

# **Merit System Protection Board Annual Report FY2008**

**Members:**

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

***Executive Secretary:***

**Kathleen J. Taylor**

**Prepared by:**

**Susan W. Goldsmith**  
***Executive Administrative Aide***

**Montgomery County, Maryland  
Merit System Protection Board  
100 Maryland Avenue, Room 113  
Rockville, Maryland 20850  
240-777-6620  
FAX: 240-777-6624**



## **TABLE OF CONTENTS**

|  |          |
|--|----------|
| <b>COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD.....</b> | <b>1</b> |
| <b>DUTIES AND RESPONSIBILITIES OF THE BOARD.....</b>         | <b>1</b> |

### **SUMMARY OF DECISIONS ON APPEAL**

|   |            |
|---|------------|
| <b>APPEALS PROCESS - DISCIPLINARY ACTIONS .....</b> | <b>4</b>   |
| <b>Dismissal.....</b>                               | <b>5</b>   |
| <b>Suspension and Subsequent Dismissal.....</b>     | <b>21</b>  |
| <b>Demotion.....</b>                                | <b>28</b>  |
| <b>Suspension.....</b>                              | <b>54</b>  |
| <b>APPEALS PROCESS – DENIAL OF EMPLOYMENT.....</b>  | <b>80</b>  |
| <b>Employment Decisions.....</b>                    | <b>81</b>  |
| <b>APPEALS PROCESS – GRIEVANCES.....</b>            | <b>89</b>  |
| <b>Retirement Plan Coverage.....</b>                | <b>90</b>  |
| <b>Delay of Service Increment.....</b>              | <b>101</b> |
| <b>Recalculation of Retirement Benefit.....</b>     | <b>107</b> |
| <b>Division of Death Retirement Benefit.....</b>    | <b>111</b> |
| <b>SHOW CAUSE ORDERS.....</b>                       | <b>114</b> |
| <b>Show Cause Order Decision.....</b>               | <b>115</b> |
| <b>RECONSIDERATION.....</b>                         | <b>120</b> |
| <b>Reconsideration Decisions.....</b>               | <b>121</b> |

|                                    |     |
|------------------------------------|-----|
| <b>DISCOVERY</b> .....             | 135 |
| <b>Discovery Decision</b> .....    | 136 |
| <b>MOTIONS</b> .....               | 141 |
| <b>Motion Decisions</b> .....      | 142 |
| <b>ATTORNEY FEE REQUESTS</b> ..... | 150 |
| <b>Attorney Fee Decision</b> ..... | 151 |
| =====                              |     |
| <b>OVERSIGHT</b> .....             | 160 |

**FY 2008**  
**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 2008 were:

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

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

The duties of the Merit System Protection Board are contained in: 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 recommendations with the Executive and the

Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

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 shall 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 [C]ounty 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 ten (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 ten (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 witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which the parties' lists of witnesses and exhibits are discussed. Upon completion of the Prehearing 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 2008.

# **DISMISSAL**

## **Case No. 07-13**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or 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**

At the time of all incidents relevant to this appeal, Appellant was a Correctional Shift Commander (Lieutenant) in the Montgomery County Correctional Facility. As a Lieutenant, Appellant directly supervised the work of Correctional Officers assigned to the Correctional Facility. According to the Class Specification for Correctional Shift Commander, the purpose of the work of a Lieutenant is to maintain security, safety, and control within the assigned unit. The incumbent's work "impacts the safety and well being of inmates, staff, visitors, volunteers, and, ultimately the community." County Exhibit (C. Ex.) 15 at 2. As part of Appellant's assigned duties, Appellant was expected to visit each post<sup>1</sup> during the course of a shift to observe and monitor implementation of security and safety procedures, and compliance with post requirements. Id.

In October 2006, the Warden received an anonymous tip from the Montgomery County Government Employees Organization that two Lieutenants were spending too much time on the computer/internet and not enough time in the units supervising staff. One of the two Lieutenants identified was Appellant. The Warden decided to check on the anonymous tip before acting further. Accordingly, the Warden observed Appellant for several days and confirmed that Appellant was spending too much time on the computer. The Warden then informed the Director, DOCR, about the tip and the Warden's observations and the Director authorized an investigation by DOCR's Internal Investigation Unit into Appellant's internet use. Mr. C, Chief Investigator, conducted the investigation. To aid the investigation, the Warden, based on the Director's approval, submitted a request to the County's Department of Technology Services (DTS) to research Appellant's internet use.

During the investigation, it came to light that Appellant operates a private business called Store, Inc. According to the Articles of Incorporation, which were found in Appellant's office, Store, Inc., deals in the importation and retail sales of jewelry and jewelry boxes, giftware, art work, apparel, health care products and services. Mr. C met with Appellant on November 8, 2006. During Appellant's interview, Appellant acknowledged to Mr. C that Appellant has a website on which Appellant sells merchandise but insisted

---

<sup>1</sup> The Warden testified that as there are two Lieutenants on duty at the Correctional Facility for each shift, each Lieutenant would visit half of the posts. To complete the visits to their respective posts, it would take each Lieutenant between two and three hours.



Appellant had never sold merchandise while at work. Appellant admitted to downloading music from the internet on one occasion during work.

Mr. C again met with Appellant on November 9, 2006, to review Appellant's internet use based on the information obtained with Appellant's computer log-on identification. Appellant identified several websites that Appellant had visited and indicated Appellant had made an error in judgment by accessing these sites during normal work hours. Appellant again stated Appellant had not sold any merchandise on eBay or Appellant's personal website (Store, Inc.) while on duty. Appellant did concede that Appellant checked Appellant's personal website briefly while at work and had purchased things from eBay during work hours.

On December 1, 2006, Mr. C submitted his investigative report to the Department Director. Mr. C indicated the allegation of Appellant's inappropriate use of the County-provided internet was substantiated. Mr. C stated that Appellant admitted that Appellant's internet access to eBay was excessive. However, Mr. C reported that Appellant denied that Appellant sold anything on eBay although Appellant conceded buying things from eBay during work hours. Mr. C concluded that Appellant had visited websites and shopped for merchandise that could be sold on Appellant's personal website. Mr. C reported that DTS research revealed that Appellant accessed PayPal.com, a payment service used by eBay. According to Mr. C's report, the type of access was associated with receipt of payments as well as payments issued for merchandise related to business transactions. Mr. C reported that Appellant had violated Departmental Policy and Procedure 3000-7, Standards of Conduct and Departmental Policy and Procedure 3000-61, Use of County-Provided Internet, Intranet, and Electronic Mail Services (email). In addition, Mr. C indicated that Appellant made a false statement or report in the course of employment. Finally, Mr. C noted that for two days, September 26 and 27, 2006, Appellant was not recorded in the log books as visiting Posts W2-1, 2, 3, 4, 5 or 6 as required by Post Orders. The Department Director reviewed the report and had it forwarded to the Warden for action.

The Warden, after reviewing the investigative report, wanted further review of Appellant's internet use, as the report was based on a four-week sampling, and the Warden wanted to determine how long Appellant had been using the internet to assist Appellant's business. Accordingly, the Warden requested DTS do an additional six-month sampling of Appellant's internet usage. The Warden received the additional information on January 5, 2007. The information revealed that Appellant had been using the internet for an extensive period of time to access on-line shopping stores.

Appellant requested to meet with the Warden to discuss the internet use investigation. Appellant assured the Warden that everything Appellant had told the investigator was true. Appellant indicated to the Warden that Appellant's internet use was not a long term issue – it had only been six to nine months that Appellant had accessed the internet for personal use. Appellant admitted that Appellant had been wrong.

Subsequently, the Warden went to Appellant's office, which Appellant shared with two other Lieutenants, to collect any of Appellant's material that might be deemed personal property in and around Appellant's desk. Eleven boxes of material were collected, including internet material going back three years. In addition, there were 30-40 computer disks which

contained information about jewelry as well as other business material. The Warden also found Articles of Incorporation for Appellant's business, Store, Inc.

On January 16, 2007, the Warden issued a Statement of Charges – Dismissal. The Warden also placed Appellant on administrative leave with pay. In addition, Appellant was barred from entering the secure portion of the Correctional Facility. On February 28, 2007, Appellant's then-attorney, Mr. A, replied to the Statement of Charges.

On March 1, 2007, Appellant was issued a Notice of Disciplinary Action – Dismissal (NODA) signed by Ms. B on behalf of the DOCR Director, dismissing Appellant effective March 16, 2007. On March 15, 2007, Appellant filed a grievance, requesting that DOCR management impose a lesser sanction than dismissal for Appellant's conduct. In a statement accompanying the grievance, Appellant indicated that “[r]ight from the investigative stage of my charges with Mr. [C], I was upfront with him about my [i]nternet usage, which was more than I should have. In reflecting on the situation at hand, I also spoke to [the] Warden about some errors in judgment on my part for giving out my county internet address for receiving mails that were not job related and promised that I will delete and unsubscribe them all.” C. Ex. 8 at 1. DOCR management denied the grievance.

Because Ms. B lacked written delegated authority to take a disciplinary action on behalf of the DOCR Director,<sup>2</sup> an Amended Notice of Disciplinary Action – Dismissal was issued by the Director on March 29, 2007, dismissing Appellant effective April 15, 2007.<sup>3</sup> The NODA charged Appellant with violating Departmental Policy and Procedure 3000-7, Standards of Conduct; Montgomery County Administrative Procedure 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services; negligence in performing Appellant's duties; and making untruthful statements during the course of an investigation.

This appeal followed.

---

<sup>2</sup> In a recent appeal involving a disciplinary action at DOCR, the Board had the occasion to review the authority of Ms. B 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 this authority to take disciplinary action in writing to Ms. B and accordingly held that the disciplinary action at issue was null and void.

<sup>3</sup> Appellant was retroactively placed on administrative leave with pay as of the prior effective date of Appellant's dismissal, March 16, 2007, until the new effective date of Appellant's dismissal, April 15, 2007.

## POSITIONS OF THE PARTIES

### County:

- The County has produced volumes of evidence that Appellant’s internet use was not casual or incidental but for the purpose of promoting Appellant’s internet business through the buying and selling of goods for an extended period.
- Appellant was aware of the County’s internet policy as Appellant attended training on the policy.
- Because of such extensive usage, Appellant neglected Appellant’s duties. The DOCR investigation revealed that Appellant failed to check Appellant’s assigned posts on two days.
- During the investigation, Appellant was not truthful concerning Appellant’s internet use and only disclosed some of Appellant’s activities when the Department of Technology Services’ research revealed what was occurring on Appellant’s computer.

### Appellant:

- The investigative report, which formed the foundation of the action of the County, is not in evidence before the Board; therefore, the Board cannot rely on it.<sup>4</sup>
- The County has failed to show that the conduct of Appellant is worse than that of other officers in comparable positions. There was nothing unusual about Appellant’s use of the internet.
- Appellant wasn’t missing from action. Appellant did not fail to do anything that was asked of Appellant. The only issue was some anonymous complaint about Appellant’s internet use.
- The County has not been able to show that some other person did not have access to Appellant’s computer and misused the internet.
- Appellant denies that Appellant was running an internet business. There is no evidence about the cash flow of Appellant’s business; instead, the County relies on speculation.
- The Statement of Charges was not properly signed by the Director but instead by the Warden.
- The Warden’s credibility is at issue as the Warden was unable to provide the dates that the Warden observed Appellant’s internet usage before initiating the investigation.
- Appellant’s privacy rights were violated when the County retrieved and reviewed the documents in Appellant’s office without Appellant’s permission.

---

<sup>4</sup> The County submitted as C. Ex. 1, a memorandum from Mr. C to the Director, dated 12/01/06, subject: Inappropriate Internet Use by [Appellant] and Lieutenant D. According to the County, this is the investigative report. See Hearing Transcript (H.T.) at 5. The memorandum references Attachments A, B and C. These attachments were not submitted by the County before the hearing. Instead, on the day of hearing, the County sought permission to submit the three attachments. Appellant’s counsel objected and the Board sustained the objection. Thus, the actual investigative report is in evidence although the attachments to the report are not.

**APPLICABLE LAW AND REGULATIONS**

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

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

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

...

- (c) A public employee must not use any County agency facility, property, or work time for personal use or for the use of another person, . . .

**Montgomery County Administrative Procedure No. 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services**, dated 6/14/2004, which states in applicable part:

**POLICY**

...

- 3.3 An employee's use of County-provided Internet, intranet, or email services indicates consent to this administrative procedure, and to the County's access and monitoring for legitimate business purposes (including a non-investigatory work-related search or investigatory search of suspected work-related misfeasance), of his/her electronically stored email messages and computer files, and any other data related to the employee's use of the County's Internet, intranet, and email services.

...

**GENERAL**

**PROHIBITED USER CONDUCT**

- 4.3 Employees must use County-provided Internet, intranet, and email services in accordance with this administrative procedure and all applicable laws, regulations, and policies. Prohibited conduct includes:

...

- D. Using the County's Internet, intranet, or email services for private gain or profit.

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

...

## **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.

...

- 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 Personnel Regulations (MCPR), 2001, Section 3, Ethics, Disclosure of Illegal or Improper Acts, Employment of Relatives, Discrimination on the Basis of Political Affiliation, Outside Employment, and Sexual or Romantic**

**Relationships in the Workplace**, which states in applicable part:

**3-1. Ethics.** A County employee must not engage in any conduct, employment, private business, or profession that violates:

...

- (c) Chapter 19A, "Ethics", of the Montgomery County Code 1994, as amended . . .

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

...

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

...

(b) *Prompt discipline*

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.<sup>5</sup>

**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.**

...

---

<sup>5</sup> As a preliminary matter, Appellant filed a Motion to Dismiss the charges against Appellant based on the County's failure to adhere to this provision of the personnel regulations. In its Decision on Appellant's Motion to Dismiss, the Board held that the County acted in a prompt manner in issuing the Statement of Charges.

(b) *Statement of charges.*

- (1) Before taking a disciplinary action other than an oral admonishment, a department director must give the employee a statement of charges that tells the employee:
  - (A) the disciplinary action proposed;
  - (B) the specific reasons for the proposed disciplinary action including the dates, times, and places of events and names of others involved, as appropriate;
  - (C) that the employee may respond orally, in writing, or both;
  - (D) who to direct the response to;
  - (E) the deadline for submitting a response; and
  - (F) that the employee may be represented by another when responding to the statement of charges.

**ISSUES**

1. Has the County proven its charges by a preponderance of the evidence?
2. Was harmful procedural error committed by the Department Director when the Department Director failed to issue the Statement of Charges as provided by MCPR Section 33-6(b)?
3. Based on the charges sustained, is the penalty of dismissal excessive?

## ANALYSIS AND CONCLUSIONS

### The County Proved Its Charges By A Preponderance Of The Evidence.<sup>6</sup>

#### A. Appellant Engaged In A Private Business While On Duty.

1. Appellant Had No Expectation Of Privacy With Regard To The Documents And Disks Retrieved In Appellant's Office As Well As The Information Retrieved From Appellant's Computer.

The County's internet policy makes clear that use of the internet by an employee indicates the employee's consent to the County's access and monitoring for legitimate business purposes (including a non-investigatory work-related search or investigatory search of suspected work-related misfeasance) of the employee's electronically stored email messages and computer files, and any other data related to the employee's use of the County's internet, intranet, and email services. Thus, Appellant had no expectation of privacy when Appellant used the internet and printed out documents from the internet. Accordingly, the Board finds that the County had every right to retrieve from Appellant's office all documents related to Appellant's internet use.

Likewise, Appellant had no legitimate expectation of privacy with regard to the other business material found in Appellant's office. In O'Connor v. Ortega, 480 U.S. 709 (1987), the U.S. Supreme Court addressed a state government employer's search of personal property that an employee kept in his office. The Court indicated that in determining whether a legitimate expectation of privacy exists in an employee's office, it is necessary to look at the actual work environment:

---

<sup>6</sup> Although the County again failed to be as precise as it should be in labeling the charges, the Board determined that there were four basic charges in the instant case: Appellant's engaging in a private business while on duty; Appellant's inappropriate use of the County's internet and email while on duty; Appellant's negligence in performing Appellant's duties; and Appellant's untruthfulness during an official investigation. The Board has previously cautioned the County that the County needs to specifically label each of its charges and provide a narrative in support of each charge instead of listing a multitude of charges together and providing one long narrative purportedly supporting all of the various charges listed. See MSPB Case No. 07-10 at 3 n.7.

The County, when it proposes to discipline an employee, must notify the employee of the conduct with which the employee is charged "in sufficient detail to permit the employee to make an informed reply." Pope v. United States Postal Service, 114 F.3d 1144, 1148 (Fed. Cir. 1998). To fulfill this responsibility to give adequate notice to the employee, the County should designate a particular charge and accompany the charge with a narrative description which sets forth the details of the charged misconduct. The Board cautions the County that failure to give adequate notice so as to enable an employee to make an informed response could lead to the invalidation of the discipline appealed. The Board finds that for the purposes of this appeal, the Appellant had sufficient notice of the conduct with which Appellant was charged so as to make an informed reply.



The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. . . .The employee's expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others - such as fellow employees, supervisors, consensual visitors, and the general public - may have frequent access to an individual's office.

Id. at 717 (emphasis in the original).

The Court held in Ortega, based on the particular circumstances – i.e., the plaintiff did not share his desk or file cabinets with any other employee, that the plaintiff had a reasonable expectation of privacy in his office. 480 U.S. at 718. However, unlike the plaintiff in Ortega, who did not share his office with anyone, Appellant shared Appellant's office with one to two other Lieutenants. Thus, the Board finds that Appellant didn't have a reasonable expectation of privacy in Appellant's office unlike the plaintiff in Ortega.

Even assuming, arguendo, that Appellant had a reasonable expectation of privacy, the Board finds that the search of Appellant's material was justified. Ortega held that a search of an employee's office by a supervisor was justified if there were "reasonable grounds for suspecting that the search [would] turn up evidence that the employee [was] guilty of work-related misconduct, or that the search [was] necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." Id. at 726. In the instant case, the Warden testified that the Warden went to Appellant's office to gather up Appellant's personal belongings as Appellant was about to be placed on administrative leave and restricted from entering the secure portion of the Correctional Facility and receive a proposal for termination. The Warden indicated that it was routine to collect personal belongings of someone who was being dismissed and sort out what was actually County property.<sup>7</sup> The

---

<sup>7</sup> Appellant has challenged the Warden's credibility based on the fact that the Warden could not recall the exact dates of when the Warden observed Appellant on the computer before the Warden decided to contact the DOCR Director about authorizing an investigation into the anonymous tip about Appellant. However, the Board had the opportunity to observe the Warden's demeanor during the Warden's testimony and finds the Warden's testimony to be credible.

Moreover, Appellant testified that if someone was relieved of their duties, their personal property was collected and went to the property manager. Appellant also testified that some of the various diskettes Appellant used were Appellant's and some were from the County. Appellant testified that Appellant stored different things on the diskettes, some things which dealt with work and some things which dealt with jewelry. H.T. at 156-57.

Board finds this reasonable and therefore concludes that under the circumstances present in this case the Warden's search and retrieval of Appellant's non-job related materials, such as the 30-40 disks, was reasonable.

