33-6. Disciplinary process.**

...

- (c) *Notice of disciplinary action.*

...

- (2) A department director must issue a notice of disciplinary action at least 5 working days before the effective date of the proposed action.

## POSITIONS OF THE PARTIES

### County:

- Appellant has been issued an Amended NODA which complies with the requirements of MCPR Section 33-4.
- The County has retroactively placed Appellant on paid administrative leave for the period of February 9, 2007 (the effective date of the first NODA) until the effective date of the Amended NODA.
- Section 33 of the MCPR does not impose a time restriction on issuing a NODA. Accordingly, Appellant is not prejudiced by the Amended NODA.

### Appellant:

- As previously noted, Appellant opposed the County's response but has provided no substantive argument in support of said opposition.

## ISSUE

Has the County shown good cause as to why the Board should retain jurisdiction over the instant appeal?

## ANALYSIS AND CONCLUSIONS

### The County Has Shown Good Cause As To Why The Board Should Retain Jurisdiction Over The Instant Appeal.

The County has acknowledged that when it issued the original NODA to Appellant, which was signed by the Human Resources Manager on behalf of the Department Director, the Human Resource Manager did not have a written delegation of authority to sign the NODA as required by MCPR Section 33-4. To cure this defect, the County reissued an Amended NODA, signed by the Department Director. The County retroactively placed Appellant on paid administrative leave for the period February 9, 2007 (the effective date of the original NODA) until April 27, 2007 (the effective date of the Amended NODA). Thus, the Board finds that Appellant has not been prejudiced by the issuance of the Amended NODA.

Furthermore, as the County correctly notes, the MCPR imposes no time limit on the issuance of a NODA; the only time limit imposed is that the effective date of a NODA be at least 5 working days after it is issued. The record of evidence before the Board indicates that the Amended NODA was dated April 5, 2007 with an effective date of April 27, 2007. Thus, it would appear that the time limit was met.

## ORDER

Based on the foregoing, the Board concludes that it has jurisdiction over the instant appeal. Accordingly, the hearing set for June 11, 2007 in this matter will proceed as scheduled.

# **RECONSIDERATION**

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code Section 2A-7(c) of the Administrative Procedures Act (APA). There is no specific time limit for filing such a motion under the APA or the Board's current procedures. Rather, the APA indicates that motions should be filed promptly.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days from a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within ten (10) days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

In FY 2007, during the course of proceedings in one case, the Board issued two Decisions – one on a request for reconsideration of a preliminary matter and one on a request for reconsideration of a Final Decision. It also issued another Decision on a request for reconsideration of a Final Decision in a different case.

# **RECONSIDERATION DECISIONS**

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

### **DECISION ON APPELLANTS' MOTION FOR RECONSIDERATION OF A BOARD DECISION ON A PRELIMINARY MATTER**

On August 1, 2006, Appellants filed a Motion for Reconsideration (Reconsideration Motion), seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Decision and Order dated July 19, 2006. The Board issued its Decision and Order in response to the County's Motion to Join Necessary Parties (Motion to Join).<sup>1</sup> The County had sought to have the Board join forty-three current Sergeants and four Lieutenants as parties to the instant appeal. The County also sought to join the union which represented some of the affected employees as a party. The rationale for the Motion to Join was that the Appellants' amended grievance challenged the process through which the forty-three Sergeants were promoted to their positions and the promotional process through which the four Lieutenants were promoted to their positions. As relief, Appellants had urged the Board to vacate the promotions and rescind the pay increases afforded to the employees who were promoted.

The Board, in considering the County's unopposed Motion to Join, reviewed Appellants' Amended Grievance.<sup>2</sup> The Board determined that the portion of the Amended Grievance which sought to challenge the promotional process that led to forty-four Master Correctional Officers (MCOs) being promoted to Sergeants on June 12, 2005 was untimely as Appellants did include the allegation in their original grievance filed on July 5, 2005. Likewise, the Board determined that the portion of the Amended Grievance which sought to challenge the subsequent promotion of four Sergeants to the rank of Lieutenant was untimely, as all four promotions occurred more than 20 calendar days prior to Appellants filing their amended grievance. Based on these findings, the Board determined that the County had failed to show good cause for the joinder of the additional parties. The Board also dismissed those portions of Appellants' Amended Grievance that it had determined were untimely.

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<sup>1</sup> Appellants were provided by the Board with six calendar days to respond to the County's Motion to Join. Appellants failed to do so. In Appellants' Reconsideration Motion, Appellants' counsel indicates that Appellants' counsel was not in Appellants' counsel's office for three of the four business days before the July 12 deadline and therefore did not respond. The Board is not persuaded by this argument and finds that Appellants were accorded sufficient time to prepare and file a response. The Board also notes that Appellants' counsel could also have sought an extension of time for filing a response but did not do so.

<sup>2</sup> The Board had previously granted Appellants the right to file an amendment to their grievance which they did on May 25, 2006. Before the issuance of the Board's Decision and Order on July 19, 2006, the Board had not had the opportunity to address the substance of the amendments, including whether the allegations contained therein were timely filed.

Appellants now seek to have the Board reconsider its Decision and Order and reinstate those portions of the Amended Grievance dismissed by the Board. Appellants indicate in a stipulation that they are withdrawing that portion of their request for relief in their Amended Grievance which sought the rescission of the promotions of the forty-four Sergeants and four Lieutenants. The County responded to Appellants' Reconsideration Motion on August 8, 2006. Appellants filed their Reply to County Opposition to Appellants' Motion for Reconsideration on August 14, 2006.

### **FINDINGS OF FACT**

The instant appeal, which involves a consolidated grievance over pay compression, was filed on February 23, 2006. The Board noted the lack of a Chief Administrative Officer's (CAO's) decision on the Appellants' consolidated grievance. Moreover, there appeared to have been no action by the County on the processing of Appellants' consolidated grievance since the grievance was appealed to the CAO on September 20, 2005. The Board issued a Show Cause Order to the CAO, requesting an explanation as to why the time limits in the grievance procedure had not been followed and why the MSPB should remand the grievance to the CAO for a decision instead of asserting jurisdiction over the instant appeal.

The County filed its response to the Board's Show Cause Order on March 15, 2006. Appellants' counsel filed a reply. The Board determined that the County had failed to show good cause for its total inaction on the grievance. Because of the seriousness of the violations of the grievance procedure by the County, the Board concluded it should assert jurisdiction. In its Decision, dated April 4, 2006, the Board granted Appellants' request to amend their consolidated grievance.

Appellants filed their Amended Grievance on May 25, 2006. In the Amended Grievance, Appellants challenged for the first time the process by which forty-four MCOs became Sergeants. The Office of Human Resources (OHR) established the new class of Correctional Supervisor – Sergeant, Grade 22, effective April 17, 2005, in the Department of Correction and Rehabilitation (DOCR). A total of forty-four Sergeant positions were created.<sup>3</sup> Subsequently, DOCR held a competitive promotional process to fill the new Sergeant positions. All forty-four Master Correctional Officers (MCOs), Grade 19, applied for the vacant positions. On June 12, 2005, DOCR promoted forty-four MCOs to the rank of Sergeant and provided them with a 10% increase in salary.

Appellants claimed in their amendment that OHR should have effected the movement of employees from the occupational class of MCO to the occupational class of Correctional Supervisor – Sergeant through a position reclassification. Under such an option, the existing MCOs would have been reclassified from MCO, Grade 19, to

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<sup>3</sup> This finding of fact is based on the County's Response to Appellants' Amended Grievance, filed with the Board on June 29, 2006. The Board cannot explain why the County subsequently sought to join as parties only forty-three of the forty-four MCOs who were promoted.

Correctional Supervisor – Sergeant, Grade 22, without an increase in annual pay. Alternatively, Appellants claimed in their Amended Grievance that OHR should have done an occupational class title change and grade reallocation. According to Appellants, such a process would have moved the employees to the new occupational class of Sergeant without an increase of annual pay.

Appellants also challenged the competitive promotional process that OHR employed to promote the forty-four MCOs to Sergeants. According to Appellants' Amended Grievance, the OHR Director set as a minimum qualification for the Sergeant class one year of experience as a MCO for which there is no substitute. By setting this requirement, OHR allegedly impermissibly restricted Correctional Officers III (CO III) from competing for the new Sergeant class. Subsequent to the promotion of the forty-four MCOs, Appellants assert that the OHR Director issued a revised class specification that, from that time forward, allowed the CO III employees to compete for Sergeant positions.

In addition, Appellants challenged the competitive examination by which the MCOs were selected to become Sergeants. According to Appellants, OHR's examination did not screen for any substantive knowledge, skills, and abilities that would help determine an applicant's qualifications for promotion.

Finally, Appellants asserted in their Amended Grievance that because the competitive examination process that led to the promotion of the MCOs to Sergeants was flawed, the Board should also vacate the follow-on competitive exam process that resulted in selected Sergeants being promoted to Correctional Shift Commander – Lieutenant, Grade 24.