2. It Is Clear From The Evidence Presented That Appellant Was Engaging In A Private Business While On Duty.

The County Charter requires that all employees who receive compensation from the County devote their entire time during their official working hours to the performance of their duties. The County has presented volumes of evidence that Appellant failed to do so. Rather, what is clear is that Appellant spent significant portions of Appellant's work time purchasing goods, such as jewelry, for Appellant's private business. The PayPal receipts clearly indicate that Appellant purchased material to be sent to Appellant's private business address. See, e.g., C. Ex. 45 at 38 (\$113.06); 39 (\$18.64); 51 (\$7.80); 175 (\$96.16), 203 (\$7.89), 360 (\$27.52), 474 (\$23.14), 630 (\$6.95), 703 (\$205.29), 729 (\$27.47), 821 (\$176.26), 1608 (\$22.06), 1616 (\$19.47), 1630 (\$14.24), 1632 (\$72.68), 1633 (\$7.57), 1634 (\$5.98), 1635 (\$20.80). Moreover, Appellant downloaded extensive material which would assist Appellant in running Appellant's private business. See, e.g., C. Ex. 45 at 3-20, 24-26 (information about Wittnauer watches); 177-96 (research on NOVICA about soaps, jewelry, candles); 204-338 (information on Tiffany jewelry); 656-75 (information on jewelry from Dreamland Jewelry web site); 971-1041 (information about jewelry on Overstock.com web site). Appellant listed Appellant's County email address as Appellant's business and billing email address.<sup>8</sup> See, e.g., C. Ex. 45 at 36, 37, 79, 170, 377, 950, 1182. Appellant also received emails at Appellant's official County email address regarding strategies to increase site traffic to Appellant's business web site. See C. Ex. 45 at 72-74, 75-77. Based on the record of evidence, the Board finds that the County proved this charge by a preponderance of the evidence.

B. Appellant Used The County Internet and Email Inappropriately While On Duty.

The County's policy only allows employees to use the internet and email for personal purposes on a limited, reasonable basis. The County prohibits the use of the internet or email services for private profit or gain. Appellant acknowledged that Appellant received training on the internet policy and knew that personal use was only allowed on a limited and reasonable basis. Based on the voluminous amount of evidence introduced, it is clear that

---

<sup>8</sup> As previously noted, Appellant acknowledged in writing on March 15, 2007, that Appellant had given out Appellant's County email address for receiving emails that were not job-related. The following email was sent to Appellant at Appellant's County email address from PayPal.com:

Dear [Store], Inc.,

This email confirms that you sent a payment for 4.80 GBP to [sallyscott@beeb.net](mailto:sallyscott@beeb.net) . . . Subject: Your invoice for Earrings.

C. Ex. 45 at 515.

Appellant did not use the internet or email for personal purposes on a limited basis. For example, County Exhibit 42 reflects that, during the week of June 18-22, 2006, Appellant worked forty hours. During that same week, Appellant used the internet for over three hours on June 18, 2006, for over four hours on June 19, 2006, for over three hours on June 20, 2006, for over two hours on June 21, 2006, and for over four hours on June 22, 2006. Thus, during Appellant's forty-hour workweek, Appellant used the internet for over sixteen hours or more than 40% of Appellant's work time. Similarly, County Exhibit 42 reflects that Appellant used the internet for over three hours on August 2, 2006, for over three hours on August 14, 2006, for over seven hours on August 15, 2006, and for over three hours on July 31, 2006. Clearly, such internet usage cannot be categorized as limited. Moreover, as previously noted, Appellant also inappropriately provided Appellant's County email address as Appellant's private business and billing email address. Appellant testified that Appellant has an eBay account and gave Appellant's County email address to eBay and received information through Appellant's County email from eBay.

At the hearing, for the first time Appellant argued that the County could not prove absolutely that it was Appellant who was on the internet for extensive periods of time. The County's DTS expert testified that all information retrieved was based on Appellant's internet account and login as well as the internet protocol (IP) address for Appellant's computer work station. In order for Appellant to access the internet or Appellant's County email, Appellant had to log on to Appellant's computer, using Appellant's user identification and Appellant's password. County policy prohibits employees from giving out their passwords and requires that passwords be changed every ninety days. Appellant pointed to the fact that Appellant shared Appellant's office with two other Lieutenants. Appellant also noted that there had been incidents of officers complaining that they had forgotten to log off their computer when relieved for break by another officer and the other officer read their emails or forwarded the contents of their emails to other people.

The Warden testified that at the time the events occurred which are at issue in this case, each Lieutenant had his/her own computer. Given that each officer assigned to Appellant's office had their own computer, it makes no sense as to why anyone else occupying Appellant's office would use Appellant's computer to access the internet.<sup>9</sup> The Board noted that Appellant stated Appellant had never complained that someone else had stolen Appellant's password. Given the chronic and significant time of non-County business usage on Appellant's computer, the Board determined it likely that such usage would have been noticed and complained about by Appellant.

Moreover, the Board noted that Appellant conceded to the investigator that Appellant accessed several websites such as eBay during normal work hours and that Appellant's internet access to eBay was excessive. Again, on March 15, 2007, Appellant acknowledged in writing that Appellant's internet usage was more than it should have been and that Appellant gave out Appellant's County email address for receiving mails that were not job-

---

<sup>9</sup> Significantly, Appellant testified that there was a resource room at the Correctional Facility. According to Appellant, any officers and supervisors who did not have their own personal computer could go there and browse the internet. Appellant indicated there was no limitation on what a person could do while on the internet in the resource room. H.T. at 152.

related. Based on the totality of the evidence, the Board concludes that the County has proven that Appellant used the County internet and email services inappropriately while on duty.

The Board would note it is extremely concerned that Appellant's inappropriate, excessive misuse of the internet went on for so long undetected. The Board urges DOCR management to take more stringent measures to ensure similar misconduct does not occur again.

C. Appellant Was Negligent In The Performance Of Appellant's Duties.

Appellant argued at the hearing that Appellant did not fail to do what was asked of Appellant and was not missing from action. However, as a Lieutenant, Appellant is expected to visit half of the posts in the Correctional Facility during Appellant's shift to observe and monitor implementation of security and safety procedures, and compliance with post requirements. The County presented un rebutted evidence that on September 26 and 27, 2006, Appellant was not recorded in the log books as visiting Posts W2-1, 2, 3, 4, 5 or 6 as required by Post Orders. Accordingly, the Board finds that the County proved this charge by a preponderance of the evidence.

D. Appellant Provided Untruthful Statements During The Course Of The DOCR Investigation Into Appellant's Misconduct.

The County's NODA specifically cites two instances of Appellant providing false statements to the investigator, Mr. C<sup>10</sup>. The first instance occurred during the initial interview with Appellant on November 8, 2006. Appellant told the investigator that Appellant accessed Appellant's personal business website at work but minimized the window which was why the report of Appellant's internet use indicated an extended period of time. However, according to the NODA, this statement was false as the DTS research clearly indicates numerous separate sessions with sign-ons and logging off.

The record of evidence indicates Appellant had nine separate sessions on the internet on July 3, 2006, with 2313 site hits.<sup>11</sup> C. Ex. 24 indicates that Appellant spent a total of two hours and forty minutes on the internet on July 3, 2006. Accordingly, the Board finds that Appellant lied to the investigator on November 8, when Appellant provided an incorrect explanation for Appellant's extended time on the internet.

The second instance of Appellant's lying to the investigator occurred on November 9, 2006 according to the NODA. Appellant reiterated to the investigator that Appellant had not sold any merchandise on eBay or Appellant's personal website during normal work hours.

---

<sup>10</sup> Although the Warden also testified that Appellant lied to him when the Warden and Appellant discussed Appellant's internet usage, this instance was not included in the NODA and, therefore, is not before the Board.

<sup>11</sup> According to the DTS technician, a hit represents Appellant's computer reaching out to the internet and touching a particular site. H.T. at 24.

According to the NODA, the DTS site research indicated this was not true based on the sites visited and their intended purpose. The NODA also indicated that Appellant accessed PayPal.com on a regular basis.

The record of evidence indicates that PayPal.com is a payment service used by eBay. According to Mr. C's investigative report, the DTS research revealed that Appellant's access was associated both with receiving payments as well as making payments for merchandise. Accordingly, the Board finds that Appellant lied to the investigator on November 9, 2006 concerning the purpose of Appellant's internet usage. Therefore, the Board finds that the County proved this charge by a preponderance of the evidence.

**Appellant Has Not Proven That The Department Director's Failure To Issue The Statement Of Charges Constituted Harmful Procedural Error.**

Appellant argues that the County committed harmful procedural error when the Warden issued the Statement of Charges to Appellant in lieu of the Department Director. The Board notes that while the personnel regulations permit the Department Director to delegate his authority to take disciplinary actions, there is no provision for delegating the issuance of a Statement of Charges which is preliminary to the actual taking of the disciplinary action. However, the Board finds that this error was not harmful to Appellant. Specifically, Appellant has not shown how the fact that the Statement of Charges<sup>12</sup> was issued by the Warden instead of the Director likely caused the Director to reach a different conclusion than the Director would have reached in the absence of the error. See Kimm v. Department of the Treasury, 64 M.S.P.R. 198, 208 (1994); Mercer v. Department of Health and Human Services, 772 F.2d 856, 859 (Fed. Cir. 1985). Indeed, it was the Director who signed the Notice of Disciplinary Action, effecting the dismissal of Appellant after considering Appellant's response.

Although Appellant has failed to demonstrate harmful procedural error with regard to the issuance of the Statement of Charges by the Warden instead of the Department Director, the Board is quite dismayed over the series of procedural issues that have arisen in the Department of Correction and Rehabilitation in the recent past in connection with the handling of disciplinary and grievance matters. For example, in MSPB Case No. 07-05, the Board invalidated a Notice of Disciplinary Action (NODA) which had been inappropriately issued by the Human Resources Manager of DOCR instead of the Department Director. In that same case, the Board also noted that the Department Director failed to get the approval of the Chief Administrative Officer before imposing more than a 10-day suspension. Accordingly, the Board in MSPB Case No. 07-05, invalidated the NODA for a 15-day suspension and ordered the Department Director to issue a 5-day suspension instead. In MSPB Case No. 06-05 (2006), and more recently in MSPB Case No. 07-12 (2007), the

---

<sup>12</sup> Unlike the NODA, which actually effectuates a disciplinary action against an employee, the Statement of Charges basically functions as a proposal for discipline, letting the Appellant know what the various charges are against him/her, the evidence that management has gathered to support the charges, and giving the Appellant the opportunity to provide the deciding official, the Director, with Appellant's side of the story.

Board decisively criticized DOCR senior management for the failure to even respond to grievances, much less process them in a timely manner.

DOCR's repeated failure to adhere to the rules, given its law enforcement mission, is a concern. To remedy this consistent failure to follow the personnel regulations, the Board has determined to order remedial action. Specifically, the Director, Office of Human Resources, will be instructed to arrange for four hours of training on the grievance and disciplinary process for DOCR senior management<sup>13</sup> to ensure DOCR is aware of the requirements that must be met in processing grievances and disciplinary matters.

**Given The Seriousness Of Appellant's Misconduct, The Penalty Of Dismissal Is Appropriate.**

Appellant, at the time of Appellant's dismissal, was a Correctional Shift Commander. A higher standard of conduct and a higher degree of trust are required of an incumbent of a position with law enforcement duties. Crawford v. Department of Justice, 45 M.S.P.R. 234, 237 (1990) (as a Correctional Officer, the appellant held a law enforcement position with the Bureau of Prisons, which is one of great trust and responsibility, and therefore the appellant must conform to a higher standard of conduct); Cantu v. Department of Treasury, 88 M.S.P.R. 253 (2001); Hanker v. Department of Treasury, 73 M.S.P.R. 159, 167 (1997). Likewise, a higher standard of conduct is required of a supervisor. Fowler v. U.S. Postal Service, 77 M.S.P.R. 8, 13 (1997); Fischer v. Department of Treasury, 69 M.S.P.R. 614, 619 (1996). Thus, the Board finds that a very high standard of conduct and degree of trust were required of Appellant. Cantu, 88 M.S.P.R. 253; Luongo v. Department of Justice, 95 M.S.P.R. 643 (2004).

The charges against Appellant are serious. Appellant lied during the course of an investigation into Appellant's misconduct. The Supreme Court has held that a Government agency may take disciplinary action against an employee for lying during the course of an investigation into an underlying charge of misconduct. LaChance v. Erikson, 522 U.S. 262, 268 (1998). Giving false information in a County investigation is a serious offense, particularly where as here Appellant is a law enforcement officer. McManus v. Department of Justice, 81 M.S.P.R. 672 (1999); Wayne v. Department of Navy, 55 M.S.P.R. 322, 330 (1992). The penalty of removal for falsification is warranted because such activity raises serious doubts about Appellant's honesty and fitness for employment and Appellant's reliability and trustworthiness. See, e.g., Scott v. Department of Justice, 69 M.S.P.R. 211 (1995); Stewart-Maxwell v. U.S. Postal Service, 56 M.S.P.R. 265, 275 (1993).

The record of evidence also establishes that Appellant's acts of misconduct – i.e., spending excessive duty time on the internet conducting Appellant's business – were not isolated but occurred over the course of many months. The Warden testified that the Warden lost trust in Appellant's ability to supervise Appellant's subordinates and be responsible for their lives. Indeed, the record of evidence establishes that Appellant failed to visit certain of Appellant's assigned posts on consecutive days.

---

<sup>13</sup> Senior management is defined for purposes of this Decision as the Director, DOCR, the Division Chiefs, the two Wardens, the various Deputy Wardens and any other management official involved in the processing of either a grievance or disciplinary action.

The County's Charter expressly requires that all employees who receive compensation from the County devote their entire time during their official working hours to the performance of their official duties. A Government employer has the right to expect an employee to devote their work hours to official duties. "To conduct personal business when the agency presumes you are performing the official duties of your position violates the trust that the agency has placed in its employee. Such conduct destroys the confidence established in the employer-employee relationship." Cohen v. Internal Revenue Service, 7 M.S.P.R. 57, 61 (1981); Biniak v. Social Security Administration, 90 M.S.P.R. 692 (2002).

Therefore, the Board finds that the penalty of dismissal is appropriate in this case.

### **ORDER**

Based on the foregoing, the Board denies Appellant's appeal from Appellant's dismissal.

The Board hereby orders the OHR Director to arrange a four-hour training session for the DOCR's senior management on processing disciplinary actions and grievances. Upon completion of the training, OHR will notify the Board concerning the date the training was held and the names of the attendees.

# **SUSPENSION AND SUBSEQUENT DISMISSAL**

## **Case Nos. 07-14 & 07-15**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Department of Public Works and Transportation's (DPWT's) Director to terminate Appellant from employment. Appellant also challenges the determination of the Acting Chief, Division of Operations, DPWT, to suspend Appellant for a three-day period.

### **FINDINGS OF FACT**

Appellant, at the time of Appellant's three-day suspension and subsequent dismissal, was a Building Service Worker II, with the Facilities, Maintenance and Operations Section (Facilities), DPWT. In December 2004, because of a reduction-in-force elsewhere in the County workforce, Appellant was placed in this position.<sup>1</sup> As a Building Service Worker II, Appellant was expected to maintain the building area Appellant was assigned to, by cleaning the bathrooms, vacuuming, dusting, shampooing the carpet and emptying the trash. Appellant's immediate supervisor was Ms. B. Ms. B first assigned Appellant to work in the Council Office Building (COB) on the first floor. Ms. B then moved Appellant from the first floor to the third floor and then to the fourth floor. Ms. B changed Appellant's assignments because Appellant was not doing Appellant's work as required. Ms. B indicated that instead of emptying the trash Appellant would socialize with the customers. Ms. B testified that Ms. B would check on Appellant's work and often had to complete it when Appellant left for the day. Ms. B stated that she counseled Appellant about this and Appellant responded that Appellant had forgotten to do the work.

Finally, Ms. B decided to reassign Appellant from the COB to the Executive Office Building (EOB). Appellant was assigned to the fifth floor of the EOB which was close to where Ms. B worked. Ms. B indicated she moved Appellant so as to ensure that she could better monitor Appellant's work. However, Appellant's work habits did not improve. Ms. B continued to receive calls from customers about Appellant's failure to empty the trash.

---

<sup>1</sup> According to Mr. A, a Property Manager in Appellant's supervisory chain, Appellant made it clear when Appellant came to Facilities that Appellant didn't intend to stay with Facilities very long. Appellant believed Appellant would make a good candidate for a police officer and on numerous occasions made efforts to pursue other positions. Mr. A testified that Appellant went to the County's Homeland Security Department looking for a police job both during Appellant's off time and during work time. Appellant told Mr. A that Appellant had been a police officer in Appellant's native country and Appellant had used a handgun.



Ms. B indicated that Appellant was allowed during Appellant's work day to take a break in the morning and the afternoon as well as go to lunch. However, if Appellant was going to leave the floor Appellant was assigned to, Appellant was required to let her know that Appellant was leaving and where Appellant would be. According to Ms. B, Appellant failed to abide by this rule. Ms. B testified that every day Appellant would leave Appellant's assigned work area and go to other floors without first notifying her. She repeatedly counseled Appellant about this to no avail.

On October 9, 2006, Appellant, who had had knee surgery in June 2006, began a light duty assignment in the Print Shop at the Judicial Center. Appellant's work hours were 8:30 a.m. until 5:00 p.m. Mr. C, Print Shop Manager, was Appellant's supervisor during Appellant's light duty. Appellant had previously been counseled that Appellant could not leave the light duty work site unless Appellant received permission from Appellant's assigned supervisor. When Appellant reported for work on October 9, 2006, Mr. A again informed Appellant that Appellant had to seek permission before leaving Appellant's work site. On October 13, 2006, Appellant appeared on the 10<sup>th</sup> floor of the EOB at approximately 10:40 a.m., asking to see Mr. A even though Appellant had not obtained authorization to leave the Print Shop.

Subsequently on October 13, 2006, Mr. A repeatedly tried to contact Appellant in the Print Shop but could not reach Appellant. Mr. A later received a call from Mr. D, the Section Chief for Facilities. Mr. D indicated he was on his way to the Print Shop to talk with Appellant because he had received a phone call from the Deputy Director, DPWT, that Appellant was trying to follow the Department Director around, attempting to get a meeting with the Director. Mr. A joined Mr. D in the Print Shop at approximately 3:15 p.m. However, Appellant was not in the Print Shop. Mr. C did not know where Appellant was and had not given Appellant permission to leave the Print Shop. Mr. C advised Mr. A and Mr. D that Appellant had been frequently leaving the Print Shop without permission.

Finally, Appellant arrived back in the Print Shop. Mr. A and Mr. D spoke with Appellant for approximately 20 minutes. During this conversation, Mr. D several times directed Appellant not to leave Appellant's work site unless Appellant obtained permission from Appellant's supervisor, Mr. C. Appellant was also informed that Appellant was not to seek a meeting with the Director.<sup>2</sup> After the meeting, Mr. D and Mr. A had a discussion. They decided to provide more direction to Appellant but when they went to locate Appellant, Appellant was gone. Subsequently, Mr. A saw Appellant in the EOB garage. Mr. A asked what Appellant was doing in the garage and Appellant indicated Appellant had permission to go home early. Mr. A checked with Mr. C who indicated he had not given Appellant permission to go home. Based on what had occurred on October 13, 2006, Appellant was issued a written reprimand for leaving Appellant's work assignment and work area during

---

<sup>2</sup> According to Mr. A, Appellant was seeking a meeting with the Director concerning an allegation of an altercation between Appellant and a security guard. Appellant indicated that the security guard had bumped into Appellant and injured Appellant. Mr. A looked into Appellant's complaint but it was Appellant's word against the security guard's word and so Mr. A had nothing to act on. Appellant was not satisfied with this outcome.

work hours without approval. Appellant was cautioned that Appellant would be considered AWOL (absent without leave) for any period Appellant was away from work and could receive additional disciplinary action.

On October 17, 2006, Mr. D received a call that Appellant was in the COB trying to get a Council member to meet with Appellant. Mr. D sent Mr. A to investigate. Appellant told Mr. A that Appellant was on leave and could do what Appellant wanted. Council staff reported that Appellant had told them Appellant was a policeman in Appellant's native country and knew how to use handguns. Staff perceived this as a threat and called Security.