As relief, Appellants requested in their Amended Grievance that the Board vacate the Correctional Supervisor – Sergeant promotional process and rescind the 10% increase of pay that all MCOs received upon their promotion to Sergeant. Likewise, the vacating of the process by which the four Sergeants were promoted to Lieutenant would lead to the rescission of their 10% pay increase.

As previously noted, after Appellants filed their Amended Grievance, the County moved to join as parties to this appeal forty-three Sergeants and the four Lieutenants who would be adversely affected if the Board granted Appellants' request to vacate the two competitive exam processes.

### **POSITIONS OF THE PARTIES**

#### **Appellants:**

- Appellants have now stipulated to waiving that portion of their request for relief that sought the rescission of the promotion of the 44 MCOs to Sergeants and subsequent promotion of 4 Sergeants to the rank of Lieutenant.
- Appellants cannot grieve the creation of an occupational class only the actual filling of positions created by the new occupational class. Accordingly, Appellants' Amended Grievance was timely filed.

- The Board’s dismissal of part of Appellants’ Amended Grievance was premature, as the County never filed a pleading which sought the dismissal of any part of Appellants’ Amended Grievance. Rather, the Board dismissed part of Appellants’ Amended Grievance on its own motion without providing Appellants with the opportunity to offer any argument in opposition.
- The 20-day time limit for filing a grievance only began to run when Appellants knew or should have known all details of the promotional process.
- The language of the original grievance indicates Appellants’ concern with the County’s promotional process. The terms “compensation policy” and “promotional process” are inextricably linked to each other and cannot be separated.
- The promotional process involving the four Sergeants who were promoted to Lieutenant is part and parcel of Appellants’ appeal. The original grievance clearly indicated that future promotions from the newly created Sergeant class would occur and cause compression.
- The Board is charged with an affirmative, proactive responsibility to report and correct improper or unlawful merit system practices.

County:

- The Board provided sufficient time for Appellants to respond to the County’s Motion to Join Necessary Parties.
- Appellants’ proposed stipulation excludes the relief which would be necessary to remedy the claims they seek to preserve and prove. The stipulation, if accepted, would serve as the basis for a jurisdictional defense of failure to state a claim for which relief can be granted.
- Appellants slept on their rights by failing to challenge the correctional officer classification study in a timely manner.
- The Board may *sua sponte* dismiss any part of Appellants’ Amended Grievance for lack of jurisdiction.
- Appellant’s argument that the statute of limitations to file a grievance does not start until they understand the substance of their claims should be rejected.

**APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Code, Article II. Merit System, Section 33-7. County Executive and Merit System Protection Board responsibilities**, which states in applicable part:

- (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.
- ...
- (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. . . .

**Montgomery County Code, Article II. Merit System, Section 33-12(b), Grievances**, which states in applicable part:

A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment.

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

**34-4. Reasons for filing a grievance.** An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

. . .

- (c) improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, RIF, promotional action that was arbitrary and capricious or in violation of established procedures, or denial of an opportunity for training;
- (d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential, overtime pay, leave, insurance, retirement, or a holiday; . . .

**34-6. Matters that are not grievable.**

- (a) The following matters are not grievable:
  - (1) a position classification; . . .

**34-9. Grievance procedure.**

- (a) ***Time limit for filing a grievance.***
  - (1) A grievance may be dismissed by the OHR Director if it is not filed within 20 calendar days after:
    - (A) the date on which the employee knew or should have known of the occurrence or action on which



the grievance is based; . . .

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

. . .

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

### ISSUE

Have Appellants shown good cause as to why the Board should reconsider its Decision and Order of July 19, 2006?

### ANALYSIS AND CONCLUSIONS

#### **Appellants' Stipulation Provides No Basis For A Different Conclusion Given The Fact That Appellants Continue To Challenge How The Sergeant Positions Were Filled As Well As The Subsequent Promotion Process That Led To 4 Sergeants Being Promoted To Lieutenants.**

The County is correct that Appellants cannot have it both ways. Appellants now stipulate that they don't seek rescission of the promotions of the 44 MCOs to Sergeants or the promotions of the 4 Sergeants to Lieutenants. However, in the same pleading they allege that "there is ample evidence to support the contention that the MCO employees should not have been promoted" and "there is compelling evidence that that [i.e., the MCO to Sergeant] promotional process is grossly flawed, not the least of which is that a large class of employees (Correctional Officer III) was denied its rightful opportunity to compete for the Correctional Supervisor – Sergeant position vacancies."

In another pleading filed with the Board contemporaneously with Appellants' Reconsideration Motion, i.e., Supplemental Report of Mr. N, Appellants continue to challenge how the MCOs were converted to Sergeants. As relief, they seek to have the Board find that the promotional examination for Sergeant was unfair as it did not permit those employees who were in the position of Correctional Officer III to apply and it was not a competitive process. The Board is at a loss to understand how, if it made such a finding, it would not lead to the need to vacate the entire competitive process. As the County correctly points out, if the Board accepted the stipulation, then with regard to the challenge to the two promotional processes, Appellants would fail to state a claim for which relief could be granted. Therefore, the Board concludes that Appellants' stipulation provides no basis for the Board to reconsider its previous decision to dismiss portions of the amended grievance.

**Appellants Are Correct That They Could Not Grieve The Establishment Of An Occupational Class But Rather Had To Wait Until Positions In The Occupational Class Were Filled; Nevertheless, This Does Not Change The Fact That Their Amended Grievance Was Untimely.**

Appellants are correct that they cannot grieve the establishment of an occupational class. The mere establishment of an occupational class is in fact multiple position classifications. A position classification is not grievable, pursuant to MCPR, Section 34-6(a)(1).

What is grievable is the filling of a position after it is classified and established. As previously noted in the Board's July 19 Decision and Order, Appellants were aware at the time they filed their original grievance that the MCOs had just been promoted to Sergeants on June 12, 2005. Nevertheless, they did not challenge the promotional process that led to the MCOs becoming Sergeants in their original grievance filed on July 5, 2005.

**Appellants Have Received The Opportunity To Offer Argument In Opposition To The Dismissal Of Parts Of Their Amended Grievance.**

Appellants argue that the County never raised the issue of timeliness in its responses to their amended grievance. They assert that it was unfair for the Board to *sua sponte* determine that portions of their Amended Grievance were filed untimely.

The Board notes that Section 34-9(b)(7) of the grievance procedure provides that the OHR Director or CAO may reconsider issues of timeliness or grievability at any stage of the grievance procedure. In the instant case, because of the failure of the OHR Director and the CAO to timely respond to the original grievance filed by Appellants, the Board asserted jurisdiction over the consolidated grievance. It then permitted Appellants to amend their grievance. The Board exercises the same authority as the OHR Director and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it.

Indeed, as the County points out in its Opposition, the issue of timeliness affects the propriety of the Board exercising jurisdiction over the amended grievance. As the Maryland Court of Appeals has noted, "[b]ecause the timeliness of an appeal relates to the propriety of an appellate court's exercise of jurisdiction, an appellate court, if it notices such a timeliness issue, will usually address the issue *sua sponte*." Bienkowski v. Brooks, 386 Md. 516 (2005).

In the instant case, although the Board *sua sponte* determined that portions of the Amended Grievance were untimely, it has permitted Appellants to file the instant Motion for Reconsideration, as well as a reply brief to the County's Opposition. Thus, Appellants have received any and all due process they are entitled to with regard to the dismissal of portions of their Amended Grievance as untimely.

**The Time Limit For Filing A Grievance Begins To Run From The Date On Which Appellants Knew Or Should Have Known Of The Occurrence Or Action On Which The Grievance Is Based.**

In an attempt to salvage their late filing, Appellants assert that their time for filing a grievance only commences to run from the time that they became aware of **all the details** of the promotional process. However, that is not the standard set in the grievance procedure. Rather the standard is the date on which Appellants knew or should have known of the occurrence or action on which the grievance is based.

Appellants have submitted as an exhibit to their pleading “Residual Issues”, an e-mail from the Director, DOCR, to “#DOCR.ALL”, dated June 8, 2005, subject: FW: Promotions to the Supervisor Rank of Sergeant – Opening a New Day and Chapter for DOCR. The e-mail announces the promotion of the 44 MCOS to the position of Sergeant, effective June 12, 2006. The e-mail asks that all DOCR staff join the Director in recognizing “our first 44 Sergeants who all successfully completed a promotional interview process and are being promoted from Master Correctional Officer to Correctional Sergeant.” The e-mail then provides the names of all 44 employees being promoted.

The Board finds that based on this e-mail Appellants had sufficient notice as of the date they filed their initial grievance about the promotion of all 44 MCOs to the rank of Sergeant to challenge the process. However, they failed to do so until they amended their grievance on May 25, 2006. Accordingly, the Board reaffirms its previous holding that the portion of the Amended Grievance dealing with the challenge to the promotion of the 44 MCOs is untimely.

**The Gravamen Of Appellants’ Original Grievances Was Pay Compression Not The Promotional Process By Which MCOs Became Sergeants.**

In the cover letter dated July 5, 2005, accompanying the eleven grievances filed by Appellants’ counsel, the very first sentence of the letter states:

Thank you for granting an extension until July 19, 2005 for the filing of multiple, related non-union employment grievances with regard to the alleged improper application of compensation policies for eleven (11) Lieutenants of Montgomery County’s Department of Correction and Rehabilitation.

Accompanying the July 5, 2005 cover letter were 11 Administrative Procedure 4-4 forms, each containing the name of a grievant and referring to an attached grievance statement, which read as follows:

Lieutenant [A] (“Grievant”) is an employee of Montgomery County, Maryland and a member of the merit system. Lt. A files this Grievance as a member of the Department of Correction and Rehabilitation because Lt. A is adversely affected by the improper, inequitable, and/or unfair application of

compensation policy, including the improper application of Lt. A's salary. See Section 34-4 of the Montgomery County Personnel Regulations, 2001. Lt. A files because of issues related to pay compression, disparate pay and/or disproportional pay and duties as compared to other employees in Lt. A's field.

As a merit system employee, Lt. A is entitled to a system of recruitment, selection and advancement of merit system employees based on relative abilities, knowledge and skills. See § 33-5 of the Personnel and Human Resources Chapter of the Montgomery County Code. According to § 401 of the Charter of Montgomery County, the merit system shall provide the means to recruit, select, develop, and maintain an effective, nonpartisan, and responsive work force with personnel actions based on demonstrated merit and fitness. Salaries and wages of all classified employees in the merit system shall be determined pursuant to a uniform salary plan.

This Grievance stems from, *inter alia*, the June 12, 2005 promotion of employees with a rank of MCO to a rank of Sergeant. These newly promoted Sergeants received a ten percent (10%) pay increase and, by way of the June 12 promotion, were given the same number of promotions leading up to their promotion as Sergeant as Grievant and/or other Lieutenants had leading up to a promotion as Lieutenant. The salaries, therefore, as compared between Grievant and the newly promoted Sergeants are improperly compressed. Moreover, when the newly promoted Sergeants are promoted to the rank of Lieutenant, they will receive another ten percent (10%) pay increase, so that many Sergeants will have greater salaries than Lieutenants. It is estimated that as a result of the June 12 Sergeant promotions, sixty-five percent (65%) of the Sergeants stand to have greater salaries than thirty-one percent (31%) of the Lieutenants. Additionally, this grievance stems from certain incremental pay increases such as cost of living increases, reclassifications and other related increases. Grievant, as a non-union employee, has been treated disparately as compared to union-represented employees with regard to pay increases, reclassifications and promotions.

Grievant files this Grievance because Lt. A is adversely affected by the unfair application of compensation policy. While Grievant's employer is an equal employment opportunity employer, Grievant does not file this Grievance as a result of any discrimination properly alleged under Section 5 of the Montgomery County Personnel Regulations, 2001. Lt. A does not intend for this Grievance to be investigated as an EEO matter and Lt. A does not intend for this Grievance to be interpreted as an EEO Complaint under Section 5 of the Montgomery County Personnel Regulations.

In the Board's view, the language of the grievance can only be interpreted as addressing solely the issue of pay compression. The mere fact that Appellants, in their

grievance statement, used the words “promotion” and “reclassification” does not change the gravamen of the grievance statement. Indeed, as Appellant’s own counsel put it succinctly in a cover letter, these grievances are about compensation policy.

**The Board Agrees With Appellants That The Original Grievance Encompassed The Impact Future Promotions Of Sergeants To Lieutenants Would Have On The Issue Of Appellants’ Pay Compression; However, It Did Not Challenge The Competitive Promotional Process That Led To The Promotion Of The Four Sergeants.**

Appellants argue that the Board was wrong to dismiss that portion of their Amended Grievance which dealt with the promotional process by which the four Sergeants were promoted to Lieutenant as it is part and parcel of their appeal. In support of this claim, Appellants note that their original grievance clearly indicated that future promotions from the Sergeant class would occur and would cause compression.

The Board agrees with Appellants’ assertion concerning the impact a promotion would have on the issue of pay compression. That is why when the Board dismissed that portion of the Amended Grievance which challenged the promotional process leading up to the actual promotion of the four Sergeants it was careful to note that it would nevertheless consider the issue of how the setting of base pay for the four newly promoted Lieutenants might have exacerbated the alleged pay compression of the Appellants.

The Board disagrees, however, with the assertion that the promotional process which led to the promotion of the Sergeants was inextricably part of Appellants’ original grievance. As no competition for promotion to Lieutenant from the rank of Sergeant had occurred at the time Appellants filed their grievance, it could not have been part of the grievance. The actual promotions occurred several months after the original grievance was filed. Accordingly, the Board finds no reason to reconsider its determination to dismiss that portion of the Amended Grievance dealing with the challenge to the promotional process that led to the elevation of the four Sergeants to the rank of Lieutenant.

**Even If Appellants Had Timely Challenged The Promotional Process That Led To The Promotion Of 44 MCOs To Sergeants And The Promotional Process That Led To The Promotion Of 4 Sergeants To Lieutenants They Were Not Aggrieved By Either Process So As To Have Standing To Grieve The Processes.**

The grievance regulation specifically provides that a grievant must be adversely affected by a promotional action. Likewise, the County Code defines a grievance as arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to the employee’s term or condition of employment. In the instant case, none of the Appellants, all of whom are Lieutenants, were adversely affected by the promotional process that led to 44 MCOs being promoted to the rank of Sergeant. There is no allegation that any of the Appellants would have applied for the position of Sergeant if they had been informed about the competition. Indeed, as Appellants’ counsel points out the only individuals possibly aggrieved by the Sergeant promotional process are those employees holding the rank of Correctional Officer III. However, no

Correctional Officer III is a party to the instant appeal. Instead, Appellants were allegedly adversely affected by the application of the compensation policy to the Sergeants upon their promotion. Accordingly, although the Board is dismissing the challenge to the promotional process that led to the MCOs being elevated to Sergeants as it is untimely, the Board alternatively would dismiss this challenge as Appellants were not aggrieved.

The same holds true for Appellants' challenge to the promotional process that led to four MCOs being promoted to Lieutenants. Appellants were already Lieutenants at the time the four Sergeants competed for promotion. The only matter over which the Appellants are possibly aggrieved is the base salary given the four Sergeants upon their promotion to Lieutenant. Therefore, the Board finds that Appellants are not aggrieved by the promotional process that led to four Sergeants being promoted to the rank of Lieutenant.

**Appellants' Argument With Regard To The Board's Personnel Oversight Authority Does Not Vest The Board With Jurisdiction Over Portions Of A Grievance Which Are Otherwise Untimely; Likewise The Board's Oversight Authority Does Not Vest It With The Authority To Provide Relief To Grievants Who Are Not Adversely Affected By A Promotional Action.**

Appellants also argue that because the Board has personnel management oversight it should address the allegedly improper promotion practices brought to light by Appellants in the course of this litigation. It is true that the Board wears two hats – one is as an adjudicator of appeals properly before it, the other as a protector of the merit system. These are two very important but nevertheless separate functions of the Board.

For purposes of deciding the instant appeal, the Board is performing its adjudicatory function. Nothing in the County Code or personnel regulations vests the Board with jurisdiction over portions of a grievance that the Board has determined are untimely simply because the Board also serves in an oversight role. Likewise, there is nothing in the County Code or personnel regulations that vests the Board with authority to provide relief to grievants who were not adversely affected by a promotional action.

Therefore, based on the above analysis, the Board finds that Appellants have failed to show good cause as to why the Board should grant their Motion for Reconsideration.

**ORDER**

Based on the foregoing, Appellants' Motion for Reconsideration is denied.

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

### **DECISION ON COUNTY'S REQUEST FOR RECONSIDERATION OF THE BOARD'S FINAL DECISION**

On September 25, 2006, the County filed a Request for Reconsideration,<sup>1</sup> seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Decision and Order dated September 13, 2006. Specifically, the County requests that the Board reconsider its decision to sanction the County<sup>2</sup> because the Office of Human Resources (OHR) Director met with Appellants to negotiate a settlement without their counsel's knowledge.

#### **FINDINGS OF FACT**

The record before the Board upon which its decision is based reflects as follows:

On September 20, 2005, Appellants, through their counsel, appealed the OHR Director's Step 1 decision concerning their consolidated grievances regarding pay compression to the Chief Administrative Officer (CAO). Pursuant to the grievance procedure, the CAO had 35 days within which to schedule a meeting with Appellants and their representative.

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 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 (DOCR), concerning the status of the consolidated grievances. Appellants' counsel asserted that Appellants' 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. Therefore, Appellants' counsel indicated Appellants' counsel was waiving all ADR procedures and insisting on strict adherence to the timetables contained in the grievance procedure.