On November 8, 2006, Appellant again went to the 10<sup>th</sup> floor of the EOB without receiving approval from Appellant's supervisor. Ms. B and Mr. A met with Appellant and again told Appellant that Appellant was not allowed on the 10<sup>th</sup> floor. On November 13, 2006, Mr. A received several calls that Appellant was on the 7<sup>th</sup> floor of the EOB. Again, Appellant did not have permission to be away from Appellant's work site. On November 14, 2006, Appellant was on the 10<sup>th</sup> floor of the EOB without permission. On November 15, 2006, after Appellant's lunch break, Appellant was on the Lobby Level of the EOB without Appellant's supervisor's approval to leave Appellant's work site. Based on Appellant's continuing failure to follow instructions that Appellant needed approval to leave Appellant's work site, Appellant was given a Statement of Charges for a five-day suspension on November 22, 2006.

On February 21, 2007, Appellant and Appellant's union representative attended an alternative dispute resolution (ADR) hearing. As a result of the ADR, Mr. A indicated that management agreed to lower the proposed five-day suspension to a two-day suspension, provided that Appellant's union representative, Mr. E, spoke to Appellant about not leaving Appellant's assigned work area without Appellant's supervisor's approval. Mr. E discussed with Appellant the need to obtain supervisory permission to leave the work site, and Appellant subsequently received a Notice of Disciplinary Action – Two Day Suspension on March 14, 2007.

On February 22, 2007, Appellant was again observed on the elevator as it stopped on the 10<sup>th</sup> floor of the EOB. Again, Appellant had not received approval to leave Appellant's work area. Based on Appellant's continued refusal to obey orders, Appellant received a Statement of Charges for a five-day suspension on March 1, 2007. Appellant did not reply to the Statement of Charges. On April 9, 2007, Mr. F, the Acting Chief, Division of Operations,<sup>3</sup> DPWT, issued Appellant a Notice of Disciplinary Action (NODA) for a three-day suspension.<sup>4</sup>

---

<sup>3</sup> On December 10, 2006, Mr. F received a temporary promotion into the Acting Division Chief position.

<sup>4</sup> Pursuant to a written delegation of authority from a previous Department Director, all DPWT Division Chiefs had authority to sign disciplinary actions on behalf of the Department Director except for dismissals.

On March 5 and 6, 2007, Appellant called in sick. On March 6, 2007, Ms. G, Senior Executive Aide to the Department Director, called Mr. A from the 6<sup>th</sup> floor of the EOB where Ms. G was in the process of delivering some correspondence. Ms. G reported that Appellant was on the 6<sup>th</sup> floor of the EOB insisting that Appellant wanted her to arrange a meeting with the Department Director. Mr. A went to the 6<sup>th</sup> floor where Ms. G had locked herself in a conference room and would not come out until after Appellant left. Mr. A asked Appellant what Appellant was doing on the 6<sup>th</sup> floor since Appellant had called in sick that day. Appellant responded that Appellant was a senior citizen and could do whatever Appellant wanted. Appellant told Mr. A that Appellant would contact Appellant's lawyer about this matter. Mr. A asked Appellant to leave the building and escorted Appellant to the lobby. Appellant became angry and told Mr. A that Appellant was "going to come get [him]". Based on Appellant's disruptive behavior, as well as Appellant's continued failure to follow instructions, Appellant was issued a Statement of Charges – Dismissal on March 21, 2007, by the Department Director. The NODA, effecting Appellant's dismissal, was issued on May 1, 2007. It was signed by Mr. H, Acting Director, on behalf of the Director.<sup>5</sup>

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Management followed Appellant all the time which was stressful.
- There are no witnesses that Appellant threatened anyone.
- Appellant's discipline is a form of retaliation because Appellant reported to Appellant's Congressman about the security guard pushing Appellant.

#### **County:**

- Appellant exhibited a continued pattern of not abiding by Appellants' supervisors' instructions to remain in Appellant's work area.
- Despite progressive discipline, Appellant continued Appellant's disruptive behavior.

### **APPLICABLE REGULATIONS**

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

...

#### **33-5. Authority to take disciplinary action.**

...

---

<sup>5</sup> Mr. H had previously been delegated in writing authority by the Department Director to sign all disciplinary actions, including dismissals.

- (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.

**33-5. 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;
- (f) behaves insubordinately or fails to obey a lawful direction from a supervisor;

...

- (h) is negligent or careless in performing duties;

...

- (q) engages in discriminatory, retaliatory, or harassing behavior;
- (r) interferes with or disrupts the work of another County employee; . . .

**ISSUES**

1. 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?
2. 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

### Appellant's Three-Day Suspension Is Justified And Consistent With Applicable Law And Regulatory Provisions.

- A. The County Proved By A Preponderance Of The Evidence That Appellant Repeatedly Failed To Obey Appellant's Supervisors' Orders Not To Leave Appellant's Work Site Without Permission.

Appellant received a three-day suspension only after receiving a written reprimand and a two-day suspension for failing to obey Appellant's supervisors' orders to remain at Appellant's work site unless Appellant obtained permission from Appellant's supervisor to leave. Even Appellant's union representative, during the ADR on Appellant's proposed five-day suspension, explained to Appellant that Appellant needed to seek permission before leaving Appellant's work site. Yet the very next day, Appellant again left Appellant's work site without permission. Clearly, Appellant's misconduct was intentional. Moreover, given Appellant's persistent misconduct despite being disciplined, the Board finds that Appellant's three-day suspension was not due to any retaliation by the County for Appellant's contacting Appellant's Congressman.<sup>6</sup>

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

Having already received a written reprimand and two-day suspension for failure to obey supervisory orders not to leave the work site without permission, the Board finds that the imposition of a three-day suspension on Appellant for Appellant's continued failure to follow instructions was consistent with progressive discipline. Accordingly, the Board will sustain Appellant's three-day suspension.

### Appellant's Dismissal Is Justified And Consistent With Applicable Law And Regulatory Provisions.

- A. The County Proved By A Preponderance Of The Evidence That Appellant Failed To Obey Appellant's Supervisors' Orders Not To Schedule A Meeting With The Department Director And Disrupted The Work Of Others.

The record of evidence indicates that Appellant had been told not to attempt to schedule a meeting with the Department Director. Yet despite this instruction, on March 6, 2007, Appellant approached Ms. G, the Department Director's aide, trying to schedule a meeting with the Department Director. While Appellant may have believed that this was an improper instruction, Appellant should have obeyed the instruction and raised Appellant's objection to the instruction through the grievance process. Walker v. City of Birmingham,

---

<sup>6</sup> The Board notes that Appellant's Congressman contacted the Department Director on October 10, 2006. The Statement of Charges, involving the ultimate three-day suspension, was issued on March 1, 2007, some five months later.

388 U.S. 307 (1967); Perron v. Department of Transportation, 16 M.S.P.R. 382 (1983).

Clearly, Appellant disrupted Ms. G's work when on March 6, 2007, Appellant insisted on her arranging a meeting with the Department Director. Ms. G locked herself in a conference room to escape Appellant and called Mr. A. She refused to come out until after Appellant left. Mr. A had to escort Appellant down to the lobby and ask Appellant to leave.

Appellant also disrupted Mr. A's work. He had to go to the 6<sup>th</sup> floor and escort Appellant from the building. Appellant became angry with Mr. A and indicated that Appellant would contact Appellant's lawyer about the matter. Mr. A was clearly upset over Appellant's interaction with him.

Based on the record of evidence, the Board finds that the County proved these charges by a preponderance of the evidence.

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

Given Appellant's past disciplinary record based on Appellant's repeated refusal to follow instructions, the penalty of dismissal was reasonable based on Appellant's failure to follow instructions on March 6, 2007, and Appellant's disruption of the workplace. See, e.g., Stephens v. Department of Air Force, 34 M.S.P.R. 649, 652 (1987).

**ORDER**

On the basis of the above, the Board denies Appellant's appeal of Appellant's dismissal. The Board also denies the appeal of Appellant from Appellant's three-day suspension.

# **DEMOTION**

## **CASE NO. 07-08**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Department of Public Works and Transportation (DPWT) Director, to demote Appellant from the position of Management Leadership Service (MLS) Manager III, Fleet Services Coordinator, Fleet Management Services Division (FMS), DPWT, to the position of Capital Projects Manager, Grade 26, effective February 5, 2007.

### **FINDINGS OF FACT**

The disciplinary action at issue in this case is based on an investigation conducted by the Office of the County Attorney (OCA). In April 2006, the Director, DPWT, received various allegations regarding how FMS was being operated under the Division Chief's supervision. In May 2006, OCA was asked by the DPWT Director to investigate these allegations.

#### **The Towing Incident**

At the time of the events at issue in this appeal, Appellant, who has twenty-eight years service with the County, worked in FMS under the supervision of the Division Chief. As a Fleet Services Coordinator, Appellant was in charge of the heavy equipment and automotive sections. Appellant also functioned as the Division Chief's second-in-command.

On October 1, 2005, the Division Chief received a call from Suburban Hospital, notifying the Division Chief that the Division Chief's son had been involved in a car accident. The Division Chief and the Division Chief's spouse immediately went to the hospital. Subsequently, the Division Chief's son had brain surgery to remove a large blood clot. He also had a subdural hematoma. The Division Chief was told that the next seventy-two hours following surgery were critical. The Division Chief and the Division Chief's spouse alternated staying at the hospital to be with their son.

Sometime during the days following surgery, the police called the Division Chief's spouse, indicating that they had concluded their investigation into the accident and would be releasing the vehicle the son had been driving. The vehicle was being held by Anchor Towing, which was a short-term facility, and needed to be moved.

The Division Chief, in the days following the Division Chief's son's accident, exchanged phone calls with Appellant and others in the Division Chief's office to keep them informed of what was happening with the Division Chief's son. After the police informed the Division Chief's spouse that their vehicle needed to be moved, the Division Chief asked

Appellant to contact some company to tow and store the vehicle to avoid expensive storage charges. The Division Chief indicated that the Division Chief could not deal with the matter at the time. The Division Chief instructed Appellant to contact the Division Chief's spouse if Appellant located someone to move the vehicle. Appellant informed the Division Chief that Appellant didn't know of any company offhand but would look into it and get back to the Division Chief's spouse.

Appellant subsequently phoned Mr. A, then a Crew Chief in the Transit Shop of FMS, on October 4, 2005.<sup>1</sup> At the time of the phone call, Mr. A was in his probationary period, which was due to end on November 28, 2005. Appellant was also aware that Mr. A had been unsuccessful in passing his Automotive Service Excellence (ASE) test, which is a prerequisite for the Crew Chief position.<sup>2</sup>

Appellant and Mr. A had been friends for years. Appellant had assisted Mr. A in working on his race cars at Mr. A's father's home in Mt. Airy. Appellant also knew Mr. A's parents. Appellant testified that Appellant and Mr. A were friends. Appellant was also aware that Mr. A had a car carrier because of Mr. A's racing activities.

When Appellant called Mr. A, Appellant asked Mr. A if he knew anyone who could assist in towing the Division Chief's vehicle, as the Division Chief's son had been in a serious car accident. Appellant indicated to Mr. A that the vehicle needed to be towed prior to 3:00 p.m. that afternoon or there would be more charges incurred for storage. Mr. A indicated he didn't know anyone but that he did have a truck and trailer and would tow the vehicle for the Division Chief. Appellant responded that "[Appellant] figured on that." Appellant also asked Mr. A if the vehicle could be stored at his parents' place so that it would be out of sight of the Division Chief.<sup>3</sup> Mr. A informed Appellant that he didn't think it would be a problem to store the vehicle at his parents' place for a couple of days. Mr. A

---

<sup>1</sup> There is a dispute in the testimony concerning when this call occurred. Appellant claims that Appellant called Mr. A before the day the vehicle was actually towed. Mr. A claims that Appellant called him the day that Mr. A actually towed the vehicle. What all parties agree on is the fact that Appellant contacted Mr. A and no one else about having the Division Chief's vehicle towed from Anchor Towing.

As discussed in greater detail *infra*, because of the factual dispute, the Board has made credibility determinations with regard to the witnesses. The Board found Mr. A to be credible; it did not find Appellant's testimony credible.

<sup>2</sup> As the Division Chief explained, FMS often hires Crew Chiefs who do not have their ASE certification and allows them twelve months to get their certification.

<sup>3</sup> Appellant denied asking Mr. A to store the Division Chief's vehicle at Mr. A's parents' home. However, Mr. C, a Mechanic, who worked for Mr. A at the time, testified during the OCA investigation that Mr. A told him that Appellant had asked Mr. A to store the Division Chief's vehicle.



explained that his parents knew Appellant and were aware that Mr. A worked with Appellant so Mr. A believed they would not object to storing the Division Chief's vehicle.

Mr. A testified that, at the time of the phone conversation with Appellant, Mr. A didn't feel he had a choice in assisting the Division Chief. He was not going to have the opportunity to take the ASE test again before the end of his probationary period. Mr. A indicated that he figured that if he did a favor for Appellant then maybe there would be a favor for him in return.

Mr. A testified that on October 4, 2005, after being contacted by Appellant, Mr. A called his supervisor, Mr. B, at the Equipment Maintenance Operation Center (EMOC), at approximately noon to let him know about the situation with the Division Chief's vehicle and the fact that Mr. A would probably be late reporting to work.<sup>4</sup> Mr. A then proceeded to his parents' home to get the trailer.

Appellant had instructed Mr. A to expect a call from the Division Chief's spouse. Appellant contacted the Division Chief's spouse and told the Division Chief's spouse that Mr. A would tow the vehicle and provided the Division Chief's spouse with Mr. A's cell phone number as well as his home phone number. The Division Chief's spouse subsequently called Mr. A and told Mr. A that the Division Chief's spouse was going to arrange to pay for the release of the vehicle.<sup>5</sup> At 1:41 p.m. on October 4, 2005, the Division Chief's spouse called Mr. A to indicate that the Division Chief's spouse had paid Anchor Towing and the vehicle would be released. Mr. A informed the Division Chief's spouse that he would immediately go and pick up the vehicle.

At the time Mr. A received the call from the Division Chief's spouse informing him that the vehicle had been paid for and would be released, Mr. A was at EMOC. Mr. A testified that he stopped by EMOC to await the phone call from the Division Chief's spouse and to update Mr. B on his status. Mr. A indicated that when he explained to Mr. B the situation, Mr. B responded in words to the effect: "You can't really tell the chief no." While at EMOC, Mr. A testified that he also spoke with Appellant, who wanted to know if the Division Chief's spouse had contacted Mr. A yet.<sup>6</sup> Mr. A told Appellant he had just finished his conversation with the Division Chief's spouse and was on his way to pick up the Division Chief's vehicle.

---

<sup>4</sup> At that time, Mr. A's scheduled shift was from 2:00 p.m. to 10:30 p.m., Sunday to Thursday. Mr. A testified that Appellant was aware of his work schedule for that day when Appellant called Mr. A about towing the Division Chief's vehicle.

<sup>5</sup> The Anchor Towing credit card receipt indicates the vehicle was paid for at 1:23 p.m. on October 4, 2005.

<sup>6</sup> Mr. A testified that he spoke with Appellant on the phone and also indicated that Appellant saw him when he stopped by EMOC before going to Anchor Towing. Mr. B testified that Appellant spoke to Mr. A in a small library across the hall from the Crew Chief office on October 4, 2005 before Mr. A towed the Division Chief's vehicle.

After receiving the Division Chief's spouse's and Appellant's calls, Mr. A proceeded to Anchor Towing to pick up the Division Chief's vehicle. He subsequently had trouble starting the vehicle as the inertia switch had flipped when the vehicle had rolled over. Mr. A was unable to locate the inertia switch and called Mr. D, a Crew Chief, who was also scheduled to work the 2:00 p.m. to 10:30 p.m. shift that day at EMOC. Mr. A asked Mr. D if he could check the "ALLDATA" system<sup>7</sup> to see where the inertia switch was located on a Ford Ranger pickup. Mr. D agreed to assist Mr. A but indicated that first he had to get the mechanics on his crew and Mr. A's crew started on the shift. At approximately 2:56 p.m., Mr. A called Mr. D back and Mr. D told him where the inertia switch was located. Mr. A subsequently arrived back at EMOC with the vehicle on his trailer at approximately 3:15 p.m. Mr. A parked the trailer with the Division Chief's vehicle in the Highway Services parking lot next to EMOC. Mr. A was muddy and wet when he showed up at work as he had trouble getting the vehicle on the trailer.<sup>8</sup> Several of the mechanics from Heavy Equipment Shop went out to see the wrecked vehicle, as did Mr. D.<sup>9</sup> Mr. A subsequently received a phone call from Appellant, who wanted to ascertain whether Mr. A had picked up the vehicle. Mr. A assured Appellant that he had successfully retrieved the Division Chief's vehicle.

After Mr. A's shift was over, he brought the Division Chief's vehicle to his parents' home. It remained there until early December. The Division Chief's spouse sold the vehicle on eBay and subsequently informed Mr. A that the buyer would pick up the vehicle. The buyer arrived at Mr. A's parents' house unannounced in early December 2005.

Subsequent to the towing incident, Mr. A filled out his time sheet for the pay period. He indicated on the time sheet he had worked eight hours. Mr. A testified that he consulted with his supervisor, Mr. B, about how to fill out the time sheet and Mr. B told him to fill it out as if he had been at work.

The Division Chief's spouse subsequently sent Mr. A a thank you note for his assistance in towing the Division Chief's vehicle. The Division Chief's spouse also provided Mr. A with a \$25 gift certificate for his parents and a \$25 gift certificate for Mr. A to a restaurant as well as a \$50 Visa gift card.

---

<sup>7</sup> The "ALLDATA" system assists the mechanics at EMOC in troubleshooting vehicle problems.

<sup>8</sup> Mr. C substantiated that Mr. A was late for work the day of the towing incident. When Mr. A arrived at EMOC, Mr. C indicated that Mr. A was in a bad mood and vented about not being able to get the vehicle on the trailer. Mr. C teased Mr. A, stating that Mr. A was the boss' pet for picking up the truck. Mr. C indicated that Mr. A told him he was on probation and afraid he wouldn't have a job so he had no choice but to pick up the vehicle.

<sup>9</sup> Mr. A also informed Ms. E, the Administrative Specialist for FMS, that he had the Division Chief's vehicle at EMOC and asked her if she wanted to see it. She declined. Ms. E recalled she was told by Mr. A about the vehicle some time after the second shift began.

Mr. A's probationary period was extended for six months from November to May 2006. Subsequently, Mr. A again attempted to pass the ASE but again failed. Concerned that he would not have a job after his probation was up, Mr. A applied for a Program Specialist position in FMS in early 2006. During the recruitment process for the Program Specialist position, Mr. A prepared a memorandum to the Division Chief, requesting a voluntary demotion into the Program Specialist position. Mr. A subsequently received a voluntary demotion; however, he was allowed to stay on in an interim basis as a Crew Chief, assigned to the Heavy Equipment Shop, because FMS had numerous vacancies for Crew Chiefs. Appellant, as Fleet Service Coordinator over the heavy equipment and automotive sections, was Mr. A's second-line supervisor.

### The Subsequent Investigation Into The Towing Incident

On August 17, 2006, the Division Chief notified the Director of DPWT that the Division Chief was scheduled for an interview with OCA, and requested that the Division Chief be apprised of all allegations being investigated by OCA. Subsequently, on August 24, 2006, Mr. F, an employee in DPWT, informed OCA about the towing incident. Accordingly, on September 1, 2006, Ms. G, the attorney in OCA charged with conducting the investigation, provided the Division Chief with a memorandum about the various allegations,<sup>10</sup> including the towing incident. The specific allegation about the towing incident was as follows:

#### **Directing County Employees to Perform Personal Services for you during County work hours**

On or about October 1, 2005, [your son] was involved in an automobile accident while driving a Ford Ranger pick-up truck. Two or three days subsequent to the accident, FMS management directed Mr. A to leave work and to tow your truck. Mr. A left work and towed your personal vehicle during County work hours and while being paid by the County.