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<sup>1</sup> Pursuant to Section 2A-10(f) of the Administrative Procedures Act, any request for reconsideration is to be filed within ten days from a Final Decision. The Board has ten days from receipt of the request to grant or deny the request.

<sup>2</sup> In its Final Decision, the Board specifically ordered the County to pay Appellants \$2,502.50 "as a sanction for its conduct in this case."

According to the County's Response, on January 19, 2006, Appellants initiated settlement discussions through the DOCR Director with OHR about their grievances. The County Attorney acknowledges that the OHR Director communicated with the County Attorney regarding Appellants' interest in settling. The County Attorney indicated to the OHR Director that if the employees were represented, the County Attorney could not communicate with any employee who was represented without consent of counsel. The County Attorney indicated that "[w]hen the OHR [D]irector determined that the employees [the OHR Director] was to meet with were still represented, [the OHR Director] met with them and no lawyer from this office participated."

On January 25, 2006, Appellants' counsel again wrote both the OHR Director and the DOCR Director regarding the status of the consolidated grievances. Appellants' counsel asserted Appellants' counsel never received a response. Thereafter, Appellants' counsel filed an appeal with the Board.

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. The OHR Director filed the County's Response to the Board's Show Cause Order, wherein the OHR Director acknowledged the OHR Director engaged in direct settlement negotiations with Appellants. Appellants' counsel filed a Reply, seeking sanctions against the County for its bad faith handling of the consolidated grievances.

The Board determined to assert jurisdiction over the consolidated grievances but deferred any decision on the request for attorney fees as a sanction for the County's conduct. In its Final Decision in this appeal, the Board determined to award sanctions. The Board stated two reasons for the award of sanctions. The first reason, which the County apparently does not challenge, was the County's failure to process the consolidated grievances in a timely fashion.<sup>3</sup> The second reason cited for the award of sanctions was the OHR Director's direct dealings with the Appellants in lieu of through their counsel. It is this reason that is the basis for the County's Request for Reconsideration.

### **ISSUE**

Has the County shown good cause as to why the Board should reconsider its Decision and Order of September 13, 2006?

### **ANALYSIS AND CONCLUSIONS**

The Board notes at the outset that sanctions against the County were awarded to Appellants based on two distinct reasons. Either reason, standing alone, would have resulted in the same sanction being awarded against the County. As previously noted, the

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<sup>3</sup> The County states in its Request for Reconsideration that "the Board may impose a sanction based upon the County's failure to timely process Appellants' grievance so long as the sanction is reasonably related to a harm suffered by Appellants. . . ."



County does not challenge the Board's sanction based on the County's failure to timely process the consolidated grievances. It only challenges the second rationale for the Board's award of sanctions – the direct dealings of the OHR Director with Appellants, even though the OHR Director was aware that they were actively represented by counsel.

The County argues that the OHR Director was fulfilling the OHR's Director's obligation to settle a grievance at the lowest possible level by dealing directly with Appellants. The Board rejects this argument. The County ignores the fact that the Section 34-3 of the grievance regulations accords the right to all employees to be represented at each step of the grievance procedure.

Counsel for Appellants contacted OHR in early December to ascertain the status of the consolidated grievances. Appellants' counsel avers without contradiction that Appellants' counsel was told that a variety of ADR options were available but that the soonest any action could begin was late January.

Unhappy with this timeline for resolving the consolidated grievances, Appellants' counsel wrote the OHR Director in early January, before the start of the settlement negotiations, and indicated Appellants' counsel wanted strict adherence to the grievance procedures time lines so that Appellants' counsel could present the matter to the Board by the end of the month. OHR provided no response to counsel's letter.

Before meeting with Appellants in mid-January, the OHR Director, after a discussion with the County Attorney, determined that Appellants in fact continued to be represented by counsel. The County Attorney then advised the OHR Director that the County Attorney could not communicate with any employee who was represented without consent of counsel. Thus, the OHR Director knew at the time the OHR Director began negotiations with Appellants that they were still actively represented by counsel and should have notified their counsel and included Appellants' counsel in any settlement discussions. Instead, the OHR Director continued direct dealings with Appellants, without their counsel's knowledge, while counsel continued to write to the OHR Director trying to ascertain the status of the consolidated grievances. Even if Appellants initiated the discussion with the County, as the County indicates in its Request for Reconsideration, the Board views it as improper for the OHR Director to have met with Appellants without notifying their counsel.

As to the County's contention that there is no authority to support the Board's position on this point and that a County employee may talk to a County supervisor or manager regarding a matter in dispute, it is one thing to have a discussion about a dispute and another matter completely to actively engage a County employee, represented by counsel, in negotiations without counsel's knowledge. The Board notes that even the County Attorney advised the OHR Director that Appellants, if acting without their counsel's knowledge or involvement, had to be counseled to seek advice before giving up any legal right or acting in a manner as to affect their legal position in the ongoing case. No where does the County assert that the OHR Director so counseled Appellants while engaging them in negotiations.

The County also claims that the Board mischaracterized a statement of the County Attorney. The Board quoted at length from a letter from the County Attorney to Appellants' counsel which was provided as an exhibit to the County's Response. After quoting from the letter, the Board noted that the OHR Director was taking advantage of the Appellants. This was the Board's determination based on the chronology of events as outlined above which occurred preceding the settlement negotiations with Appellants. Their counsel was actively trying to represent them but the OHR Director and OHR staff continued to refuse to even respond to Appellants' counsel correspondence or timely schedule an ADR session. However, OHR readily responded to Appellants when they approached OHR without their counsel's knowledge. The Board had every right to make the determination that in the circumstances of this case, the OHR Director was taking advantage of Appellants.

Accordingly, the Board concludes the County has not established good cause as to why the Board should grant its Request for Reconsideration.

### **ORDER**

Based on the above, the Board denies the County's Request for Reconsideration.

## **CASE NO. 07-01**

### **DECISION ON THE COUNTY'S MOTION FOR RECONSIDERATION OF THE BOARD'S FINAL DECISION**

On November 30, 2006, the County filed a Motion for Reconsideration,<sup>1</sup> seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Decision and Order dated November 21, 2006. Specifically, the County seeks to have the Board reconsider its determination that Appellant's grievance is grievable.<sup>2</sup> Appellant provided a reply to the County's Motion for Reconsideration on December 5, 2006.

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<sup>1</sup> Pursuant to Section 2A-10(f) of the Administrative Procedures Act, any request for reconsideration is to be filed within ten days from a Final Decision. The Board has ten days from receipt of the request to grant or deny the request. If it does not issue a decision within ten days, the reconsideration request is deemed denied.

In accordance with Section 1-301(3) of the Montgomery County Code, in computing deadlines established by the Code, if the last day falls on a Sunday, it is not counted. Therefore, the Board has until December 11, 2006 to issue this Decision on the County's Motion for Reconsideration.

<sup>2</sup> The County does not challenge the Board's determination that Appellant's grievance was timely filed.

## FINDINGS OF FACT<sup>3</sup>

Appellant is an Operations Manager with the Emergency Communication Center of the Police Department. In the grievance, Appellant alleges that over the course of a number of years Appellant has been the target of repeated instances of false allegations, distorted representations, and discriminatory practice initiated by subordinate employees who also serve as shop stewards for the Municipal and County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO (MCGEO). Appellant states that these allegations have been made in an attempt to intimidate and harass Appellant in the performance of Appellant's duties. According to Appellant, there have been several formal investigations and countless informal investigations into Appellant's conduct and behavior based on these allegations.

Appellant also alleges that Appellant has repeatedly sought assistance from management with regard to these false allegations. Appellant has indicated continually to management that Appellant wanted the individuals making the false allegations to be held accountable for their actions. Appellant alleges that management has repeatedly refused to do anything to protect Appellant from harassment.

Appellant's grievance cites to the fact that on March 6, 2006, MCGEO filed a charge of prohibited practice based on Appellant's alleged conduct towards shop steward Ms. D. Specifically, MCGEO claimed that on January 5, 2006, Appellant verbally berated Ms. D because she was a shop steward. By memorandum dated March 22, 2006, MCGEO's Field Service Coordinator, Ms. E, provided union members with a copy of the unfair labor practice (ULP) charge regarding Appellant's behavior. Ms. E indicated in her cover memorandum that Appellant's behavior was completely unacceptable and would not be tolerated by the union. She also stated that the union would update union members as the ULP went through the process.

On March 29, 2006, Mr. A sent an e-mail to Internal Affairs complaining about Appellant's outburst on the floor, involving Ms. D on January 5, 2006. Appellant indicates that an informal inquiry regarding this complaint was made by Appellant's supervisor. According to Appellant, Appellant's supervisor verified that the complaint lacked merit.