Joint Exhibit (Jt. Ex.) 12, Attachment (Attach.) 1 at 1. The Division Chief tasked Appellant with obtaining statements from Mr. A and Mr. H about two of the issues contained in the September 1 memo. Specifically, Appellant was to obtain a statement from Mr. A about the towing incident.

Mr. A testified that Appellant showed him the paragraph in the September 1, 2006 memorandum from Ms. G concerning the towing incident. Mr. A indicated that he was shown this paragraph after he had been interviewed by Ms. G about the towing incident. Appellant told Mr. A that the paragraph was very damaging to the Division Chief. Although, according to Mr. A, the information in the paragraph was very accurate, Mr. A testified that he lied to Appellant, telling Appellant that was not what he stated to Ms. G. Mr. A testified

---

<sup>10</sup> In addition to the towing incident, the memorandum discussed the issue of the hiring of Mr. H.

that he was afraid that he would lose his employment as he was only serving as an acting Crew Chief at the time. Appellant instructed Mr. A to write a memorandum, contradicting the statement in the September 1, 2006 memorandum from Ms. G.<sup>11</sup> Specifically, Appellant told Mr. A that the memorandum had to indicate that Mr. A did not tow the Division Chief's vehicle on County time and did not do it based on a directive.

Mr. A testified that he prepared a hand-written memorandum, which reflected the truth about what happened on October 4, 2005, and showed it to Appellant. According to Mr. A, Appellant did not like the memorandum at all, crumpled it up, and threw it in the trash. Appellant directed Mr. A to write another memorandum regarding the towing incident. Mr. A drafted this memorandum in the Crew Chiefs' office. Mr. B testified that he saw Mr. A working on the memorandum and Mr. A was frustrated. Mr. A told Mr. B that he didn't understand why he had to keep redoing the memorandum. Mr. A testified that he was stressed out about preparing the memorandum. Likewise, Mr. F testified that Mr. A was distraught while writing the memorandum.

Ultimately, Mr. A prepared a typed memorandum (Mr. A Memorandum), dated September 6, 2006, which he provided to Appellant. The document indicated that Mr. A towed the Division Chief's vehicle from the impoundment lot and arrived back at the shop prior to his 2:00 p.m. start time. Appellant edited the second memorandum provided to Appellant by Mr. A<sup>12</sup> but was still not satisfied with it. Mr. A testified that at that point he decided not to do another memorandum.

Subsequently, Mr. A was approached by Mr. B on September 19, 2006. Mr. B presented a document which Mr. B had prepared to Mr. A. The document, which was addressed to the Division Chief from Mr. B, had signature lines for both Mr. B and Mr. A. The document stated that on October 4, 2005, Mr. A had reported to work on time and worked his designated shift. Mr. B wanted Mr. A to sign the document. He indicated to Mr. A that the Division Chief needed it and Mr. B thought they should do this for the Division Chief as the Division Chief was in a "bad spot". Mr. A indicated that he told Mr. B he didn't think it was right to do this. However, after about a half hour discussion with Mr. B, Mr. A

---

<sup>11</sup> When Appellant was subsequently interviewed by the OCA attorney a month later on October 7, 2006, Appellant was questioned about whether Appellant had asked Mr. A to prepare a memorandum in response to Ms. G's September 1, 2006 memorandum. At the time, Appellant replied to the OCA attorney that "I don't know, I could have asked him or [the Division Chief] could have asked him. I don't know." County Exhibit (C. Ex.) 11 at 33. During the hearing, Appellant indicated that Appellant did in fact ask Mr. A to prepare a memorandum for the Division Chief. Hearing Transcript for June 26, 2006 (H.T. III) at 47.

<sup>12</sup> The first two sentences in the Mr. A Memorandum, which Appellant crossed out, stated: "The WORDS I have seen printed concerning the towing of a vehicle for the [Division Chief's] family after an accident involving their son are not what I recall saying or meaning. I can only assume that my words were not understood correctly or I was not as clear on this as I should have been." Jt. Ex. 1, Attach. 14.

eventually signed the memorandum. Mr. A explained that he believed if he didn't sign the memo Mr. B would inform the Division Chief and Appellant. Mr. A was convinced that his failure to sign would result in adverse consequences for his job. Mr. F testified that he spoke to Mr. A after Mr. A signed the memorandum. Mr. F described Mr. A as very distraught. Mr. A indicated to Mr. F he had been coerced into signing the memorandum and told Mr. F that the memorandum represented his job.

#### The Crew Chief Meeting

Appellant attended a Crew Chief meeting on September 19, 2006,<sup>13</sup> at 1:30 p.m. During the meeting, Appellant informed Mr. A that Appellant wasn't sure how much longer Mr. A would be allowed to work as a Crew Chief if he didn't pass his ASE certification. Appellant made this statement to Mr. A in front of the other Crew Chiefs and Mr. A's immediate supervisor, Mr. I. Mr. A testified that he was humiliated by the comment. Mr. A believed that Appellant made this comment to him based on Mr. A's refusal to write a memorandum for the Division Chief.

#### The September 29, 2006 Meeting

On September 29, 2006, the Division Chief was interviewed by OCA. During the course of the interview, the Division Chief was asked about the towing incident. Specifically, the Division Chief was asked whether the Division Chief or the Division Chief's manager directed Mr. A to tow the vehicle the Division Chief's son was driving when he was in an accident. The Division Chief indicated in response that the Division Chief did not direct nor have anyone else direct a County employee to move the vehicle on County time. The Division Chief stated that the Division Chief had a written statement from Mr. A and his supervisor indicating that the tow was done on October 4, 2005 between 11:00 a.m. and 12:00 noon, prior to Mr. A's start time at 2:00 p.m. The OCA attorney informed the Division Chief that Mr. A had told her something different and several other employees that worked that afternoon corroborated what Mr. A had told the OCA attorney. The OCA attorney indicated there was a conflict about the matter.

Subsequent to completing the Division Chief's interview with the OCA attorney on September 29, 2006, the Division Chief returned to EMOC. On the Division Chief's way back to EMOC, the Division Chief called Appellant and asked Appellant to come to the Division Chief's office. The Division Chief subsequently informed Appellant that that the Division Chief was concerned about the towing incident as the OCA attorney indicated there was conflicting information. Appellant called Mr. A<sup>14</sup> and told him to report to the Division Chief's office immediately.

---

<sup>13</sup> The Notice of Disciplinary Action incorrectly states that this meeting occurred on September 6, 2006.

<sup>14</sup> Mr. A was still at work that day, cleaning up a few details, because he was due to attend the FASTER conference for four days.

When Mr. A reported to the Division Chief's office, Appellant, the Division Chief and Ms. E were present. Mr. A testified that, when he entered the office, the Division Chief was crying. Appellant asked Mr. A what he had told the OCA attorney. Mr. A testified that he lied to Appellant, telling Appellant that he had said nothing to hurt Appellant. The Division Chief also asked Mr. A about the towing incident and he replied that he had said nothing to hurt the Division Chief. The Division Chief then received a call from the Director, DPWT, and the meeting ended.

Subsequent to the meeting, Mr. A called Appellant. Mr. A demanded to know what the meeting had been all about. Appellant told Mr. A that the Division Chief had been informed by the OCA investigator that there was testimony that the Division Chief's vehicle had been towed during working hours. Mr. A told Appellant he had not said anything that would hurt either Appellant or the Division Chief.

#### Mr. A's Notification To OCA About FMS Management's Questioning Him Concerning His Testimony To OCA

Upset with the fact that he believed he had been badgered in the meeting with the Division Chief, Appellant and Ms. E, Mr. A testified that he decided to let the OCA attorney know that he was being questioned by FMS management after each time he met with the OCA attorney to discuss the towing incident. Mr. A stated that he hadn't told the OCA attorney everything as he didn't want to hurt Appellant, because he considered Appellant a friend.

While attending the FASTER conference from September 30, 2006-October 3, 2006, Mr. A indicated that he discussed with Mr. D what had taken place during the day of the towing incident. After talking with Mr. D, Mr. A recalled the problem he had had with the inertia switch. Mr. A called the OCA attorney, while he was still at the FASTER conference, and told her that he needed to talk to her as soon as possible.

On October 2, 2006, the Division Chief again appeared for an interview with the OCA attorney. During that interview, the Division Chief testified again that Mr. A had not picked up the Division Chief's son's vehicle during work hours. The Division Chief told the OCA attorney that in reconstructing what had occurred, the Division Chief had talked to several people, including Mr. D, the other Crew Chief. The Division Chief stated that Mr. D advised the Division Chief that he had no recollection of Mr. A getting the vehicle during work hours. According to the Division Chief, Mr. D told the Division Chief that had Mr. A towed the vehicle during work hours, he would have recalled as he would have had to cover for him.

On October 5, 2006, Mr. A met with the OCA attorney and told her that Appellant had called Mr. A about the Division Chief's vehicle and that he had towed the Division Chief's vehicle during working hours. Mr. A also testified about the September 29, 2006 meeting held with Appellant, the Division Chief and Ms. E. The OCA attorney also interviewed Mr. D on October 5, 2006. Mr. D testified that he remembered Mr. A towing the Division Chief's vehicle as Mr. D had to assist Mr. A with locating the inertia switch. Mr. D

told the OCA attorney that Mr. A had called Mr. D for assistance just as he was getting the mechanics ready to start their shift and that Mr. A should have been with Mr. D at work but instead was at the towing lot. Mr. D indicated that he received a second call from Mr. A about an hour later and at that time told Mr. A where the inertia switch was located.

On October 6, 2006, Mr. A was instructed by his supervisor, Mr. I, based on Appellant's directive, not to discuss the investigation with bargaining unit employees. Appellant subsequently told Mr. A that Appellant was not a bargaining unit employee and therefore, Mr. A could discuss his testimony with Appellant. According to Mr. A, Appellant repeatedly pressed Mr. A to tell Appellant what Mr. A had told the OCA attorney the prior day. Mr. A told Appellant that he had been instructed by the OCA attorney not to discuss what he had said. Appellant told Mr. A that Mr. A could request a copy of Mr. A's interview transcript.<sup>15</sup>

Later in the afternoon of October 6, 2006, Mr. A met with the OCA attorney again and provided her with the Mr. A Memorandum that he had prepared on September 6, 2006 at Appellant's request. He again discussed with the OCA attorney the meeting on September 29, 2006 and Appellant's latest request that very day for information about what Mr. A had told the OCA attorney on October 5, 2006.

#### Appellant's Subsequent Interview With The OCA Attorney

Late in the afternoon of October 6, 2006, Appellant and the Division Chief met with the Director, DPWT. The Director gave them each a memorandum, placing them on paid administrative leave. Appellant's memorandum directed Appellant to appear on October 7, 2006 at the OCA office for a deposition interview.

Appellant appeared at OCA on October 7, 2006, with Appellant's counsel. During Appellant's interview, Appellant was asked by the OCA attorney if Appellant had asked Mr. A to prepare a statement concerning moving the Division Director's vehicle. Appellant replied: "I don't think so." C. Ex. 11 at 21. When pressed by the OCA attorney on this issue, Appellant replied: "I don't recall." *Id.* Appellant later stated: "I don't recall who asked him. It could have been me. It could have been someone else. But I don't recall." *Id.* at 22. The OCA attorney subsequently showed Appellant the September 6, 2006 Mr. A Memorandum and asked Appellant if Appellant had ever seen it. Appellant responded Appellant had. The OCA attorney then asked Appellant who asked Mr. A to prepare it and Appellant responded: "I don't remember if [the Division Chief] asked [Mr. A] or if I asked [Mr. A]. I don't remember. As I said before, I could have." *Id.* at 26. Appellant did acknowledge during the interview that Appellant had made the edits on the Mr. A Memorandum. When asked about what was the printed material referred to in the first line of the Mr. A Memorandum, Appellant stated that Appellant had "no clue." *Id.* at 30. Appellant was then asked if Appellant had shown Mr. A some printed material concerning the towing of the Division Chief's truck. Appellant responded: "I don't think so, no. I don't

---

<sup>15</sup> Appellant also informed Mr. B that he could obtain a copy of his interview transcript.

ever remember seeing any printed material concerning the towing of [the Division Chief's] truck." Id. at 31.

Appellant was also asked if Appellant was at work on Friday, September 29, 2006. Appellant indicated Appellant didn't know. The OCA attorney then asked Appellant if Appellant recalled asking Mr. A to go to the Division Chief's office. Appellant recalled that Appellant was at work the day of the meeting. However, Appellant could not recall if it was Appellant or the Division Chief who asked Mr. A to come to the Division Chief's office. Appellant recalled the Division Chief asking Mr. A when he towed the vehicle, and Mr. A replying that he towed it during "off hours."

#### The Notice Of Disciplinary Action (NODA)

Subsequently, Appellant received a Statement of Charges and replied verbally to the charges. Appellant later received an Amended Statement of Charges for Dismissal, dated December 27, 2006. Appellant responded to the Amended Statement of Charges on January 10, 2007.

On January 27, 2007, Appellant received a Notice of Disciplinary Action – Involuntary Demotion. Appellant was informed that Appellant would be demoted to the position of Capital Projects Manager, Grade 26, effective February 5, 2007. The NODA set forth three charges: 1) Tow truck incident; 2) interference with OCA 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 – involved Mr. A towing the Division Chief's vehicle from Anchor Towing's lot 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 coercion of Mr. A to prepare the Mr. A Memorandum, which contained false statements, for submission to OCA in connection with its investigation into the towing incident. The second charge also asserted that Appellant made untruthful statements to the OCA investigator during Appellant's sworn testimony regarding Appellant's knowledge that Mr. A towed the Division Chief's vehicle during County work hours and Appellant's knowledge of the circumstances surrounding the preparation of the Mr. A 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 his testimony: 1) a Crew Chief meeting on September 6, 2006, during which Mr. A was told that Mr. A might not be continued in his Crew Chief position as he failed to meet the minimum qualifications; and 2) a meeting on September 29, 2006, with Mr. A and the Division Chief during which Appellant questioned Mr. A concerning his testimony to the OCA investigator and attempted to coerce Mr. A to lie to the investigator. The third charge also indicated that Appellant made untruthful statements



to the OCA investigator concerning Appellant's knowledge of and the purpose for the September 29, 2006 meeting.

Appellant filed this appeal, challenging Appellant's demotion on February 7, 2007.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant never directed or asked Mr. A to tow the Division Chief's vehicle. Appellant simply asked if Mr. A knew someone who could tow the vehicle, as Appellant was aware that Mr. A's friend had a tow truck.
- The only action Appellant took after Appellant's initial conversation with Mr. A was to put the Division Chief's spouse in touch with Mr. A. All the arrangements for the towing of the vehicle were between Mr. A and the Division Chief's spouse.
- When Appellant asked Mr. A to prepare a statement about the towing incident on September 6, 2006, Appellant simply asked Mr. A to state the facts and tell the truth. Appellant had no way of knowing at the time that Mr. A had been providing Appellant with false information about when the vehicle was towed.
- The County has cited the wrong date for the Crew Chief meeting wherein Appellant discussed with Mr. A the fact that he still did not have his ASE certification. The meeting occurred on September 19, 2006 not September 6, 2006.
- At the September 19, 2006 Crew Chief meeting, Appellant told Mr. A something that Appellant and all the other Crew Chiefs already knew – Mr. A needed to possess his ASE certification to remain in the position of Crew Chief. Appellant was merely giving Mr. A a "heads-up" that Appellant didn't know how long Appellant would be able to keep Mr. A in the Crew Chief position because they were about to fill the position following interviews.
- As for the September 29, 2006 meeting, the only thing Appellant did was ask Mr. A to come to the meeting. It was the Division Chief who asked Mr. A if he towed the Division Chief's vehicle on County time and Mr. A denied doing so.
- The County's entire case is based on the credibility of Mr. A. Mr. A, by his own admission, lied to the Division Chief and Appellant at the September 29, 2006 meeting. Mr. A also admits that he lied to the OCA attorney about towing the vehicle on County time.

#### **County:**

- At the time Appellant called Mr. A about the Division Chief vehicle, Appellant was aware that Mr. A owned a car carrier. Appellant admitted that Appellant made no attempt to call anybody but Mr. A.
- When Appellant called Mr. A about the Division Chief's vehicle, Appellant was second-in-command of FMS. Mr. A was a probationary employee who had not passed his ASE certification, which was a prerequisite for being a Crew Chief.
- The record of evidence establishes that Mr. A did not report to work on time on October 4, 2005.

- Mr. A's version of the events of October 4, 2005 is corroborated by the Anchor Towing records, and Mr. A's cell phone records, all obtained by the County subsequent to his October 5 and 6, 2006 testimony.
- When the County finally received information about the towing incident from Mr. F, Appellant had Mr. A prepare a memorandum indicating he didn't tow the Division Chief's vehicle on County time and he wasn't directed to tow it. Mr. B has corroborated that Appellant had Mr. A working on this memorandum and that Mr. A was stressed and frustrated over having to do the memorandum.
- Appellant made no attempt to tell anyone except Mr. B and Mr. A that they could obtain their transcripts from OCA.
- Appellant's statement to Mr. A during the Crew Chief meeting on September 19, 2006, that he might not be working much longer as a Crew Chief if he didn't get his ASE certification was a direct message to Mr. A that he needed to cooperate on the towing incident.
- Appellant's presence during the September 29, 2006 meeting was for the purpose of intimidating Mr. A into lying about the towing incident.

**APPLICABLE LAWS AND REGULATIONS**

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

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

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

(a) A public employee must not intentionally use the prestige of office for private gain or the gain of another.

...

(f) A person must not influence or attempt to influence a public employee to violate this Chapter.

**Montgomery County Personnel Regulations (MCPR), 2001, Section 3, Ethics, Disclosure of Illegal or Improper Acts, Employment of Relatives, Discrimination on the basis of Political Affiliation, Outside Employment, and Sexual or Romantic Relationships in the Workplace**, which states in applicable part:

**3-1. Ethics.** A County employee must not engage in any conduct, employment, private business, or profession that violates:

...

- (c) Chapter 19A, "Ethics", of the Montgomery County Code 1994, as amended . . . .

**MCPR 2001, Section 33, *Disciplinary Actions***, which states in applicable part:

**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:

...

- (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;

...

- (q) engages in discriminatory, retaliatory, or harassing behavior;

...

- (v) directs an employee to perform service or work outside of the employee's official duties;

...

- (z) fails to cooperate or provide information during an investigation, unless the employee invokes the Fifth Amendment right against self-incrimination or refuses to give information that the employee is ethically or legally prohibited from revealing, such as attorney-client privileged material or mental health records.

**MCPR 2001, Section 35, *Merit System Protection Board Appeals, Hearings and Investigations***, which states in applicable part:

**35-21. Prohibited practices; protections for employees.**

- (a) ***Prohibited practices.*** It is unlawful for any person to:

- (1) coerce or attempt to coerce any merit system employee into taking an illegal or improper action; . . .

### **ISSUES**

1. Has the County proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of demotion excessive? If not, is Appellant qualified for the position to which Appellant was demoted?

### **ANALYSIS AND CONCLUSIONS**

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

##### A. The Board Finds That Appellant’s Testimony Is Simply Not Credible.

Both parties have challenged the credibility of the other side’s main witness. The County states that Appellant is not credible and Appellant counters that Mr. A is not credible. Credibility is “the quality that makes something (such as a witness or some evidence) worthy of belief.” Haebe v. Department of Justice, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002) (quoting Black’s Law Dictionary 374 (7th ed. 1999)).