In a letter to the Chief Administrative Officer (CAO), dated April 20, 2006, Mr. F, President of MCGEO, requested that Appellant be immediately removed from supervising any MCGEO bargaining unit employee. Mr. F indicated in his letter that the union had filed a request for an investigation into Appellant's "abusive conduct" pursuant to Article 52 of the collective bargaining agreement<sup>4</sup> and had also filed an ULP charge which was

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<sup>3</sup> The Board will only discuss the record of evidence before the Board which is relevant to its Decision on the County's Motion for Reconsideration.

<sup>4</sup> Article 52 of the collective bargaining agreement between MCGEO and the County provides that if the union believes that a supervisory employee has engaged in abusive or intimidating behavior toward a unit member, the union may file a confidential

being held in abeyance pending the results of the Article 52 investigation.

On April 25, 2006, Appellant e-mailed Appellant's supervisor, Ms. G, regarding the prohibited practice charge which had been mailed to every MCGEO member assigned to the Communications Division. According to Appellant, Appellant had recently obtained a copy of this prohibited practice complaint. Appellant informed Ms. G about Appellant's concern that the two shop stewards – i.e., Ms. D and Mr. F – could make untruthful statements and false charges against Appellant without being held accountable. Appellant stated to Appellant's supervisor that Appellant viewed the false allegations as a form of harassment. Appellant went on to assert that these two shop stewards had created "a hostile work environment" for Appellant based on "the false charges and pattern of exaggerated accusations."

In concluding the e-mail, Appellant requested protection of management from the on-going harassment Appellant was experiencing. Appellant also asked to be advised of what action, if any, management would be taking to address this matter. Ms. G subsequently told Appellant that Appellant's e-mail had been forwarded to Mr. C for response.

By e-mail dated May 12, 2006, Mr. C responded to Appellant's April 25<sup>th</sup> e-mail to Ms. G. Mr. C indicated that he could not prevent any other employee from making a complaint against Appellant.

Appellant responded to Mr. C's e-mail, stating that Appellant wanted him to hold people accountable for making false statements against Appellant. Appellant noted that Appellant had been involved in processes where employees had been fired for making false statements. Appellant indicated Appellant would be filing a grievance in an attempt to have Appellant's concerns appropriately addressed.

On May 30, 2006, Appellant filed a grievance with OHR. In the grievance, Appellant alleged that Appellant had been subjected to harassment, false and distorted allegations, and discriminatory practices initiated by subordinate employees who serve as shop stewards for MCGEO as well as by MCGEO President. As relief, Appellant requested that management initiate an investigation into Appellant's allegations and take the necessary steps to hold employees accountable for making false statements and engaging in retaliatory and discriminatory practices against Appellant. Appellant also requested that the Department provide training to its executives in the recognition and eradication of harassment and discriminatory practices.

By memorandum dated July 7, 2006, the OHR Director issued a final decision, finding that Appellant's grievance was untimely. In the final decision, the OHR Director

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complaint with the Office of Human Resources (OHR). OHR is required to conduct a confidential investigation of the complaint.

indicated that because the OHR Director had determined that the grievance was untimely, there was no need to decide whether the subject matter of the grievance is grievable.<sup>5</sup>

Appellant appealed the OHR Director's determination to the Board. In its Decision, the Board held that Appellant's grievance had been timely filed. Because the Board was concerned about the inordinate delay in the processing of Appellant's grievance based on its dismissal for untimeliness, the Board determined to *sua sponte* address whether the subject matter of the grievance was grievable. The Board found that OHR mischaracterized the gravamen of Appellant's grievance. The grievance concerned management's failure to protect Appellant against alleged harassment and its failure to initiate an investigation into what Appellant regards as false statements. The Board determined that this is a proper subject matter for a grievance.

### **POSITIONS OF THE PARTIES**

#### **County:**

- By deciding *sua sponte* that the subject matter of Appellant's grievance was grievable, the County was deprived of any opportunity to be heard on the issue.
- Appellant's underlying complaint is not grievable as it deals with conduct undertaken by the union, not individual employees.
- The conduct Appellant finds objectionable is, at least facially, legitimate union conduct under the collective bargaining law.
- The County could subject itself to a prohibited practice charge for interfering with employees in the exercise of union activities if it investigated the union's president or stewards.
- Bad faith conduct by the union must be addressed through the labor relations process, either by an arbitrator or the labor relations administrator, and not by the Board.
- The Board cannot fashion any meaningful remedial action involving union activity.

#### **Appellant:**

- The Board's decision should stand, as it is lawful and procedurally correct in its application.
- The OHR Director failed to properly investigate the merits of the grievance. It is unreasonable for the County to argue it has been deprived of the opportunity to be heard on an issue they were first to raise.
- The actions of individual employees are grievable and were the subject of the grievance.

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<sup>5</sup> The County, in its response to Appellant's appeal to the Board, also indicated that it was unnecessary to determine whether the subject matter of the grievance, which it characterized as "harassment and false allegations lodged by subordinate employees in their role as MCGEO shop stewards as well as by the MCGEO president himself," is grievable given the fact that the grievance was untimely.

- The Article 52 complaint, the prohibited practice charge, the letter to the CAO and the mass mailings to all subordinate employees within Appellant's unit were all attempts to harass Appellant and created a hostile work environment.

### APPLICABLE LAW AND REGULATION

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

A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. The determination of the Board as to what constitutes a term or condition of employment shall be final.

**Montgomery County Code, Section 33-14(c), Decisions**, which states in applicable part:

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

. . .

- (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;

. . .

- (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

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

**34-4. *Reasons for filing a grievance.*** An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

. . .

- (b) improper or unfair act by a supervisor or other employee, which may include coercion, restraint, retaliation, harassment, or intimidation; . . .

### ISSUE

Has the County shown good cause as to why the Board should reconsider its Decision and Order of November 21, 2006?

## ANALYSIS AND CONCLUSIONS

### The County Has Received The Opportunity To Offer Argument In Its Motion For Reconsideration Regarding The Board's Finding That The Subject Matter Of Appellant's Grievance Is Grievable.

In the instant case, although the Board *sua sponte* determined that the subject matter of Appellant's grievance was grievable, it has carefully considered the arguments in the instant Motion for Reconsideration, as well as the reply by the Appellant. Thus, the County has received any and all due process it is entitled to with regard to the finding by the Board that the subject matter of Appellant's grievance is grievable.

### The County Has Failed To Show Good Cause As To Why The Board Should Reconsider Its Decision.

#### A. The Subject Matter Of Appellant's Grievance Is Grievable.

The County misunderstands the Board's finding with regard to the subject matter of Appellant's grievance – it is not about union conduct but management conduct or lack thereof. The Board specifically found that the grievance is about Appellant's management's failure to protect Appellant against alleged harassment and its failure to initiate an investigation into what Appellant regards as false statements. Appellant wants management to hold employees accountable if they have made false statements against Appellant. Appellant's request for relief specifically asks that Appellant's employer initiate an investigation into Appellant's allegations. Appellant also requests that additional training be provided to executive management members of the Department of Police in the identification, recognition, and eradication of harassment and discriminatory practices. Thus, the conduct Appellant finds objectionable and has grieved about is management's conduct.

The Board has determined that Appellant's grievance clearly represents a disagreement between Appellant and Appellant's management chain with regard to a term or condition of Appellant's employment. Appellant alleges that Appellant has a right to be free from harassment in the workplace. Appellant also alleges that by its inaction, management has allowed a hostile environment to be created by not addressing the false allegations of two employees.

At this point, the Board's Order does not require the County to do anything more than address the merits of Appellant's grievance. The County argues that it could subject itself to a prohibited practice charge for interfering with employees in the exercise of union activities if it investigated the union's president or stewards. In the Board's view, there are clearly ways that management could address the merits of the grievance without interfering with the exercise of legitimate union activities. For example, in addressing Appellant's grievance, management may determine to investigate Appellant's allegation that the charges levied against Appellant by the two employees are false. If management determines the charges are false, then management will have to decide how to address the matter. As the County itself acknowledges, the union does not have carte blanche to knowingly file false or frivolous claims. The County also acknowledges that such bad faith conduct is addressable through the labor relations process.

B. The Board Has The Ability To Fashion An Appropriate Remedy With Regard To Management's Conduct.

As previously noted, Appellant has requested that executive management be required to take additional training in the identification, recognition, and eradication of harassment. This request certainly comes within the broad scope of the Board's remedial authority under Section 33-14(c) of the Montgomery County Code. The Board also has the authority to order management, where appropriate, to conduct an investigation. Thus, the Board rejects the County's argument that it lacks the ability to fashion an appropriate remedy.

Accordingly, the Board concludes the County has not established good cause as to why the Board should grant its Motion for Reconsideration.

**ORDER**

Based on the above, the Board denies the County's Motion for Reconsideration.



# **DISCOVERY**

The County's Administrative Procedures Act (APA), Montgomery County Code Section 2A-7(b), provides for discovery prior to a hearing. Discovery may include requests for production of documents, the propounding of interrogatories (i.e., requesting a set of questions be answered) or the taking of deposition(s) (i.e., the taking of testimony). Generally, the Board expects the parties to an appeal to amicably resolve any discovery disputes. However, pursuant to Section 2A-7(c), a party may file a Motion to Compel Discovery with the Board. In determining whether to grant a party's motion, the Board evaluates whether the party has "shown good cause" for the information sought as required by the APA.

During FY 2007, the Board issued the following Decision on a discovery dispute.

# **DISCOVERY DECISION**

## **Case No. 07-08**

### **DECISION ON APPELLANT'S MOTION TO ALLOW DISCOVERY**

On March 27, 2007, Appellant filed a Motion to Allow Discovery, seeking to have the County produce certain documents and respond to interrogatories,<sup>1</sup> as well as requesting the Merit System Protection Board's (MSPB's or Board's) permission to take various depositions.<sup>2</sup> The County responded to Appellant's Motion and Appellant subsequently replied. The following constitutes the Board's determination regarding the discovery dispute.

### **BACKGROUND**

This appeal involves the demotion of Appellant from the position of Management Leadership Service (MLS) Manager III, Department of Public Works and Transportation, (DPW&T) to the position of Project Manager, Grade 26, effective February 5, 2007. The Notice of Disciplinary Action – Involuntary Demotion (NODA) set forth three charges: 1) Tow truck incident; 2) interference with OCA<sup>3</sup> investigation, untruthful statements to an OCA investigator, and intimidation of a County employee; and 3) interference with OCA investigation, untruthful statements to an OCA investigator, and intimidation of a County employee.

The first charge – the tow truck incident – which involved Mr. A, an employee of DPW&T, towing a truck belonging to the Division Chief from a commercial towing lot, occurred on October 4, 2005. The NODA alleged that Mr. A towed the vehicle for free at Appellant's implied direction while Mr. A was on County time.

The second charge dealt with Appellant's alleged coercion of Mr. A to prepare a memorandum, dated September 6, 2006 (Memorandum), for submission to OCA in connection with its investigation into the towing incident, which contained false statements. The second charge also asserted that Appellant made untruthful statements to the OCA investigator during Appellant's sworn testimony regarding Appellant's knowledge that

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<sup>1</sup> Appellant originally sought a response to four interrogatories. See Motion to Allow Discovery. However, in the Reply of Appellant to County Response to Motion to Allow Discovery (Reply), Appellant indicated that the County had responded to two interrogatories.

<sup>2</sup> Originally, Appellant sought to take two depositions – Mr. A and Mr. B. See Motion to Allow Discovery. However, Appellant subsequently requested permission to take a third deposition – Mr. C. See Reply at 6.

<sup>3</sup> OCA stands for the Office of the County Attorney.

Mr. A towed the Division Chief's vehicle during County work hours and Appellant's knowledge of the circumstances surrounding the preparation of the Memorandum.

The third charge cited two incidents involving Appellant in which it was alleged that Appellant sought to harass and coerce Mr. A to alter testimony: 1) a meeting on September 6, 2006, during which Mr. A was told that Mr. A might not be continued in Mr. A's position as Mr. A failed to meet the minimum qualifications; and 2) a meeting on September 29, 2006, with Mr. A and the Division Chief during which it is alleged that Appellant questioned Mr. A concerning testimony to the OCA investigator and attempted to coerce Mr. A to lie to the investigator.

The charges that form the bases of the NODA were a result of an investigation conducted by OCA. According to the County's Response, OCA initiated an independent investigation concerning various management practices in the Department of Public Works and Transportation, Division of Fleet Management (FMS) in May 2006. However, it was not until August 24, 2006, that OCA became aware of the tow truck incident, which constitutes the first charge in the NODA. On that date, according to the County, OCA interviewed Mr. C and he disclosed to the County the tow truck incident. According to the County, "[i]n light of the potential and serious ethics violations, OCA investigated the tow truck incident separately from the issues originally presented in May 2006." County Response to Motion to Allow Discovery (County's Response) at 1. The County has already submitted the investigative report and supporting documents related to the tow truck incident as County Exhibit 1. Thus, based on the information provided by the County, OCA did two investigations – one dealing with general management practices in DPW&T and the other dealing with the towing incident.

### **APPLICABLE LAW**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7. Pre-hearing procedures,** which states in applicable part,

- (b) **Discovery.** Subject to the provisions of the state public information law:
  - (1) Any party shall have the right to review at reasonable hours and locations and to copy at its own expense documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law.
  - ...
  - (3) The provisions contained herein shall not infringe upon any attorney-client privilege and shall not include the work product of counsel to any party to the proceedings.

- (4) Where it appears that a party possesses information or evidence necessary or helpful in developing a complete factual picture of a case, a hearing authority may order such party to answer interrogatories or submit itself or its witnesses to depositions upon its own motion or for good cause shown by any other party. . . .

## ANALYSIS AND CONCLUSIONS

### Document Requests

1. All transcripts from the investigation in which Appellant's name was mentioned, or in which any of the facts that are the basis of the allegations in the NODA were discussed.<sup>4</sup>

Appellant argues that Appellant needs this information so as to obtain knowledge as to whether some employees/witnesses gave testimony that is favorable to Appellant's position in this matter.

The County argues that it has produced all transcripts and supporting documentation related to the tow truck incident.<sup>5</sup> The County notes that it only learned of this incident through testimony from Mr. C on August 24, 2006, and therefore all previous interviews did not address or discuss the tow truck incident. In support of this position, the County also relies on that portion of the Administrative Procedure Act which provides for discovery of "documents, statements or other investigative reports or portions thereof pertaining to the charging documents."

The Board finds that the gravamen of Appellant's disciplinary action is the towing incident and events which happened subsequently. The County has asserted that it has provided Appellant with all the transcripts dealing with this matter and that the towing incident was investigated separate and apart from the investigation done regarding FMS general management practices. Nevertheless, the Board is going to order the County to produce all transcripts with regard to the FMS general management practices investigation in which Appellant's name was mentioned or in which any of the facts that are the basis of

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<sup>4</sup> This request, contained in Appellant's Motion to Allow Discovery, differs somewhat from the original request made by Appellant to the County on February 20, 2007. While Appellant seeks all of the material Appellant originally requested on February 20, 2007, see Motion to Allow Discovery at 6, the Board is only going to address herein those documents, interrogatories, and depositions specifically discussed in Appellant's Motion to Allow Discovery and Appellant's Reply. The reason for this is that Appellant has only enunciated a rationale as to Appellant's need for the information discussed in Appellant's Motion to Allow Discovery and Reply so as to permit the Board to make an informed decision about whether good cause has been shown.

<sup>5</sup> County Exhibit 1 in this matter is the OCA investigation of the towing incident with supporting documents and transcripts. The County's investigation consisted of 23 exhibits, numbered 1-1 through 1-23.

the allegations in the NODA were discussed so that Appellant can have the opportunity to develop a complete factual picture. However, Appellant is cautioned that just because the Board is allowing this discovery does not mean that the Board views any events before the County's discovery of the towing incident as relevant to this appeal.

2. The telephone records from the Shop for October 2<sup>nd</sup> and 3<sup>rd</sup>, 2005. Appellant subsequently amended this request to include Mr. A's home phone records for October 4, 2005.

Mr. A has stated that Appellant called Mr. A on the day of the towing incident both at home and subsequently at work. Appellant alleges that Appellant needs this information to impeach Mr. A, as the records will show that relevant telephone calls made to Mr. A at the Shop were not made on the day of the towing incident. Appellant also claims that Appellant needs Mr. A's home phone records as Appellant does not recall calling Mr. A at home on the day of the towing incident.

The County asserts that it provided telephone records from the Shop for October 4, 2005, which prove that Mr. A called his supervisor, Mr. D, to notify Mr. D that Mr. A would be late. The County also states that it provided Mr. A's cell phone records for October 4, 2005, which show that Mr. A received a phone call from Mr. E about towing Mr. E's vehicle.

The Board finds that Appellant has shown good cause as to why the County should produce the telephone records from the Shop for October 2<sup>nd</sup> and 3<sup>rd</sup>, 2005. This information bears directly on the towing incident which is one of the charges in the NODA. Likewise, the Board also finds that Appellant has shown good cause as to why Mr. A's home phone records for October 4, 2005, the date of the towing incident, should be produced.

3. Inter-County telephone records (i.e., County extension to County extension) that would show the time of the telephone call from Mr. B to the Division Chief on the afternoon of September 29, 2006.

Mr. A has testified that he attended a meeting on September 29, 2006 with the Division Chief and Appellant which lasted from 3:00 p.m. to 4:30 p.m. It was during this meeting that Mr. A was purportedly asked about the testimony he had given to the OCA investigator. According to Mr. A, the meeting ended when the Division Chief received a phone call from Mr. B. Appellant asserts that Appellant needs these records to impeach Mr. A's credibility.

The County states that it has submitted Mr. B's office records (which include incoming and outgoing calls but not internal calls) for September 29, 2006, and they fail to support the claim that Mr. B called the Division Chief.