In Bailey v. U.S., 54 Fed. Cl. 459 (2002), the Claims Court noted that in evaluating credibility

[i]t is proper for the [fact finder] to take into account the appearance, manner, and demeanor of the witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or uncertainty in testifying.

Id. at 462 n.2 (quoting 81 Am. Jur. 2d § 1038 at 848-49 (1992)). The Bailey court also noted that credibility determinations include an evaluation of the witness’ demeanor, perception, memory, narration and sincerity. 54 Fed. Cl. at 462 n. 2 (citing 40 Case W. Res. L. Rev. 165, 174 (1989/1990)).

The Third Circuit has held that “[d]emeanor is of utmost importance in the determination of the credibility of a witness.” Government of the Virgin Islands v. Aquino, 378 F.2d 540, 548 (1967). “Demeanor reflects a way of acting, behavior, bearing and outward manner.” Paramasamy v. Ashcroft, 295 F.3d 1047, 1052 (9<sup>th</sup> Cir. 2002) (citing Shorter Oxford English Dictionary 628 (1973)). Likewise, demeanor denotes “outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.” Haebe, 288 F.3d at 1300 n. 27 (quoting Black’s Law Dictionary at 442). Thus, in assessing demeanor, the Board considers the carriage, behavior,

manner, and appearance of a witness during his testimony. See Hillen v. Department of the Army, 35 M.S.P.R. 453, 462 (1987) (citing Dyer v. MacDougal, 201 F.2d 265, 268-69 (2d Cir. 1952)).

The Board had the opportunity to directly observe the demeanor of both Appellant and Mr. A during their testimony. The Board finds that Appellant was evasive and less than forthcoming during Appellant's testimony. For example, as demonstrated by the following exchange during the hearing, Appellant refused at first to admit even that Mr. A worked under Appellant.

BY [MS. G]:

Q: Did [Mr. A] work under you?

A: No.

Q: Did you hear [the Division Chief's] testimony?

A: I may have heard pieces. I have a hearing loss.

Q: Okay.

A: A lot of times I hear things.

Q: I'll refresh your memory then, okay.

A: Thank you.

Q: Page 19 of the transcript from June 6th states right here, [Appellant] was my second-in-command. Was that at Fleet Management Services, you were [the Division Chief's] second-in-command?

A: I think [the Division Chief] considered me that, yes.

Q: Okay. And isn't Fleet Management composed of transit as well as heavy equipment?

A: They're all under the same division. That's correct.

Q: That's right. And as the second-in-command you would be number two, is that correct?

A: Yes.

Q: And while [the Division Chief] was out of the office the week of October 1, 2005 you were the highest person in command at Fleet, isn't that correct?

A: Well, there's three Fleet Services coordinators and we alternate. I'm not the highest person.

Q: Oh, who's above you then?

A: There's three of us people.

Q: Okay. But, [the Division Chief] testified here, and I'll quote, move on, [Appellant] was an equipment services coordinator. He was subsequently promoted to a Fleet Services coordinator. [Appellant] functioned as my second-in-command in the division during my tenure there. Second-in-command.

A: Okay.

Q: Okay. And that would include all of Fleet Management, wouldn't it?

A: Yeah, I guess it would.

H.T. III at 33-34.

Likewise, Appellant was not straightforward in responding to the County's question about Appellant's knowledge that Mr. A owned a truck and car carrier when Appellant called Mr. A on October 4, 2005.

BY [MS. G]:

Q: Were you aware – weren't you aware that [Mr. A] owned a truck and a car carrier?

A: I never thought about it.

Q: Were you aware that [Mr. A] owned a truck and a car carrier?

A: I've seen [Mr. A's] truck and I've seen [Mr. A's] trailer but it didn't occur to me. [Mr. A's] not in the towing business.

Q: But, you've seen [Mr. A] race, haven't you?

A: Sure.

Q: And when [Mr. A] moved [Mr. A's] race cars to the track isn't it true [Mr. A] puts them on [Mr. A's] car carrier and [Mr. A] pulls them with [Mr. A's] truck?

A: I told you, I've seen [Mr. A's] truck and I've seen [Mr. A's] trailer.

H.T. III at 38-39.

Similarly, Appellant was less than forthcoming with regard to Appellant's testimony during Appellant's interview with the County Attorney's office on October 7, 2006. During this interview, Appellant was asked about events that had occurred in the prior four weeks but could not remember details. At the hearing, Appellant was asked to explain why Appellant couldn't remember certain information during Appellant's interview, such as Appellant's request to Mr. A to prepare the Mr. A Memorandum.

BY [MS. G]:

Q: Who asked [Mr. A] to prepare this?

A: I asked [Mr. A] to prepare a statement of facts in regards to the tow.

Q: Now, the county showed you this statement on October 7, 2006 during your deposition interview, didn't we?

A: Yes.

Q: Okay. You stated that when asked by the county did you ask [Mr. A] to prepare a statement concerning moving the truck you said I don't think so, I don't recall.

A: You questioned me for about 20 minutes about events in 2005 and then you said did you ask [Mr. A] to prepare a statement. I was thinking of 2005 and I didn't realize that you had just moved to 2006.

Q: But, we showed you the statement here when we asked you the question, didn't we?

A: And when you showed me the statement I told you that, yes, I didn't

prepare it. When I realized this is what you were talking about I readily talked about it.

Q: And doesn't the notation state at the top right-hand corner 9/06/2006?

A: Yeah.

Q: But, you state – why did you state then that on October 7, 200[6] when I asked you who asked [Mr. A] to prepare it, referring to this memorandum on page 32 and 33, and [Mr. J] replied if you know and your response was – I encourage you to look at page 33 here – I don't know, I could have asked him or [the Division Chief] could have asked him. I don't know.

A: I couldn't remember specifically at that time.

Q: But, [Appellant], it was only four weeks earlier –

H.T. III at 47-48.

Appellant also could not remember during Appellant's interview on October 7, 2006, that it was Appellant who summoned Mr. A to the Division Chief's office on September 29, 2006.

BY [MS. G]:

Q: You testified that you called [Mr. A] around 3:27 on September 29, 2006 to go to [the Division Chief's] office, is that correct?

A: Yes.

Q: Why then did you testify to the [O]CA I don't recall if it was me or [the Division Chief] that asked [Mr. A] to come to the office?

A: Because I couldn't remember specifically at that time. When I took a look at this I had a chance to look at my phone records. I know we had a conversation back and forth. I just – the environment that I was in, I just couldn't remember all of the specifics and you also said that I called him at 2:45 p.m. You gave me specific times.

H.T. III at 57-58. Given the short time that had elapsed between the September 29, 2006 meeting and the date Appellant was interviewed by the OCA attorney, Appellant's failure to respond to these questions demonstrates Appellant's lack of credibility.

Moreover, Appellant's demeanor at times was flippant (e.g., when asked if Appellant coerced Mr. A during the September 26, 2006 meeting, Appellant replied: "Unless he was afraid of my looks I didn't say anything."), H.T. II <sup>16</sup> at 168, or argumentative (e.g., when asked if Mr. H testified on Appellant's behalf, Appellant stated: "Mr. H testified." H.T. III at 50. When asked a follow-up question if Mr. H testified on behalf of Appellant's case, Appellant replied: "We called him as a witness." Id.).

The Board finds that Appellant's explanation as to why Appellant told Mr. A he

---

<sup>16</sup> H.T. II refers to the hearing transcript for June 6, 2007.

could request a copy of his transcript<sup>17</sup> similarly lacks candor. According to Appellant, on October 6, 2006, Appellant asked Mr. A about his interview with the OCA attorney the day before – October 5<sup>th</sup>. Appellant stated that Mr. A indicated that he was scared and thought he was going to lose his job. H.T. II at 171. Concerned that Mr. A was upset about the interview, Appellant testified that Appellant told Mr. A that Mr. A could get Mr. A's transcript. Id. at 174. Yet, Mr. A had no reason to be concerned as he had been assured by the OCA attorney on October 5, 2006, that he could not lose his job for telling her the truth. See Jt. Ex.1, Attach. 1 at 56. He was also told that if anyone attempted to retaliate against him, he should contact the OCA attorney. Id. at 57.

In contrast to Appellant's clear lack of forthrightness, Mr. A was very straightforward and sincere in his testimony. For example, Mr. A repeatedly conceded that he lied to the OCA attorney the first time he was questioned about the towing incident. See, e.g., H.T. I<sup>18</sup> at 152-53, 157. Likewise, he repeatedly conceded that he lied to the Division Chief and Appellant during the September 29, 2006 meeting when he told them that he had said nothing to the OCA attorney that would hurt them. H.T. I at 158-59; H.T. III at 90-91. Moreover, Mr. A plausibly explained why he finally contacted the OCA attorney.

BY [MS. G]:

Q: Okay. When you contacted me at the end of September –

A: Yes, ma'am.

Q: – okay, what was the purpose of your contact with me?

A: It was after the meeting I had had with these three, badgering me in the, in [the Division Chief's] office, and I wanted to tell you about what had happened, because I hadn't told you about what had been happening after each time I had been questioned by you . . . .

Q: What was the purpose of your contacting me after the September 29th meeting?

A: Because I wanted to get everything out front that had been happening to me. I hadn't told you the whole story about the badgerings I would get every time I came back from seeing you.

Q: Why hadn't you told me the truth?

A: Because I didn't want to hurt [Appellant] at that time.

Q: Why didn't you want to hurt [Appellant]?

A: Because I considered [Appellant] a friend at that point in time.

H.T. I at 113, 115.

In addition, Mr. A had the carriage and appearance of a believable witness both on direct and cross-examination. Mr. A's testimony was direct, unequivocal, and unwavering.

---

<sup>17</sup> The Board also notes that the only two people Appellant talked to about requesting their transcripts were Mr. A and Mr. B, the two individuals who would have first-hand knowledge of whether Mr. A towed the Division Chief's vehicle on County time.

<sup>18</sup> H.T. I refers to the hearing transcript for June 5, 2007.



BY [APPELLANT'S COUNSEL, MR. J]:

Q: Sure. You also told, and my previous question was, you told [Ms. G] in an interview that you were not late to work on the date of the tow. And your answer, as I understood it was, yes. Is that right?

A: That I was not late?

Q: Yes.

A: When I originally, when I was originally questioned about it, yes, sir, I did not. I told her I did not arrive late.

Q: And you also said that you did not arrive late to [Appellant, the Division Chief, and Mr. B].

A: False. False. Very false. [The Division Chief] and I never ever spoke after the vehicle was towed about the vehicle in any shape or form. No shape or form did [the Division Chief] and I talk until I was questioned by the three of them in the [Division Chief's] office.

Q: And during that meeting, you told the [Division Chief] that you did not tow it on County time, isn't that right?

A: No, sir. I told the [Division Chief] that I didn't say anything that would hurt the [Division Chief]. That's the answer I gave the [Division Chief] throughout the whole conversation. That's the answer I gave [Appellant]. I was instructed that day by [Ms. G] to not speak about what I had testified to her that day about. My answer was a general answer just to get out of there. I said, I don't think I said anything that would hurt you all. That's the answer I gave throughout the whole conversation in [the Division Chief's] office that day. And then the conversation with [Appellant] occurred after that meeting.

Q: Let's look at your deposition transcript of October 6th of 2006. This is Joint Exhibit 1, attachment 18 at page 34, beginning on, and this is in the context of the meeting, line 5. And they, they had something. I don't know what it was. I didn't get to see that. They had something with statements concerning this truck wrote on it. And [the Division Chief] goes, in other words, you didn't say anything, you didn't say anything about being late to work and doing it on County time? And so on and so on. And I said, no, I didn't. I said, not that I can remember. And to be honest with you, I was lying to them at that point in time, because I didn't feel it was any of their business exactly what I said, you know. I just wanted out of there, to be honest with you. And I figured, if I gave them the answers they wanted to hear, I could get the hell out of there. Is that your testimony, sir?

A: Yes. But my answer was, I didn't say anything that would hurt you. That's what I said to them. You can take those words and make them what you want, but I know what I said.

H.T. I at 157-59.

Finally, much of Mr. A's testimony was bolstered by other witnesses. For example, Mr. C testified that Mr. A told him that Appellant had asked Mr. A to store the Division Chief's vehicle after he retrieved it from the towing shop's lot. Mr. D credibly testified that he spoke with Mr. A and gave him the location of the inertia switch after Mr. A's shift had begun on October 4, 2005. Likewise, Mr. C testified that Mr. A returned to EMOC on October 4, 2005, after the start of his shift. Both Mr. B and Mr. F testified that Mr. A was frustrated when tasked by Appellant with preparing the Mr. A Memorandum. Mr. F also supported Mr. A's testimony that he felt compelled to sign the memorandum prepared by Mr. B.

Accordingly, based on the foregoing analysis, the Board has determined that Appellant's testimony was not credible while Mr. A's testimony was believable.

**B. The County Proved The First Charge By A Preponderance Of The Evidence.**

The first charge dealt with the towing incident and Appellant's use of the prestige of Appellant's office for the private gain of the Division Chief and Division Chief's spouse. There is no dispute that Appellant called Mr. A about the Division Chief's vehicle and he was the only person Appellant called. Appellant claims that Appellant was calling Mr. A because Mr. A had previously worked in the automotive industry and would know about a towing company. However, as Mr. D testified, many of the individuals who worked in FMS came from the automotive industry. Appellant also claimed that Appellant was aware that Mr. A had a friend that could tow the vehicle. Yet, Appellant offered no credible reason why Appellant simply did not look in the Yellow Pages of the local telephone book for a towing company.

What the record of evidence indicates is that Appellant was well aware that Mr. A possessed a car carrier. Appellant was also aware that Mr. A was nearing the end of his probationary period and had not passed his required ASE certification. Under these circumstances, the Board finds that Appellant knew that Mr. A would readily agree to assist the Division Chief, especially as this request was coming from Appellant, the Division Chief's second-in-command. Indeed, as Mr. A indicated, he didn't feel he had a choice. Even if one were to accept that Appellant did not specifically request Mr. A to tow the Division Chief's vehicle, it is clear that the reason why Appellant called Mr. A was because Appellant clearly figured that Appellant could get Mr. A to offer to tow the vehicle. As a senior manager over Mr. A, Appellant should never have permitted Mr. A to be involved in the towing of the Division Chief's vehicle.

Moreover, by inducing Mr. A to tow and store the vehicle, Appellant saved money for the Division Chief. The Anchor Towing invoice indicated that the vehicle was towed on October 1, 2005. The charge for the tow was \$123 and the charge for three days of storage came to \$138.00 or \$46.00 a day. Jt. Ex. 1, Attach. 7. Mr. A did not charge the Division Chief anything for the tow or the subsequent storage of the vehicle for nearly two months. Even after factoring in the small gifts the Division Chief ultimately gave Mr. A, the towing

and storage of the vehicle by Mr. A represented a financial gain for the Division Chief. Thus, the Board finds that Appellant's inducement of and acceptance from Mr. A of the towing and storage of the Division Chief's vehicle violated Section 19A-14(a) of the Montgomery County Code because Appellant used the prestige of Appellant's office for the gain of another – the Division Chief.

C. The County Proved The Second Charge By A Preponderance Of The Evidence.

The second charge was composed of several components – interference with the OCA investigation, untruthful statements to the OCA investigator and intimidation of a County employee. As discussed below, the Board finds that the County has proven all components of this charge.

1. Appellant Harassed And Coerced Mr. A To Get Mr. A To Prepare The Mr. A Memorandum, Which Falsely Described Mr. A's Involvement In The Towing Of The Division Chief's Vehicle, For The Purpose Of Interfering With The OCA Investigation.

The record of evidence establishes that Mr. A towed the Division Chief's vehicle while on County time. The Mr. A Memorandum clearly contains false information about Mr. A's involvement in the towing incident. At the hearing, Appellant finally acknowledged that Appellant directed Mr. A to prepare the memorandum for the Division Chief to submit to the OCA attorney.

Mr. A credibly testified that Appellant called him at approximately 1:42 p.m. on October 4, 2005, just before he left EMOC to tow the Division Chief's vehicle. Moreover, Appellant also called Mr. A after he returned to EMOC from towing the vehicle to ensure that Mr. A had successfully retrieved the Division Chief's vehicle. Based on the timing of the two phone calls, Appellant had to know that Mr. A towed the vehicle on duty time. Notwithstanding this knowledge, Appellant instructed Mr. A that the memorandum Mr. A needed to prepare had to indicate that Mr. A did not tow the Division Chief's vehicle on County time and Mr. A did not do it based on a directive.

The record of evidence also clearly establishes that Mr. A did not want to do the Mr. A Memorandum. Mr. A testified credibly that the first hand-written memo he did was not satisfactory to Appellant as it told the truth about the towing incident. Appellant then ordered Mr. A to prepare a second memorandum. Both Mr. B and Mr. F testified that Mr. A felt stress and pressure, and was frustrated and distraught over having to prepare this memorandum. Mr. A testified that he believed he had no choice if he wished to save his job.

A County employee is expected to cooperate and provide information during a County investigation. Failure to do so is a basis for discipline. See Section 33-5(z) of the MCPR. Clearly, when Appellant repeatedly instructed Mr. A to prepare the Mr. A Memorandum, containing false information, Appellant was harassing and coercing Mr. A for the purpose of interfering with the OCA investigation. Appellant knew that Appellant had

induced Mr. A to tow the vehicle. Appellant also knew that Mr. A towed the vehicle when he was scheduled to be on duty. Therefore, the Board finds that the County has proven the charge.

2. Appellant Made Untruthful Statements To The OCA Investigator During Appellant's October 7, 2006 Interview.

Appellant has argued that Appellant's testimony on October 7, 2006 should not be admitted as Appellant failed to receive any due process protections. However, the Board notes that Appellant received advance notice of the interview<sup>19</sup> and was provided the right to counsel during the interview. Under the circumstances, the Board finds that the County had the right to conduct the interview and expect Appellant to be truthful.

It is also clear that Appellant was not truthful during the interview based on the record of evidence. Appellant repeatedly testified that Appellant could not recall who had asked Mr. A to prepare the Mr. A Memorandum. Given that Appellant directed Mr. A to do so only four weeks previously, the Board finds that Appellant did not give truthful testimony concerning this matter.

The Board finds that Appellant also gave untruthful testimony to the OCA attorney when Appellant denied any knowledge that Mr. A had towed the Division Chief's vehicle during County work hours. As previously discussed, based on Appellant's two phone calls to Mr. A, before and after the tow, Appellant knew exactly when the tow took place.

D. The County Proved The Third Charge By A Preponderance Of The Evidence.

The third charge also has several components – interference with the OCA investigation, untruthful statements to the OCA investigator and intimidation of a County employee. As discussed below, the Board finds that the County has proven all components of this charge.

1. Appellant Sought To Intimidate Mr. A During The September 19, 2006<sup>20</sup> Crew Chief Meeting.

---

<sup>19</sup> The County presented evidence that when it conducts a disciplinary interview of a bargaining unit employee, it provides the employee with 120 minutes to arrange representation for the interview. C. Ex. 13. In the instant case, Appellant was informed at 4:30 p.m. on Friday that Appellant would be interviewed at 10:00 a.m. the next day. Appellant notified Appellant's counsel about the interview at 6:00 p.m. the same day. Counsel appeared with Appellant at the October 7, 2006 interview.

<sup>20</sup> The Board finds that the County was mistaken in citing the Crew Chief meeting as occurring on September 6, 2006. However, the Board has determined that this mistake does not constitute harmful procedural error as it did not affect Appellant's substantive rights. Appellant was well aware of which Crew Chief meeting the County was referencing in the NODA. See, e.g., Walcott v. USPS, 52 M.S.P.R. 277, 282 (1992) (where appellant

Appellant does not deny that during the September 19, 2006 Crew Chief meeting Appellant indicated to Mr. A in front of his peers and his immediate supervisor that Mr. A might not be in the Heavy Equipment Shop much longer if he didn't pass his ASE test. Appellant argues that Appellant did not tell Mr. A anything that Mr. A and the rest of the Crew Chiefs did not already know. Even if the other Crew Chiefs were aware that Mr. A had not passed the ASE certification, there is no excuse for why an experienced senior manager such as Appellant would discuss this "personnel" matter in front of others. Clearly, Appellant should have taken Mr. A aside and discussed this with him. The fact that Appellant instead chose to announce Mr. A's predicament in front of others points to the fact that Appellant was trying to intimidate Mr. A. Mr. A credibly testified that he was humiliated by the statement. Moreover, the record of evidence establishes that at this point in time Mr. A had failed to provide Appellant with an acceptable statement that the Division Chief could use, which Appellant had requested Mr. A do on September 6, 2006.

2. The Purpose Of The September 29, 2006 Meeting Was To Intimidate Mr. A.

During the Division Chief's sworn testimony on September 29, 2006, the Division Chief indicated that the Division Chief did not direct nor have anyone else direct a County employee to move the Division Chief's vehicle on County time. The Division Chief stated that the Division Chief had a written statement from Mr. A and his supervisor indicating that the towing was done on October 4, 2005 between 11:00 a.m. and 12:00 noon, prior to Mr. A's start time at 2:00 p.m. The OCA attorney then informed the Division Chief that Mr. A had told her something different and several other employees that worked that afternoon corroborated what Mr. A had told the OCA attorney. The OCA attorney indicated there was a conflict about the matter.

Upon leaving the interview, the Division Chief tried to contact Appellant. When the Division Chief reached Appellant, the Division Chief told Appellant to report to the Division Chief's office. After Appellant reported to the Division Chief's office, the Division Chief told Appellant the Division Chief was really concerned about the towing incident and the conflicting testimony in the record. Given the fact that Appellant knew that Mr. A had towed the Division Chief's vehicle during County time, there was no legitimate purpose for Appellant to have summoned Mr. A to a meeting with Appellant and the Division Chief. Nevertheless, Appellant did concede at the hearing that Appellant called Mr. A and told him to report to the Division Chief's office. After Mr. A reported, he was repeatedly questioned about the information he had provided to the OCA attorney. The Board finds that, given the totality of the circumstances, the only purpose of the meeting was to intimidate Mr. A.

---

responded intelligently to the allegation of misconduct despite a mistake by the agency in stating the date of the misconduct, the mistake in the date did not constitute harmful procedural error).

3. Appellant Made Untruthful Statements To The OCA Investigator During Appellant's Sworn Testimony Concerning Appellant's Knowledge Of And The Purpose For The September 29, 2006 Meeting.

Appellant repeatedly told the OCA investigator that Appellant couldn't recall who had summoned Mr. A to the September 29, 2006 meeting. Given that this meeting had transpired only eight days before Appellant's interview, Appellant's inability to recall the fact that Appellant summoned Mr. A lacks credence. Similarly, Appellant denied any attempt to question Mr. A during the meeting. However, Mr. A testified credibly that Appellant asked him specifically what he had testified about when Mr. A met with the OCA investigator. Appellant wanted to know if Mr. A had said that he towed the Division Chief's vehicle on County time and that he was given a directive to do so. Mr. A testified that he repeatedly told Appellant and the Division Chief, who also questioned him, that he had said nothing to hurt them. Accordingly, the Board finds that Appellant made untruthful statements to the OCA investigator concerning Appellant's knowledge of and the purpose for the September 29, 2006 meeting.

**Given The Seriousness Of Appellant's Misconduct, Demotion To A Non-Supervisory Position Is An Appropriate Penalty; However, Appellant Is Not Qualified For The Position To Which Appellant Was Demoted.**

Having determined the County proved by a preponderance of the evidence the charges contained in the NODA, the Board will address whether the penalty is appropriate. The charges against Appellant involve serious misconduct – use of the prestige of Appellant's office for the gain of another; repeated interference with the OCA investigation; repeated untruthful statements to an OCA investigator; and intimidation of a County employee.

The Board notes that Appellant has worked for the County for twenty-eight years<sup>21</sup> and has received awards for Appellant's service. Nevertheless, the Board notes that Appellant was a senior level manager in the County's Management Leadership Service before Appellant's demotion. As the Board has previously held, the County is allowed to hold a supervisor to a higher standard as a supervisor holds a position of trust and responsibility and should be a role model for Appellant's subordinates. See MSPB Case No. 05-07 (2005). Clearly, based on Appellant's actions, Appellant failed to serve as a role model for Appellant's subordinates. Given the fact that Appellant sought to intimidate one of Appellant's subordinates into providing false information to the OCA investigator, the Board finds it appropriate that the County determined to place Appellant in a non-supervisory position where Appellant could no longer have influence over other County employees. Moreover, given Appellant's actions, it is also understandable why the County chose to move Appellant out of FMS where Appellant had been the second-in-command.

---

<sup>21</sup> Indeed, the Board assumes that it was because of Appellant's twenty-eight years of service that the County ultimately chose to demote Appellant instead of terminating Appellant based on Appellant's egregious conduct.

Nonetheless, the Board finds that the County did not place Appellant in a position for which Appellant qualified. The position of Capital Projects Manager requires a minimum of five years of experience in design/construction project management, design consultant and contractor construction contract administration, or architectural work, civil engineering or a similar engineering field which included project management responsibility. Alternatively, it requires graduation from an accredited college or university with a Bachelor's degree in architecture, civil engineering, construction management or a related field. Appellant testified that Appellant lacked these qualifications.

The County failed to produce any evidence that Appellant met the qualifications for the Capital Projects Management position. As Mr. K, acting Deputy Director of DPWT, testified, in selecting the Capital Projects Manager position, he was aware that Appellant did not have construction management. However, he had been instructed by the Director, DPWT, to come up with a position that had the least impact on Appellant's salary. Mr. K tried to find a Grade 27 position but was unable to find one that would work with Appellant's background. Mr. K explained that a Grade 25 Program Manager was the best fit based on Appellant's experience. However, he placed Appellant in the Grade 26 position as it would have the least impact on Appellant's salary.

Because Appellant does not meet the qualifications of the position of Capital Projects Management, the Board will order the County to find another non-supervisory position for which Appellant qualifies, located outside FMS. If the position is at a lower grade than Grade 26, such as the Grade 25 Program Manager position which Mr. K indicated was the best fit, then the County will be ordered to permit Appellant to retain Appellant's current salary for two years, after which it may reduce Appellant's base salary to the maximum for the pay grade of Appellant's position.

### **ORDER**

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

1. The Board affirms the decision of the County to demote Appellant based on the charges sustained;
2. The Board orders the County to place Appellant in a non-supervisory position, located outside of FMS, for which Appellant is qualified.
  - a. Said position shall be at a grade that will cause the least impact to Appellant as far as salary;
  - b. Should the position be at a grade lower than that currently held by Appellant, the County shall provide Appellant with retained pay for two years after Appellant is placed in the new position. Upon the expiration of two years, the County may reduce Appellant's base salary to the maximum for the pay grade of Appellant's position;

- c. The OHR Director shall certify to the Board within 15 days of this Order that Appellant has been placed in a position for which Appellant qualifies; and
- d. The County shall develop for Appellant a performance plan and place Appellant on it within 30 days after Appellant is placed in Appellant's new position. The County shall furnish the Board with a copy of Appellant's performance plan.



# **SUSPENSION**

## **Case No. 07-17**

### **FINAL 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 Public Works and Transportation's (DPWT's) Director to suspend Appellant for two days.<sup>1</sup> In addition, Appellant subsequently added a claim of retaliation to the appeal, asserting that DPWT retaliated against Appellant for filing this appeal.<sup>2</sup>

### **FINDINGS OF FACT**

Appellant is Chief, Section Z, in DPWT. Appellant has worked for DPWT since 1998, when Appellant first came to the County. Prior to that, Appellant had many years of experience with the New York City government. Ms. A, Appellant's current supervisor, selected Appellant for the position Appellant holds. Ms. A indicated that she interviewed Appellant for the position. In addition, her predecessor called her when he became aware that Appellant was applying for the position and informed her that Appellant had much planning and scheduling experience.

As a Section Chief, Appellant is in the Management Leadership Service (MLS),<sup>3</sup> Grade M3. Appellant supervises fifteen employees and reports to Ms. A, who is the Division Director.<sup>4</sup> Ms. A reports directly to the Department Director. Appellant has several unit

---

<sup>1</sup> Although the Director testified it was the Director's decision to impose a two-day suspension on Appellant, the actual Notice of Disciplinary Action (NODA) was signed by the Director's Deputy.

<sup>2</sup> Appellant later withdrew this retaliation claim.

<sup>3</sup> MLS is defined as: "A program for merit system employees in high level positions who have responsibility for managing County programs and services or developing and promoting public policy for major programs and management functions, or both, that includes a broadband classification system, performance-based pay, and professional development opportunities." See Montgomery County Personnel Regulations (MCPR), 2001, Section 1-36 (as amended April 8, 2003).

<sup>4</sup> Ms. A testified that prior to becoming the Division Chief, she was the Section Z Chief. According to Ms. A, the management style of the Division Chief before her was similar to hers – it was a much freer style, with the Division Chief going directly to people to ask them for specific things. Ms. A indicated that interaction directly with staff is important to her.

managers reporting to Appellant, including Mr. C, manager of Unit I, and Ms. B,<sup>5</sup> manager of Unit II.

Since coming to Montgomery County, Appellant has repeatedly discussed with Appellant's subordinates the need to follow the chain-of-command and, up until ordered by Ms. A to remove it, has made chain-of-command a performance measure in Appellant's subordinates' performance plans. Under Appellant's chain-of-command concept, Appellant expects that when Appellant's subordinates ask Appellant to make a decision, they refrain from simultaneously presenting the question to Appellant's superiors; they keep Appellant informed of all requests made of them by Ms. A, the Department Director, and other senior management; they inform Appellant of any dealings with senior management that they initiate; and they not make policy or policy decisions. According to Appellant,<sup>6</sup> Appellant has repeatedly had problems with the issue of chain-of-command with Mr. C and Ms. B. In addition, Appellant asserts that Ms. A routinely undermines the chain-of-command.

In 2002, Ms. A conducted an investigation into Appellant which was based on complaints she had received concerning Appellant's management style. At the conclusion of the investigation, Ms. A determined that Appellant needed to improve Appellant's management skills. To assist Appellant, Ms. A developed performance measures for Appellant dealing with Appellant's management and leadership skills. She also directed Appellant to attend several management courses, which Appellant completed.

Subsequently, Ms. A contacted Mr. K, a consultant for the County on issues of organizational effectiveness. Ms. A had confidence in Mr. K's ability given his long reputation of working with the County and was familiar with his work in other parts of the County Government. Ms. A discussed with Mr. K her problem with Appellant's manner of interacting with staff. She requested Mr. K do an organizational and management assessment of Section Z. According to Ms. A, Mr. K indicated that his plan was to interview Appellant, then interview each of the unit managers working for Appellant, and then do a second interview with Appellant or with Ms. A, or both of them, and finally do a briefing and report. After Ms. A secured a purchase order for Mr. K's services, she told Appellant to follow-up with Mr. K.

In mid-April, 2005, Appellant contacted Mr. K and explained that Ms. A wanted Appellant to arrange with Mr. K to conduct an organizational and management assessment. Appellant requested Mr. K make recommendations on how to increase teamwork within the Section. Mr. K states that during this conversation he was impressed with Appellant's "credentials, experience, manner, responsiveness, eagerness to cooperate and the substance of [Appellant's] responses to my inquiries. As such, I raised questions about the necessity of

---

<sup>5</sup> According to Appellant, Appellant was "effectively forced" by Ms. A, who strongly recommended Ms. B to Appellant, to hire Ms. B in 1998. County Exhibit (C. Ex.) 4.

<sup>6</sup> See C. Ex. 4 at 2.

my services.” Affidavit of Mr. K (Mr. K Affidavit) at 3.<sup>7</sup> However, Appellant explained to Mr. K that Ms. A had ordered Appellant to set up a session. Accordingly, Mr. K agreed to facilitate a session with Appellant and Appellant’s staff in June 2005.

Prior to holding a session with Section Z management, Mr. K met with Appellant to discuss Appellant’s assessment of each of Appellant’s managers and the structure of the session. On June 10, 2005, Mr. K held the session with Appellant and Appellant’s staff. During the session, Mr. K indicated that not a single complaint was raised by any attendee with respect to Appellant or about Appellant’s supervisory practices or Appellant’s communications skills. Mr. K Affidavit at 4. Mr. K prodded the group to fully avail themselves of the opportunity to air all of their concerns. Id. The only response Mr. K received was at the very end of the session from Ms. B. Id. She indicated the group had not been forthcoming, that the session had not gotten to issues of real concern and the meeting had been a waste of time. Id. According to Mr. K, while Ms. B was clearly put out, she offered nothing specific or substantive as to what might have been discussed.<sup>8</sup> Id. Mr. K

---

<sup>7</sup> An affidavit from Mr. K was submitted by Appellant as an exhibit to a Motion in Limine prior to the hearing. The County responded to Appellant’s Motion and sought to exclude Mr. K’s affidavit. The Board subsequently denied Appellant’s Motion in Limine but determined that Mr. K’s affidavit would remain part of the pleadings in this case as the County had cited to interactions between Mr. K and Appellant in both the Statement of Charges (SOC) and Notice of Disciplinary Action (NODA).

<sup>8</sup> Ms. B’s testimony differs markedly. She testified that at the end of the session she told Mr. K that the problem was with Appellant’s style of management. Hearing Transcript (H.T.) at 146. Ms. B stated that she also told Mr. K that she didn’t really feel she was free to say what was happening and that when Mr. K questioned the other managers they each said they did not believe they were free to respond as to what was going on. Id. According to Ms. B, Mr. K stated that he would speak to Ms. B about setting up another meeting. Id. When questioned by two Board members about whether Ms. B specifically told Mr. K that she had problems with Appellant’s management style at the end of the session, Ms. B emphatically indicated she had. H.T. at 159-60.

Ms. B’s testimony was directly contradicted by another participant in the session, Mr. C. The County’s representative asked Mr. C if he felt free to express his feelings about Appellant in front of Appellant. Mr. C replied: “The subject of [Appellant] didn’t really come up in that meeting. That wasn’t a topic that was discussed. I mean, you don’t bad mouth your boss in a setting like that.” H.T. at 179. Subsequently, Mr. C was asked whether Mr. K asked him if he felt free to share his opinion about Appellant during the session. Mr. C replied: “I don’t recall that specific question.” H.T. at 201. Mr. C was then asked if he remembered Mr. K asking this question to the other managers. Mr. C replied that as they were all in the meeting together he guessed the answer would be no. Id.

When again questioned by a Board member about this, Mr. C reaffirmed that Appellant was not the topic of the retreat; the participants were talking about the unit as whole. H.T. at 212. Mr. C went on to state that the session became heated at the end, as

stated that he then asked each of the participants about this. Id. at 5. Mr. K stated unequivocally that there was no indication that any participant shared Ms. B's impressions or feelings. Id.

Subsequent to the end of the session, Mr. K testified that he asked Appellant if he had any problems with Ms. B and Appellant indicated Appellant had problems with her failure to follow the chain-of-command and her going consistently behind Appellant's back to Ms. A. Appellant asked Mr. K for his feedback and suggested to Mr. K a follow-up session be scheduled for sometime in September 2005. The following is Mr. K's description of his response:

I was impressed with [Appellant] and [Appellant's] apparent managerial skills, and I unambiguously told [Appellant] so.<sup>9</sup> I had few pointers or suggestions of any substance for [Appellant] to improve [Appellant's] performance. As to a follow-up session, I advised [Appellant] that I would not schedule one immediately. Nothing in the session suggested an urgent need. I recommended that [Appellant] carefully observe conditions in [the Section] for a period of time to see if the session had any impact. If it proved to have an impact, for better or for worse, a follow-up might be in order.

Mr. K Affidavit at 5.

Ms. A asked Appellant sometime in July 2005 how the session went with Mr. K and Appellant replied that it had gone well. Ms. A did not follow-up further in 2005 about the assessment.<sup>10</sup>

---

some concerns were expressed, although he could not remember what they were about, and he had the sense there were unresolved issues. Id.

Mr. K has no motive for not telling the truth. The County's representative challenged the validity of Mr. K's affidavit in the County's opening statement, characterizing it as "[Appellant] channeled through the consultant. In other words, the world according to [Appellant]." H.T. at 13. The Board would note that the County had been on notice since September 20, 2007, that the affidavit would be included as part of the proceedings in this case. Accordingly, the County could have sought to depose Mr. K or propound interrogatories to him prior to or as part of the hearing, see Administrative Procedures Act, Section 2A-8(h)(14), but chose not to do so. Therefore, based on the totality of evidence in the record, the Board finds that Mr. K's version of events about the June 10, 2005 session is credible and Ms. B's version is not.

<sup>9</sup> Mr. C testified that about a month after the session, during a meeting, Appellant talked about the session with him, and Appellant indicated that Appellant believed it had gone well and stated that Appellant had been ranked highly as a manager, and Appellant was determined to be a good manager. H.T. at 180.

<sup>10</sup> Ms. A testified that in August 2005 she had unexpected surgery and was out for four months. She did not return until very late in November 2005.

In June 2006, Ms. A asked Appellant whether a follow-up session had occurred with Mr. K. Appellant replied there had been no follow-up session as there was no need for one. Appellant suggested that Ms. A contact Mr. K to corroborate what he was saying. Ms. A contacted Mr. K on June 27, 2006. Mr. K testified that Ms. A indicated she was concerned with whether Appellant had scheduled a follow-up session. Mr. K told Ms. A<sup>11</sup> what he had advised Appellant at the conclusion of the session – Appellant should carefully observe conditions in the Section “for a period of time to see if the session had any impact. If there was no change, or if circumstances were problem-free, then the staff’s time and the government’s money should not be wasted. I also told her that no request had been made for a follow-up session.” Mr. K Affidavit at 3.

Subsequently, Ms. A gave Appellant Appellant’s FY 06 performance rating. In the rating, Ms. A indicated that “[a]lthough [Appellant] has made some efforts at improving [Appellant’s] communication with others, this still remains [Appellant’s] largest weakness. . . Although [Appellant] did conduct one session with [Appellant’s] unit managers and [Mr. K], [Appellant] failed to follow-up. I feel [Appellant’s] efforts are only half-hearted in this area.” C. Ex. 21 at 2-3. Ms. A rated Appellant as “Does Not Meet Expectations” for the performance element “[a]ssure effective communication with [the Section] unit managers, [the Division’s] customers, and management team.” Appellant responded to this rating, indicating that Mr. K had “applauded [Appellant’s] ‘willingness’ and ‘eagerness.’”<sup>12</sup> C. Ex. 21. Appellant also indicated that Mr. K had told Appellant that Mr. K had seen no evidence during the session that Appellant’s “communication and interpersonal skills were deficient. [Mr. K] felt that the [Section] managers and staff were a ‘tough bunch’ (2 in particular) but

---

<sup>11</sup> Ms. A’s testimony differs as to what was said. She indicated that during their conversation Mr. K stated that at the end of the session he sensed “there was more at the end of that day, things started coming out, so he thought there would be follow-up, but neither he nor [Appellant] proceeded.” H.T. at 60.