The Board finds that the Appellant has shown good cause for the County to produce the inter-County telephone records for Mr. B's County phone for September 29, 2006. One

of the charges in the NODA resulted in part from the events that occurred at a meeting with Mr. A, the Division Chief and Appellant on September 29, 2006. Mr. A has indicated that the meeting took an hour and a half, see County Exhibit (Ex.) 1-1 at 15, 33 and County Ex. 1-18 at 32, 35, and the Division Chief and Appellant have indicated it only took a short period of time. See County Ex. 1-22 at 21 and County Ex. 1-21 at 50. However, the parties to the meeting agree that it began sometime around 3:00 p.m. and ended when Mr. B called the Division Chief. Therefore, these inter-County phone records are relevant.

### **Interrogatory Requests**

1. State the names of all witnesses interviewed in the investigation, the number of times that they were interviewed, and the date(s) that they were interviewed. If a transcript was prepared, provide a copy.

Appellant contends that numerous unfounded accusations were leveled against Appellant by subordinate employees in DPW&T. There may be information favorable to Appellant or useful in Appellant's defense in these transcripts. Also, according to Appellant, the numerous witnesses and transcripts will reflect the great lengths to which the OCA investigator went to find a basis for disciplinary action against Appellant. In addition, Appellant intends to raise as an issue in this case the fact that the County had no legal authority to conduct the investigation in the manner it was conducted and the County Attorney's Office could not investigate the towing incident if it was already a subject of investigation by the Office of the Inspector General.

The County contends that the tow truck incident was treated as a separate investigation from the other matters investigated in FMS. The County has provided a copy of OCA's investigative report and all supporting documentation. Anything that occurred before the County learned of the tow truck incident on August 24, 2006 is irrelevant to this appeal.

The Board finds that Appellant has not shown good cause for the County to produce the names of all witnesses interviewed in the investigation, the number of times they were interviewed and the dates they were interviewed. As the Board is ordering the County to produce all transcripts of the general management practices investigation in which Appellant's name was mentioned or in which any of the facts that are the basis of the allegations in the NODA were discussed, Appellant should have sufficient information to develop a complete factual picture.

2. The memorandum of April 17, 2006 from Mr. B (Exhibit A-3), and the memoranda of September 1, 2006 (Exhibit A-13) and September 13, 2006 (A-14) from the OCA Investigator identified issues in the investigation. A number of allegations were directed against Appellant and the Division Chief. What disciplinary action, if any, was taken against employees who made allegations against Appellant and the Division Chief that were not substantiated and/or were false?

Appellant asserts that the OCA investigator relentlessly pursued unfounded allegations against Appellant, until the OCA investigator finally discovered an issue (over 10 months after the incident occurred) upon which the OCA investigator could attempt to build a case against Appellant. Appellant notes that Appellant has been charged with making false statements in the course of this investigation, and has received severe and unjust punishment based on this charge. At the same time, according to Appellant, the County has apparently ignored the allegations by subordinate employees against Appellant that were false or unfounded. Thus, this interrogatory seeks to establish the unfair manner in which Appellant was treated, and the pattern of false and unfounded allegations made during the investigation.

The County asserts that this interrogatory is not relevant to the tow truck incident and Appellant's involvement in the tow truck incident.

The Board finds that Appellant has not shown good cause as to why the County should respond to this interrogatory. At issue in this case is Appellant's discipline, not that of any other employee.

### **Depositions<sup>6</sup>**

#### 1. Mr. A

Appellant contends that Mr. A was interviewed as many as five to six times by the OCA investigator and has been designated a witness by the County. The charge in the NODA that Appellant provided false testimony is based at least in part upon Mr. A's testimony in the depositions with the OCA investigator. Mr. A's credibility will be a central issue in this case. Appellant argues that Appellant must be allowed the same opportunity as the County to interview Mr. A before the hearing; denying Appellant's request would place the County at an unfair advantage.

The County argues that Appellant has failed to show good cause for taking Mr. A's deposition. The County notes that Mr. A will be present at the MSPB hearing and Appellant will have the opportunity to examine Mr. A then.

The Board finds that Appellant has shown good cause as to why Appellant should be able to take Mr. A's deposition. Mr. A is a key witness in this case and his testimony is relevant. The Board will grant the County's request that any attorney-client communications and discussions with Mr. A, any matter relating to executive privilege, and any matter or issue deemed to be confidential and/or protected under the County's merit system law be respected and maintained.

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<sup>6</sup> If the MSPB decided to permit Appellant to depose Mr. A and/or Mr. B, the County requested that the Board set forth the subject matter areas and permitted scope of the deposition(s). The County further requested that attorney-client communications and discussions, matter relating to executive privilege, and any matter or issue related to a merit system right of the deponent be respected and maintained.

2. Mr. B

Appellant contends that Appellant needs to take Mr. B's deposition as it was Mr. B who initiated the investigation and made the decision to issue the Statement of Charges and NODA. According to Appellant, Mr. B described the investigation to the Division Chief as a "witch hunt." Appellant also alleges that when Mr. B handed Appellant and the Division Chief the memoranda of October 6, 2006, placing them on administrative leave, Mr. B stated Mr. B was "only the messenger."

The County argues that Appellant has failed to show good cause for taking Mr. B's deposition. The County notes that Mr. B will be present at the MSPB hearing and Appellant will have the opportunity to examine Mr. B then.

The Board finds that Appellant has not shown good cause for why Appellant should be able to take Mr. B's deposition. The Board notes that Appellant has named Mr. B as a witness. Thus, Appellant will have the opportunity to examine as well as cross-examine Mr. B at the hearing.

3. Mr. C

In Appellant's Reply to the County's Response to Motion to Allow Discovery, Appellant for the first time identified Mr. C as a subject for deposition. Appellant argues that Appellant only first became aware that the towing incident was reported by Mr. C to the OCA investigator at the pre-hearing conference held by the Board on April 9, 2007. Appellant asserts that Appellant needs to take Mr. C's deposition for two reasons. According to Appellant, Mr. C is one of the disgruntled employees in DPW&T who had a motive to provide false and damaging information against Appellant. Secondly, Appellant believes that Mr. C may have reported the towing incident to the Office of the Inspector General. Appellant needs to ascertain if Mr. C did so, as this relates to the question of whether the County Attorney's Office had the legal authority to pursue the investigation related to the towing incident.

As Appellant only raised the issue of Mr. C's deposition in his Reply, the County did not address this in the County's Response to Appellant's Motion to Allow Discovery.

The Board finds that Appellant has not shown good cause as to why Appellant should take Mr. A's deposition. Although the County has indicated that Mr. C was the first individual to report the towing incident during the investigation, the charges in the NODA are not based on Mr. C's testimony but rather Mr. A's testimony. As previously noted, Appellant is being given the opportunity to take Mr. A's deposition before the hearing.

**ORDER**

Based on the foregoing, the Board hereby orders the following actions:

1. The County is to produce all transcripts in the FMS general management



practices investigation in which Appellant's name is mentioned or in which any of the facts that are the basis of the allegations in the NODA were discussed. Said information shall be produced **within 5 calendar days** from the date of this Order.

2. The County is to produce the telephone records from the Shop for October 2<sup>nd</sup> and 3<sup>rd</sup>, 2005. Said information shall be produced **within 5 calendar days** from the date of this Order.

3. The County is also to produce Mr. A's home phone records for October 4, 2005 if it has said records in its possession. Said information shall be produced **within 5 calendar days** from the date of this Order. If the County does not have the records in its possession, the County is ordered to ask Mr. A for these records. If Mr. A refuses to provide them to the County, the County is to notify the Board **within 5 calendar days** from the date of this Order and the Board will issue a subpoena for these records to Mr. A.

4. The County is to produce the inter-County telephone records (i.e., County extension to County extension) that would show the time of the telephone call from Mr. B to the Division Chief on the afternoon of September 29, 2006. Said information shall be produced **within 5 calendar days** from the date of this Order.

5. The County is to produce Mr. A for deposition at a time and place mutually agreeable to both sides.

All remaining discovery requests of Appellant are hereby denied.

# **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 case involves a request for attorney fees that was decided during fiscal year 2007.

# **ATTORNEY FEE DECISION**

## **Case No. 06-04**

### **DECISION AND ORDER ON ATTORNEY FEE REQUEST**

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

Appellant has submitted a request for attorney fees and costs in the amount of \$8,792.25, and expenses in the amount of \$44.00, for a total of \$8,836.25. The County has filed a response raising issue with respect to the hourly rate charged for the services rendered by the attorney in this matter as well as the number of hours billed. Appellant then filed a reply to the County's response and sought an additional \$142.50 in fees for filing the reply. Section 33-14(c)(9) of the County Code vests the Board, as part of its remedial authority, with the authority to order the County to reimburse or pay all or part of the employee's reasonable attorney fees. Set forth below is a discussion of the issues of this case and the Board's determinations.