Later, when questioned by a Board member, Ms. A changed her testimony about her conversation with Mr. K. She stated that “when I spoke with him he said neither he – that he sensed at the end there were things coming out, problems coming out. He sensed a need to follow-up, but said it sort of like we dropped the ball. . . [Appellant] did and I did.” H.T. at 129. In both the SOC and the NODA, which were authored by Ms. A, she indicated that Mr. K said “there was definitely a need for follow-up.” C. Ex. 6 at 2; C. Ex. 3 at 3. Based on the totality of evidence in the record, the Board finds that Mr. K’s version of the discussion is more credible than Ms. A’s.

<sup>12</sup> Mr. K confirmed in his affidavit that this was a correct statement. Mr. K Affidavit at 4. Appellant had contacted Mr. K prior to responding to Appellant’s performance evaluation and asked Mr. K to comment on Appellant’s proposed response to Ms. A. Id.

that [Appellant] seemed to be handling it properly.”<sup>13</sup> Despite this reply, Appellant’s rating remained the same.

In August 2006, one of Ms. B’s subordinates retired. Ms. B proceeded to write up the announcement and position description for a Program Specialist II, grade 21, and sent it to Appellant for approval. Appellant sent an email to Ms. B, indicating Appellant was neither approving nor disapproving the filling of the position. Instead, Ms. B needed to provide Appellant with justification as to why the position should remain a grade 21 and why it needed to be filled now. One of Appellant’s concerns about the position was the fact that the incumbent would be expected to expend a considerable amount of time counting certain items.<sup>14</sup>

Ms. B prepared a justification and emailed it to Appellant on October 23, 2006. She then met with Appellant that day. Although Appellant indicated to her that she had done a very good job in justifying why there was a need for the position, Appellant was not convinced that it should be a grade 21 and told her Appellant would recommend that the position be downgraded. Ms. B indicated to Appellant that the position was critical and that by lowering the grade she would not be able to get someone with the skill set needed. Ms. B stated that she was going to request a meeting with Ms. A about filling the position. According to Ms. B, Appellant said nothing after she indicated she was going to try and meet with Ms. A.

After the meeting with Ms. B, Appellant spoke with Ms. A about the position and raised the fact that the work of counting certain items seemed inappropriate for a grade 21. Ms. A testified that counting certain items is “pretty menial work.” H.T. at 81. Nevertheless, her attitude was that the Division had a grade 21 position and it wasn’t her intention to downgrade the position as it was too hard to get a higher grade position in the County. Rather, she advised Appellant that Appellant should simply tell Ms. B to inform all the applicants that a certain amount of time had to be spent counting certain items. According to Ms. A, Appellant agreed with this approach.

On October 26, 2006, Ms. B met with Ms. A. She told Ms. A that Appellant had asked her to go through a lot of analysis in order to justify the filling of the position. Ms. A testified that she thought all the analysis required was excessive as she had no intent to downgrade the position. Therefore, Ms. A gave Ms. B the authority to proceed to fill the position.

---

<sup>13</sup> Mr. K confirmed in his affidavit that Appellant’s account of Mr. K’s impressions of Appellant’s conduct during the session and Mr. K’s inferences about Appellant’s management proficiency were all true and correct. Mr. K Affidavit at 4.

<sup>14</sup> Appellant apparently believed that this task would take up 40% of the incumbent’s time; Ms. B believed it would occupy approximately 20-25% of the incumbent’s time. C. Ex. 18.

Ms. A indicated to Ms. B that she didn't understand why Appellant would want the position lowered as it is so hard to get it upgraded once it is lowered. Ms. B responded that the reason why was that Appellant had "been chewing [her] out, riding [her] back for the last few years." H.T. at 139. Ms. B then proceeded to speak to Ms. A about the way Appellant interacts with her. Ms. B told Ms. A that Appellant's interaction with her was demeaning and she believed she was harassed.<sup>15</sup> According to Ms. A's notes of the meeting with Ms. B, Ms. B told her that "she is always written up for insubordination if she speaks with [Ms. A] about anything."<sup>16</sup> Ms. B also told Ms. A that she believed that Appellant was sexist, racist or just didn't like her.<sup>17</sup> Ms. B testified that she told Ms. A that she had been enduring years of Appellant's demeaning treatment and criticism for failure to follow the chain-of-

---

<sup>15</sup> Ms. B claims she told Ms. A during this meeting about an incident which apparently occurred in May 2002 during a Section Z staff meeting attended by the unit managers. According to Ms. B, Appellant screamed at her to shut up. Ms. B testified that she remained quiet and at the end of the day met with Appellant to discuss Appellant's lack of professional behavior. Appellant, according to Ms. B, would not apologize for Appellant's action. Ms. A's notes for October 26<sup>th</sup> meeting do not indicate that Ms. B discussed this issue. Rather, it is reflected in the document Ms. B subsequently prepared and gave to Ms. A on November 8, 2006, entitled: Summary of Major Incidents with [Appellant].

During the hearing, when cross-examined about this incident, Ms. B acknowledged that she had no idea what Appellant had been talking about at the staff meeting just prior to Appellant shouting at her as she was preoccupied with a conversation she was having with another unit manager. H.T. at 154.

<sup>16</sup> Ms. B, when asked if she ever told Ms. A that Appellant had written her up, emphatically answered: "No." H.T. at 145. Ms. B went on to explain that she told Ms. A that Appellant uses the staff's performance review measure, chain-of-command, as the tool for control and intimidation.

Ms. A was asked whether she ever requested that Ms. B provide Ms. A with the write ups she had told Ms. A about. Ms. A indicated she had asked Ms. B for the write ups but received none. Ms. A testified that Ms. B "was not formally written up." H.T. at 84. According to Ms. A, although Ms. B had told Ms. A she was written up, Ms. B was actually just orally admonished.

<sup>17</sup> Ms. A indicated she was concerned about Ms. B's characterization of Appellant as sexist or racist, even though Ms. A testified that she does not believe that Appellant is either. Therefore, after the meeting with Ms. B, Ms. A went to her Deputy Director at the time and asked what to do. The Deputy Director advised her to ask Ms. B if she wanted Ms. A to go to EEO/OHR about her issue. Ms. B indicated to Ms. A that she wanted Ms. A to pursue the matter and she was concerned about retaliation by Appellant for speaking with Ms. A about the matter. Ms. A testified that she assured Ms. B that she would not allow retaliation to occur.

command.<sup>18</sup> Ms. B then went on to describe an incident to Ms. A where Appellant yelled at Mr. C.<sup>19</sup>

After this meeting concluded, having received permission to move forward with recruitment for the Program Specialist II position, Ms. B sent an email to Appellant late the next afternoon (Friday), informing Appellant of the results of her meeting with Ms. A on the position and that she was moving forward with the recruitment action. Appellant was out of the office on leave and was due to return on Monday. Appellant responded back to Ms. B the next day, noting that Appellant had previously spoke to Ms. A about the filling of the position and that Ms. B's material had been quite convincing. Appellant went on to note that Ms. B's email to Appellant was sent at 4:57 p.m. on Friday and a few minutes later Ms. B sent another email to the Office of Human Resources (OHR) about recruiting for the position. Appellant indicated that the directive to OHR could have waited until Appellant's return on Monday. Ms. A, who had been copied on the various emails, responded to Appellant and Ms. B indicating Ms. B had Ms. A's approval to move forward. Appellant responded solely to Ms. A, indicating that Appellant did not understand why normal procedures were not being followed where Section Chiefs sign off on all personnel actions. Appellant again reiterated that Ms. B could have waited one day.

Ms. A subsequently contacted Mr. D in OHR on October 30, 2006, about how to handle the situation with Appellant. According to Ms. A, she explained to Mr. D all the various things she had already done with Appellant, including her investigation, her changing Appellant's performance plan, the training she had sent Appellant to, and the session held by Mr. K. Ms. A's notes of this meeting reflect that Mr. D advised that she did not need to do an investigation. Ms. A testified that:

- Mr. D indicated that she had done enough of the “touchy feely stuff”;
- It was time to move forward with discipline (H.T. at 38);
- If, after taking disciplinary action, Appellant still did not “get it”, Ms. A should move forward with dismissal; and
- Mr. D advised her to speak with both Ms. B and Mr. C and get specifics about their harassment to put into the disciplinary memorandum.

On November 8, 2006, Ms. B provided Ms. A with a document entitled: Summary of Major Incidents with [Appellant]. Ms. B specifically stated in the document that “[a]ll reprimands were oral—there were no written reprimands.” C. Ex. 12 at 2.

On November 14, 2006, Mr. C met with Ms. A. According to Ms. A's notes, Mr. C

---

<sup>18</sup> Although Ms. B testified that she was criticized about not adhering to the chain-of-command, she acknowledged that Appellant never downgraded her on her performance appraisal. H.T. at 163.

<sup>19</sup> No reference is made to Mr. C in the notes taken by Ms. A during the October 26<sup>th</sup> meeting with Ms. B.



indicated that Appellant was abusive in nature, rude, discourteous, and not professional. Mr. C related to Ms. A an incident in May 2006 during which Appellant yelled at him.<sup>20</sup> According to Mr. C, Appellant yelled so loudly that Appellant's aide, Ms. E, opened the door to Appellant's office to inform Appellant that the office could hear Appellant. Mr. C later testified that this incident was in fact a shouting match between both he and Appellant. Mr. C also told Ms. A that on September 12, 2006, Appellant threatened him with a written reprimand because Mr. C had copied Ms. A on an email announcing that new trucks had been delivered. Mr. C also indicated to Ms. A that Appellant was rude and discourteous to Ms. B. During this conversation, Ms. A specifically asked Mr. C if she could share the information he had provided her with Appellant and Mr. C indicated she could.

On December 5, 2006, Ms. A again met with Mr. C. During their meeting, Mr. C discussed three incidents where he found himself in trouble with Appellant because he didn't follow the chain-of-command. However, Mr. C indicated to Ms. A that things had gotten better with Appellant. Mr. C testified that he believed at that time that he and Appellant were working better together.

On or about December 8, 2006, Mr. C met with Appellant regarding Mr. C's FY 08 budget. Mr. C was dissatisfied that he had not been authorized enough information technology (IT) slots to be able to give the support needed. According to Appellant, Appellant told Mr. C to speak with Ms. A about this issue. See C. Ex. 4.

On December 11, 2006, Mr. C left Ms. A a voice mail. According to her notes, Mr. C indicated he was willing to go on the record concerning Appellant. Mr. C stated he had an encounter the previous Friday with Appellant where Appellant was angry because Appellant thought Mr. C had raised his concerns about the FY 08 budget with someone else.

On December 27, 2006, Ms. A met with Appellant about the allegations made by Ms. B and Mr. C.<sup>21</sup> Ms. A explained to Appellant the allegations made by both Ms. B and Mr. C. Ms. A testified that she instructed Appellant that Appellant's actions must cease – Ms. A had “tried all the touchy-feely stuff, now there will be disciplinary action.” C. Ex. 8 at 1. According to Ms. A, Appellant told her that yelling is how Appellant communicates best with Mr. C. Appellant also shared with Ms. A that Mr. C was very upset about his FY 08 budget request for an IT position. Appellant indicated to Ms. A that Appellant would stop yelling if Ms. A wanted Appellant to do so. Ms. A told Appellant under no circumstances was Appellant to yell; Appellant was to treat others respectfully. Appellant also indicated to Ms. A that Appellant tells Ms. B when she does good work but has trouble getting through to

---

<sup>20</sup> Appellant denied that this incident occurred in May 2006. C. Ex. 4. According to Appellant, the May 2006 incident took place through email. Id. The yelling incident occurred between Appellant and Mr. C in September 2006. Id. Ms. E, a witness to the incident, was never interviewed by Ms. A. H.T. at 129-30.

<sup>21</sup> Ms. A testified that prior to this meeting she had been on leave for three days and Appellant had been on leave for a week.

her. Ms. A told Appellant that Appellant needed to fix Appellant's communication problems. Appellant responded that Mr. K did not think Appellant's communications skills were bad. Ms. A indicated that, in her discussion with Mr. K, he indicated that there was a definite need for follow-up but neither Appellant nor Mr. K followed up.

On February 2, 2007, Ms. A issued the SOC for a five-day suspension to Appellant. The SOC charged Appellant with violating Sections 33-5(e) & (q) of the personnel regulations by failing to perform duties in a competent or acceptable manner and engaging in discriminatory, retaliatory or harassing behavior. The SOC cited Appellant's interaction with Ms. B on October 23, 2006, indicating that Appellant became irate and yelled at her.<sup>22</sup> The SOC also stated that a similar situation with Ms. B occurred on September 22, 2006. The SOC charged that Appellant many times reprimanded Ms. B for responding to requests from Ms. A. The SOC also stated that Appellant had given Ms. B Oral Admonishments on February 21, 2006 and July 22, 2006, as well as an oral admonishment on June 2, 2005.<sup>23</sup>

The SOC also charged that on December 11, 2006, Mr. C notified Ms. A that Appellant's behavior towards him was abusive. The SOC stated that Mr. C confirmed that Appellant had treated Ms. B in a hostile manner and was rude, discourteous and not professional. The SOC charged Appellant with yelling at Mr. C in May 2006. It also charged that Appellant threatened Mr. C with a disciplinary action on September 12, 2006, because he had carbon-copied Ms. A on an email concerning new trucks.

The SOC went on to indicate that several unit managers had asked to be removed from Appellant's unit because of Appellant's demeaning behavior. It noted that Ms. A had conducted an investigation in 2002 into Appellant's demeaning behavior. The SOC stated that a performance plan was developed with specific performance measures related to Appellant's management skills as a result of the investigation. The SOC stated that in every performance review since FY 02, Appellant's communications had been identified as needing improvement.

The SOC also discussed the organizational assessment conducted by Mr. K and indicated that, when Ms. A contacted Mr. K in 2006, he indicated there was definitely a need for follow-up but no follow-up occurred.

Appellant submitted a detailed response to the SOC, along with attachments, to Ms. A. On May 31, 2007, Appellant was issued the NODA, effecting a two-day suspension on June 8 & 9, 2007, based on the same charges contained in the SOC.

This appeal followed.

---

<sup>22</sup> Ms. B's document summarizing the major incidents with Appellant indicated that Appellant "raised [Appellant's] voice" on September 20, 2006 and again on October 23, 2006, during meetings with her.

<sup>23</sup> The SOC contained a typo regarding this last date – it indicated the oral admonishment was received on June 2, 20005. This typo was also in the NODA.

## APPLICABLE REGULATIONS

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

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

(b) ***Prompt discipline.***

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
- (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

(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; . . .

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

(a) ***Oral admonishment.*** An oral admonishment is:

- (1) the least severe disciplinary action;
- (2) a spoken warning or indication of disapproval about a specific act of misconduct or violation of a policy or procedure; and
- (3) usually given by the immediate supervisor.

...

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

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

- (1) document the incident or employee's behavior that caused

concern;

- (2) conduct an investigation, if appropriate and necessary; and
- (3) interview the employee and others who may have witnessed the conduct or have information about it.

(b) ***Statement of charges.***

- (1) Before taking a disciplinary action other than an oral admonishment, a department director must give the employee a statement of charges that tells the employee:
  - (A) the disciplinary action proposed;
  - (B) the specific reasons for the proposed disciplinary action including the dates, times, and places of events and names of others involved, as appropriate;
  - (C) that the employee may respond orally, in writing, or both;
  - (D) who to direct the response to;
  - (E) the deadline for submitting a response; and
  - (F) that the employee may be represented by another when responding to the statement of charges.
- (2) The department director must allow the employee at least 10 working days to respond to the statement of charges.
- (3) If the employee responds to the statement of charges, the department director must carefully consider the response and decide:
  - (A) if the proposed disciplinary action should be taken;
  - (B) if no disciplinary action should be taken; or
  - (C) if a different disciplinary action should be taken.

**Montgomery County Personnel Regulations, Section 35, *Merit System Protection Board Appeals, Hearings, and Investigations***, which states in applicable part:

...

**35-3. Appeal period.**

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:
  - (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; . . .

**35-4. Appeal filing requirements.**

- (a) An appeal is a simple written statement that the appellant wants the MSPB to review the action.
- (b) After the MSPB acknowledges receipt of intent to appeal an action, the appellant must be given 10 working days to submit the following information in writing:<sup>24</sup>
  - (1) appellant's name, signature and date;
  - (2) home address and telephone number;
  - (3) title of position;
  - (4) department, agency, or office, if applicable;
  - (5) concise description of the action or decision being appealed;
  - (6) reason why the appellant disagrees with the action or decision; and
  - (7) relief requested, subject to later modification by the appellant.

**POSITIONS OF THE PARTIES**

County:

- Appellant's behavior toward subordinates is unacceptable and must change. Although not wedded to two-day suspension, the County wants some significant discipline on the record.
- The management culture of Montgomery County is to be collaborative, respectful of others and team-oriented. Appellant's management style is autocratic, dictatorial, and Appellant has an almost obsessive focus on chain-of-command. Anyone who violates Appellant's conception of chain-of-command is punished.

---

<sup>24</sup> The Board notes that completion of the Board's Appeal Form satisfies the requirements of Section 35-4(b).

- DPWT has attempted to deal with Appellant’s mistreatment of subordinates in a variety of nondisciplinary ways. Ms. A added performance measures to Appellant’s performance plans addressing Appellant’s communication and interpersonal skills and Appellant’s ability to motivate and manage Appellant’s staff by fostering team spirit. Appellant was sent to several training sessions. An organizational consultant was hired to interview Appellant and Appellant’s subordinates and make recommendations to Ms. A.
- The organizational consultant failed to do what he was tasked with doing. Rather, the consultant met with Appellant and then conducted a five-hour session with Appellant and Appellant’s direct reports, wherein none of the direct reports felt free to express themselves in front of Appellant.
- Appellant inappropriately yelled at Ms. B in a staff meeting.
- Appellant unreasonably required Ms. B to justify the filling of a vacant position and insisted it be downgraded, was abusive towards Ms. B and cut off all further communication.
- Mr. C confirmed that Appellant has targeted Ms. B for years. Mr. C also indicated that he has been harassed by Appellant since 2005.
- The County needed more than 30 days to issue the SOC as it had to confirm Appellant’s treatment of Ms. B and Mr. C, since Mr. C was initially hesitant to go on the record. It took several meetings between Mr. C and Ms. A before he finally agreed to go on the record. Also, the Division at the time was dealing with a crisis regarding the provision of services.
- Appellant was not timely in filing this appeal and there is no provision for extenuating circumstances so as to permit Appellant to file late.

Appellant:

- The County failed to adhere to the requirements of the MCPR to initiate the disciplinary process promptly and issue a SOC within 30 calendar days of the date on which the supervisor became aware of the employee’s conduct or performance problem. The SOC contained stale charges.
- The NODA incorrectly charged Appellant with issuing Oral Admonishments to Ms. B.
- The SOC and NODA both indicate that Appellant’s communications have been rated by Ms. A as needing improvement in every performance appraisal since 2002. This is incorrect, as Appellant was rated “Successful” in communications in 2005.
- Appellant for years has requested that Appellant’s subordinates observe the chain-of-command; they have failed to heed this request.
- The NODA acknowledges that Appellant raised substantial credibility questions concerning the SOC but failed to resolve these questions.
- The Department Director simply rubber stamped the entire SOC. The NODA is almost the same as the SOC and contains the same typographical errors as the SOC.

**ISSUE**

Has the County proven, by a preponderance of the evidence, that the two-day

suspension of Appellant was reasonably justified and consistent with applicable law and regulatory provisions?

### **ANALYSIS AND CONCLUSIONS**

At the close of the County's case-in-chief on November 8, 2007, Appellant's counsel moved for the Board to dismiss the disciplinary action against Appellant.<sup>25</sup> The County opposed the Motion for Judgment. After considering both Appellant's arguments and the County's, the Board granted Appellant's motion. The Board indicated that it had determined that the Statement of Charges was not issued in a timely manner and that the discipline given to Appellant was not appropriate given the evidence presented by the County.