#### **Procedural History Of This Case**

Appellant filed the initial appeal with the Board on December 22, 2004. The Board's Decision on that appeal, dated April 4, 2005, denied in part and granted in part Appellant's appeal from the determination of the Montgomery County, Maryland, Chief Administrative Officer (CAO), that certain incidents in Appellant's grievance were untimely and one incident was moot. Specifically, in granting a portion of the appeal, the Board found that Appellant's placement on a sick leave restriction was not moot and remanded that issue for further processing on the merits.

In its April 4, 2005 Decision and Order, the Board indicated it was not granting attorney's fees as it had made no decision on the merits of the grievance. After receiving Appellant's request for reconsideration on the issue of attorney fees, the Board, in its Decision and Order on Request for Reconsideration, amended its original decision to provide for the awarding of attorney fees and costs. The Board indicated, however, that it would grant attorney fees only for those fees incurred in prosecuting the appeal and subsequent request for reconsideration before the Board. It did not award fees for the time spent by counsel representing Appellant during the administrative stage of the grievance procedure leading up to the appeal.

After the Board remanded back the sick leave restriction issue to the CAO, a Step 3 meeting was held on October 20, 2005. On March 15, 2006, the CAO issued a Step 3 decision, denying Appellant's grievance. Appellant appealed the CAO's decision to the Board.

In a Decision and Order, dated July 13, 2006, the Board determined that the County failed to adhere to the provisions of Section 17-9 of the Montgomery County Personnel Regulations in placing Appellant on sick leave. The County was ordered to expunge the sick leave restriction. As Appellant had prevailed, the Board authorized a request for attorney fees.

### **Appellant's Request And The County's Response**

Appellant seeks attorney fees for work performed during 2004, 2005 and 2006. Specifically, Appellant seeks fees for 9.75 hours of work on Appellant's original grievance during 2004. Appellant also seeks fees covering 2005<sup>1</sup> and 2006 for 21.10 hours of work on the sick leave restriction issue which was remanded to the CAO and the subsequent appeal from the CAO's decision. Appellant seeks compensation at the rate of \$285.00 per hour. Thus, Appellant initially sought \$8,792.25 in fees, as well as expenses in the amount of \$44.00. As previously noted, Appellant also now seeks compensation for .5 hours expended on a reply to the County's Response at the rate of \$285.00 per hour.<sup>2</sup>

The County asserts that the number of hours claimed, i.e., 30.85, is excessive given the fact that the appeal involved a single issue and no hearing. The County notes that there was no hearing scheduled in this case and the Board's Decision was based on the written submission of the parties.

The County also challenges the hourly rate claimed by Appellant's counsel. The County asserts that the Board should reduce the rate to the one used by the Board in this matter in the Board's previous Decision and Order on Attorney Fee Request (Attorney Fee Decision I). The County notes that in the Board's previous decision it awarded a rate of \$175.00 per hour. The County does acknowledge that Appellant's counsel is very experienced and states that for someone with Appellant's counsel's experience 30.85 hours is an excessive amount of time.

In Appellant's reply to the County's response, Appellant questions the County's challenge of counsel's \$285.00 per hour rate, noting that the County reimbursed Appellant's counsel at the rate of \$285.00 per hour for fees incurred in this case regarding the issue of unauthorized practice of law.<sup>3</sup> Appellant also notes that the County has not taken issue with any particular entry of time on Appellant's counsel's invoice for services.

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<sup>1</sup> Appellant does not seek fees for time spent on the original appeal of Appellant's grievance to the Board.

<sup>2</sup> Thus, Appellant now seeks a total of \$8,934.75 in fees, as well as \$44.00 in costs.

<sup>3</sup> The Office of Human Resources had during the pendency of this case filed a Motion for Clarification with the Board. Appellant's counsel moved to strike the Motion for Clarification and sought attorney fees in connection with the motion. The County responded by offering to pay Appellant's counsel's fees in connection with the motion if the Appellant would agree to a withdrawal of the motion. Appellant subsequently agreed to the withdrawal.

### **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. Reimbursement For Time Expended On The Original Grievance In 2004**

As previously noted, Appellant seeks fees for 9.75 hours expended on the original grievance. As noted in the Board’s Attorney Fee Decision I, Appellant only partially prevailed with regard to the appeal of the original grievance. Therefore, based on Board precedent, *see, e.g.*, MSPB Case No. 03-05 (2003); MSPB Case No. 02-07 (2002), the Board reduced the number of compensable hours for the appeal. The same logic applies to time expended on the original grievance. As Appellant prevailed on only the mootness issue, under Board precedent a reduction in the number of compensable hours expended on the original grievance is appropriate. Accordingly, the Board will grant fees for 5.75 hours.

With regard to the hourly rate for these 5.75 hours, the County correctly notes that the Board, in Attorney Fee Decision I, determined to compensate Appellant’s counsel at the rate of \$175.00 per hour for work on the appeal of the original grievance. In determining the appropriate hourly rate in Attorney Fee Decision I, the Board considered the nature and complexity of the case, the tasks necessary in presenting the case, and the customary fees charged in these type cases. Based on the reasoning relied on by the Board in its Attorney Fee Decision I, the Board finds that Appellant’s counsel should be compensated for 5.75 hours of work in 2004 at the rate of \$175.00 for a total of \$1006.25.

B. Reimbursement For Time Expended On The Sick Leave Restriction Issue

Appellant seeks reimbursement for 21.10 hours expended during 2005 and 2006. The County alleges that this is an excessive amount of hours and urges the Board to closely scrutinize Appellant's counsel's time sheets. The Board has carefully reviewed the time sheets and determined that amount of time claimed is reasonable. Therefore, Appellant will be reimbursed for the 21.10 hours.

The County argues that Appellant should be reimbursed at the rate of \$175.00 per hour for work done by Appellant's counsel in 2005 and 2006. The Board disagrees. In Mathena v. Merit System Protection Board, Case No. 263758V (Cir. Ct. Apr. 18, 2006), the Circuit Court addressed the issue of what constitutes a reasonable attorney fee. It considered various factors listed in the Code and determined that based on the case before it, the customary fee for an attorney with 15 years of employment law experience and a strong reputation in the legal community was \$275.00 per hour. Appellant's counsel has similar qualifications. Appellant's counsel is an experienced employment lawyer. Appellant's counsel has practiced before the Board on many occasions and it is aware of Appellant's counsel's experience, reputation and ability. The Board has considered the nature and complexity of the instant case, the experience of counsel, the tasks necessary in presenting the case, and the customary fees charged in these type cases and finds that \$275.00 an hour for counsel's services is reasonable under the Code's factors.

Accordingly, the Board will reimburse Appellant for 21.1 hours at \$275.00 per hour for a total of \$5,802.50.

C. Costs Claimed

Appellant has also requested \$44.00 in costs. The Board has reviewed this claim, and noting that the County does not object to this request, the Board will award \$44.00 in costs.

D. Reimbursement For Time Expended On Appellant's Reply To The County's Response

Appellant also seeks reimbursement for .5 hours expended on the reply to the County's response. In its Decision and Order dated July 13, 2006, the Board specifically ordered that Appellant file the request for attorney fees and that the County respond to the request. The Board neither ordered nor provided for any additional reply by Appellant to the County's response.<sup>4</sup> In addition, the Board finds there was no demonstrated need for a reply. Accordingly, the Board denies the additional fee request submitted by Appellant for Appellant's reply to the County's response.

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<sup>4</sup> The Board notes that in its Attorney Fee Decision I, it likewise denied Appellant's request for additional compensation for time expended on Appellant's reply to the County's response to Appellant's request for attorney fees based on the same reasoning.

**ORDER**

Based on the above, the Board concludes that 5.75 hours of attorney fees are allowable at an hourly rate of \$175.00, for a total of \$1006.25. The Board also concludes that 21.10 hours of attorney fees are allowable at an hourly rate of \$275.00, for a total of \$5,802.50. The Board also awards costs of \$44.00. Accordingly, the County is hereby ordered to reimburse the Appellant for attorney fees and costs in the amount of \$6,852.75.

# **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 . . .

Based on 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 07, the Board reviewed and where appropriate provided comments on the following new class creations:

- 1) Labor Relations Adviser, Grade 27;
- 2) Intake Processing Aide, Grade 14;
- 3) Traffic Enforcement Field Service Technician, Grade 12;
- 4) Telecommunications Specialist, Grade 20;
- 5) Manager, Taxicab Regulation and Special Transit Service, Grade 26;
- 6) Lead Revenue Counter, Grade 13;
- 7) Architect I, Grade 19;
- 8) Architect II, Grade 22;
- 9) Architect III, Grade 25;
- 10) Senior Pool Manager, Grade 18;
- 11) Assistant Inspector General, Grade 28;
- 12) County Government Assistant, Grade S1;
- 13) Correctional Nurse I, Grade 21;
- 14) Correctional Nurse II, Grade 24.