Although not reflected in the hearing transcript, after the Board granted Appellant's Motion for Judgment, the County's representative asked whether the Board intended to issue a written decision as the County needed to understand what it had done wrong in this case. The Board assured the County it would issue a written decision. As the County did several things wrong in this case besides failing to issue a prompt SOC, the Board has determined to honor the County's request to explain in detail what the County did wrong.

### **Despite The County's Assertion To The Contrary, Appellant Met The Time Limits For Filing Appellant's Appeal With The Board.**

At the beginning of the hearing in this matter, the County, for the first time, asserted that Appellant had failed to file Appellant's appeal in a timely manner. The County noted that Appellant received the disciplinary action on May 31, 2007, but Appellant's Appeal Form is dated June 27, 2007. According to the County, Appellant filed twenty days beyond the time limit for filing this appeal.

The record of evidence in this case indicates that Appellant received the NODA on May 31, 2007. In accordance with MCPR Sections 35-3 and 35-4, Appellant had ten (10) working days after receipt of the NODA to file his intent to file an appeal. Thus, Appellant had until June 14, 2007 to file. On June 12, 2007, Appellant hand-delivered to the Board an intent to file an appeal.

On June 13, 2007, the Board's Executive Secretary, in a letter, acknowledged receipt of Appellant's intent to file an appeal and informed Appellant that Appellant had until June 27, 2007 to file the enclosed MSPB Appeal Form. On June 27, 2007, Appellant filed the

---

<sup>25</sup> Appellant's counsel indicated Appellant's counsel did not know what to call the motion but that it was akin to a motion for a directed verdict. See Fed. R. Civ. Proc. 41(b) (permitting a defendant, in an action tried by a court without a jury, to move for dismissal of the case after the plaintiff has presented his evidence on the ground that upon the facts and law the plaintiff has shown no right to relief). The Board finds that Appellant's counsel moved for judgment in Appellant's favor. See Gibson v. Department of Transportation, 18 M.S.P.R. 384 (1983); McKenzie v. Department of Interior, 16 M.S.P.R. 397 (1983).

completed Appeal Form with the Board. Thus, it is clear from the record that Appellant timely filed this appeal.

**The County Failed To Follow The Procedures In The MCPR To Initiate Prompt Discipline.**<sup>26</sup>

As Ms. A testified, the basis for the SOC was Appellant's interactions with Ms. B and with Mr. C. Under the County's Administrative Procedures Act, the County has the burden of proving by a preponderance of the evidence that it adhered to the applicable regulations when imposing discipline. As previously noted, the MCPR requires that the Statement of Charges be issued within 30 days of when a supervisor knew of the event giving rise to the proposed discipline. See MSPB Case No. 04-15 (2005). The MCPR provides an exception to this 30-day requirement where an investigation is necessary<sup>27</sup> or other circumstances justify a delay.

The Statement of Charges references Appellant giving Ms. B an oral admonishment on June 2, 2005, an Oral Admonishment on February 21, 2006, and an Oral Admonishment on July 22, 2006. The SOC also cites Appellant's inappropriate interactions with Ms. B on September 20, 2006 and October 23, 2006. The Statement of Charges was issued on February 2, 2007, over a hundred days from the last incident cited in October 2006.

The Statement of Charges also cited several incidents between Appellant and Mr. C. The first incident occurred sometime in May 2006; the second incident on September 12, 2006; and the final incident on December 11, 2006. The Statement of Charges was issued over fifty days from the last incident cited in December 2006.

The County seeks to excuse its delay in issuing the Statement of Charges as time was needed to confirm Appellant's treatment of Ms. B and Mr. C, and Mr. C was initially hesitant to go on the record. According to the County, it took several meetings between Mr. C and Ms. A before Mr. C agreed to go on the record. In addition, the County asserts that the Division was dealing with a crisis regarding provision of services at the time the Statement of Charges was being considered.<sup>28</sup> These arguments fail to provide a justification for delaying

---

<sup>26</sup> In Appellant's Motion in Limine filed prior to the hearing, Appellant raised the issue of stale charges and the need to initiate action within 30 days of when a supervisor becomes aware of an employee's conduct or performance problem. Although the Board denied Appellant's Motion in Limine, it ordered the County to produce evidence during the hearing regarding the need to delay the issuing of the SOC. Thus, the County was clearly on notice before the hearing about the Board's concern regarding this matter.

<sup>27</sup> Ms. A stated Mr. D of OHR specifically told her on October 30, 2006, that no investigation was necessary before taking disciplinary action. See C. Ex. 13; H.T. at 69.

<sup>28</sup> The County also argues that in terms of timeliness the Board should consider the fact that Appellant did not timely file this appeal. The County notes that while there is a provision for extenuating circumstances in terms of extending the 30-day period for issuing the SOC there is no such provision for extending the 10 working day limit for filing an



the SOC.

Ms. A's notes of her November 14, 2006 interview with Mr. C indicate that she told Mr. C that she intended to discuss Ms. B's issues with Appellant and would like to discuss Mr. C's issues. C. Ex. 11 at 2. The notes also reflect that Mr. C felt his career would be hurt by Appellant but that Mr. C was "OK w/ my sharing." *Id.* Ms. A acknowledged during the hearing that Mr. C indicated to her on November 14, 2006, that it was alright to share the information he had provided with Appellant. Thus, as of November 14, 2006, Ms. A had Ms. B's detailed list of incidents with Appellant, as well as Mr. C's issues and permission from Mr. C to share his information. Moreover, Ms. A specifically denied during her testimony that Mr. C's reluctance to go public delayed the SOC.<sup>29</sup> Accordingly, based on the record of evidence, the Board finds that Ms. A should have met immediately with Appellant after her November 14, 2006 meeting with Mr. C to discuss the issues raised by Ms. B and Mr. C. Then, if not satisfied with Appellant's response, she should have issued the Statement of Charges within 30 days thereafter.

While Ms. A asserts that a crisis developed around Thanksgiving which continued until July of the next year, the Board is unpersuaded that this constituted a circumstance justifying a delay. The Board notes that even though this crisis had started, Ms. A still took leave during the month of December prior to her meeting with Appellant on December 27, 2006.

Moreover, after her meeting with Appellant on December 27, 2007, Ms. A failed to move forward in a prompt manner. Ms. A testified that Appellant was on leave through mid-January. However, she did not meet with Appellant or Ms. B or Mr. C again before issuing the Statement of Charges to Appellant on February 2, 2007. H.T. at 102-03.

---

appeal. As discussed *supra*, the County is mistaken with regard to the lack of timeliness by Appellant in filing this appeal.

<sup>29</sup> When asked by Appellant's counsel about the delay in developing the SOC, Ms. A testified thusly:

Q: Can you turn, please, back to County 11? You had said that [Mr. C] didn't want you to go forward, is that right?

A: Correct.

Q: And that's one of the reasons this particular statement of charges took so long to develop, is that right?

A: It was, I met – no, I said I met with [Mr. C] several times. It's my responsibility to get the statement of charges done in a timely manner. It's not [Mr. C's] responsibility. It's mine.

H.T. at 100.

As previously noted, Ms. A testified that it was her responsibility to get the Statement of Charges done in a timely manner. This she failed to do. Accordingly, the Board finds that the County failed to follow the procedures in the personnel regulations to initiate prompt discipline. This basis standing alone would warrant the overturning of Appellant's two-day suspension.

**The Department Director Committed Harmful Error When The Department Director Failed To Follow The Requirement In The MCPR To Carefully Consider Appellant's Response.**

The County's personnel regulations at Section 33-6<sup>30</sup> set forth certain due process rights<sup>31</sup> that all merit employees have in connection with a disciplinary action. They include: a) the right to the specific reasons for the proposed disciplinary action; b) the right to respond orally and/or in writing; and c) the requirement that the department director carefully consider the employee's response before deciding whether to effect the disciplinary action as proposed, withdraw the action in its entirety, or take a different disciplinary action. It is clear, based on Department Director's testimony, that the Department Director did not carefully consider Appellant's written response before imposing the two-day suspension.

Appellant, as a MLS employee, occupies a high level position in the County. While the Board understands that the Department Director has 1500 employees in the Directorate, the Department Director was authorizing action against a member of the Department Director's management team, which could lead to the end of Appellant's career advancement. The Director had a duty to carefully consider the action being taken against Appellant – this the Director did not do.

The Department Director could not even remember whether the Department Director signed the Statement of Charges – the Department Director testified the Department Director believed the Department Director's signature was on it but was not sure. The Department Director then testified that the Department Director decided it should be handled by the Division Chief but then it came back to the Department Director and the Department Director

---

<sup>30</sup> The Board notes that the County Code requires the County Executive to promulgate personnel regulations. The MCPR in effect at the time Appellant was disciplined was issued by the County Executive and approved by the County Council. The Board finds that Section 33-5 “significantly affects individual rights” and “confers important procedural benefits on employees of Montgomery County.” See Anastasi v. Montgomery County, 123 Md. App. 472, 491, 719 A.2d 980 (1998). As such, under the dictates of the Accardi doctrine, see United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954), the Department must follow Section 33-6 or its action will be considered invalid. 123 Md. App. at 491.

<sup>31</sup> Section 1-18 of the MCPR defines due process as: “The right of a County employee to be afforded those procedural protections expressly established by applicable provisions of the Charter, merit system law, and regulations in any matter affecting terms and conditions of employment.”

signed off on it. H.T. at 221. Although the Department Director couldn't remember if the Department Director signed the SOC or even what was in the SOC, H.T. at 226, the Director repeatedly testified that the Department Director wanted to impose a five-day suspension against Appellant.

The SOC specifically instructed Appellant to respond to Ms. A. According to Ms. A, after Appellant provided Appellant's response, she reviewed it. She noted that Appellant had raised some credibility issues as many of the conversations included in the SOC happened between just two people. Based on this and the fact that she had never been comfortable with a five-day suspension, she consulted with OHR and prepared a NODA for a two-day suspension. She then sent the NODA, the SOC and Appellant's response to the Director.

The process followed by DPWT management in developing the NODA is totally unacceptable. While the Board does not expect the Director to draft a NODA, it does expect that the employee's response be sent to the Director, not the individual who proposed the action. Then, after the Director has carefully considered the employee's response, as well as the SOC, the Director needs to make a decision on the appropriate discipline, if any. Having made the decision, the Director needs to convey the decision, as well as the Director's reasons for the decision, to whomever the Director has determined will draft the NODA for the Director.

Because of the Director's hands-off approach, the Director had no hint of what was meant by statements contained in the NODA. The first paragraph of the NODA specifically stated:

On February 2, 2007, you received a Statement of Charges for a 5-Day Suspension. You responded to that statement on February 16, 2007.<sup>32</sup> In that response you disputed the charges of harassment and intimidation and took issue with the statements of Ms. [B] and Mr. [C] that your actions and behavior are harassing and abusive. Noting that there were some factual disputes and credibility issues, I have concluded that a 5-Day Suspension is not warranted. However, based upon the nature and character of your interactions with staff, prior admonishments and counseling, and your failure to demonstrate any improvement in how you conduct yourself with staff, I believe that a 2-Day Suspension is warranted.

C. Ex. 3 at 1. Although the Director stated that the Director read Appellant's reply, the Director had no memory regarding any factual disputes or credibility issues raised therein, H.T. at 227, much less being able to give examples of any of the factual disputes raised by Appellant. Id. at 235.

The Director was asked specifically why the Director reduced Appellant's suspension from five days to two:

---

<sup>32</sup> Appellant's response to the SOC is dated February 14, 2007.

Q: Isn't it true, [Mr. Director], that after reading [Appellant's] rebuttal, you decided that the punishment of five days was excessive, and [Appellant] should only be punished for two days?

A: No, that's not true. I still believe that a five-day suspension was warranted. However, given the staff input, I said, okay, I will go over to two. And as I said before, what I was trying to do was send a message that there should be something done for the activities that were being brought forward.

Q: So just so you and I understand each other, this sentence that I just had you read aloud is not true?

A: No, I didn't say that. It is true, as I said. And you are characterizing what I said inaccurately. I said that the five-day suspension was not warranted because, and that was after having had some staff input, and I said two days, and that's where I am.

Q: I want to make sure this is clear for the Board. Did you reduce [Appellant's] suspension from five days to two days because [Appellant] raised issues of fact and credibility, or did you reduce it just because the staff suggested that you should reduce it?

A: Because the staff, in talking to Appellant, and talking to -- it was a staff thing. I did not go into Appellant's rebuttal after that.

H.T. at 228-29.

Appellant's counsel also asked the Director about the contents of Appellant's rebuttal. Appellant had indicated in the rebuttal that the May 2006 charge concerning a yelling match with Mr. C was false and the entire event took place through email, copies of which Appellant had attached to Appellant's response. The Director was asked if this was one of the factual disputes the Director referred to in the NODA. The Director responded: "No. This is not my concern and my facts came from discussions with [Ms. A]." H.T. at 233. Appellant's counsel then followed up about the Director's statement concerning "the facts" coming from the Director's discussion with Ms. A. The Director responded: "I'm saying, I discussed this with [Ms. A], and discussed this with [my Deputy]. And so I don't, I have no knowledge of the emails. I didn't read the emails." H.T. at 233. The Director indicated later that this had happened some time ago and the Director didn't remember all of the documents the Director read. *Id.* at 234.

It is clear that the Director, contrary to the requirement in the MCPR, failed to give careful consideration to Appellant's reply. Rather, as the Director testified, the Director's facts came from Ms. A. This is simply not acceptable on the part of a decision-maker, which the Director repeatedly indicated the Director was. If the Director is not willing to take the time to carefully consider an employee's response, which is a due process right of an employee in Montgomery County, then the Board submits that the Director should delegate

all responsibility for taking a disciplinary action to the Director's three deputies. The Board finds that the Director's failure to carefully consider Appellant's response before deciding to take a two-day suspension warrants its invalidation.

**Various Statements In The SOC And NODA<sup>33</sup> Simply Were Not True.**

During the hearing, it was established that both the SOC and NODA contained statements that were not true. An Oral Admonishment is a form of disciplinary action under the personnel regulations. See MCPR, Section 33-3 (a). Although an Oral Admonishment is a spoken warning, the incident or employee behavior that led to it is to be documented by the supervisor. See MCPR, Section 33-6(a)(1). Both the SOC and NODA contained the following charges concerning Appellant's interactions with Ms. B:

1. On July 22, 2006, she was given an Oral Admonishment for providing to the division chief<sup>34</sup> a requested copy of the approved Standard Operating Procedure (SOP) on "Public Notification Process for Public Forums. [sic]"
2. On February 21, 2006, Ms. B was given an Oral<sup>35</sup> Admonishment for providing a complaint report to the division chief upon her request.

Ms. A testified that an Oral Admonishment in "capital letters" is a disciplinary action. She indicated that Ms. B was never formally written up. H.T. at 84. She stated "unfortunately, that got put forward in the statement of charges." *Id.* According to Ms. A, any reference to an oral admonishment should have been in "small letters" to connote it was not a disciplinary action. Appellant, in Appellant's detailed response, specifically told Ms. A that Appellant had never issued an Oral Admonishment to Ms. B. C. Ex. 4 at 5. Ms. A testified that she then recognized that Ms. B did not understand that the term "oral admonishment" meant "something in the personnel regs." H.T. at 85. Ms. A, under cross-examination, acknowledged that she failed to change the capitalization when drafting the NODA – "I missed that, yes, when I drafted the NODA." H.T. at 90. Based on the evidence, the Board concludes that the County has failed to prove these charges by a preponderance of the evidence.

Both the SOC and NODA contained the following statement: "In every performance review since FY 02, your communication has been identified as needing improvement." C.

---

<sup>33</sup> That the NODA had misstatements in it is of real concern to the Board, given the fact that Ms. A testified that the NODA had to be reviewed by both legal and OHR before it was issued. The Board notes that the NODA, dated April 20, 2007, was received back in DPWT, after being reviewed by legal and OHR, on May 31, 2007, almost six weeks later.

<sup>34</sup> The SOC substituted "me" for "division chief" in both the July 22, 2006 and February 21, 2006 charges.

<sup>35</sup> Unlike the SOC, the NODA failed to capitalize the word "oral" but did capitalize "Admonishment".

Ex. 3 at 2; C. Ex. 6 at 2. Ms. A insisted this statement was true during the hearing. H.T. at 111. Only after being shown Appellant's Ex. 56, which was a copy of Appellant's performance evaluation for FY 05, did Ms. A acknowledge that this was an incorrect statement as she had rated Appellant successful in the area of communications. H.T. at 114.

Both the SOC and NODA indicate that Ms. A "followed up with [Mr. K] who said there was definitely a need for follow-up." As discussed in greater detail supra, the Board has determined that this is an incorrect statement.

**Not Only Did The County Fail To Adhere To The Concept Of Progressive Discipline,<sup>36</sup> It Should Have Addressed This Matter Through Training, Not Discipline.**

Both the SOC and the NODA indicate that Appellant yelled at and became irate with Ms. B on October 23, 2006 and a similar situation occurred on September 20, 2006 between Ms. B and Appellant. When specifically asked by the County's representative about Appellant's tone during the meeting on October 23, 2006, Ms. B replied: "Well, all of [Appellant's] meetings, [Appellant's] tone is always that of, that of final authority. This is what I'm saying, and it's not for you to discuss or question or to challenge. This is me and I have made the final decision on this." H.T. at 136-37. As previously noted, in her summary of major incidents with Appellant, Ms. B described Appellant as raising Appellant's voice on September 20 and October 23, 2006. C. Ex. 12 at 1. Ms. B never confirmed during her testimony that Appellant yelled at her on these occasions. While Appellant conceded to Ms. A on December 27, 2006, that Appellant had yelled at Mr. C, Appellant never conceded any such misconduct towards Ms. B. Accordingly, the Board finds that these two charges were not proven by the County.

Based on the record of evidence before the Board, it is evident that some of Appellant's conduct is inappropriate in the workplace. Appellant should treat Appellant's subordinates with respect and not yell at them.<sup>37</sup> Significantly, however, when Ms. A finally confronted Appellant with Appellant's yelling at Mr. C<sup>38</sup> in December 2006 and counseled

---

<sup>36</sup> The Board totally disagrees with the advice reportedly given by OHR to Ms. A. Specifically, Mr. D counseled Ms. A to do a short suspension and if this didn't work to move to a dismissal action. Such advice is directly contrary to the notion of progressive discipline.

<sup>37</sup> However, this does not mean that the Board condones Appellant's subordinates' conduct. As noted infra, it is apparent that they by-pass the chain-of-command with Ms. A's acquiescence. Moreover, while it was totally inappropriate for Appellant to yell at Ms. B during a staff meeting, it was unprofessional of Ms. B to be speaking to someone else while Appellant was talking. Ms. A never indicated that she counseled Ms. B about her lack of professionalism. Likewise, with regard to the yelling incident between Appellant and Mr. C, while Appellant was wrong to yell, it was just as inappropriate for Mr. C to yell at Appellant. There is no evidence that Ms. A corrected Mr. C for his inappropriate behavior.

<sup>38</sup> When questioned by a Board member regarding the yelling incident, Mr. C indicated that he never asked Appellant to stop yelling, as he was yelling back at Appellant. Mr. C indicated that this was the only time that Appellant yelled at him.

Appellant on its inappropriateness, Appellant offered to stop yelling at Mr. C.<sup>39</sup> Thus, it appears that counseling alone would have resolved this problem.

The Board finds that the remaining charges against Appellant – that Appellant repeatedly reprimanded Ms. C, gave her an oral admonishment in June 2005 and threatened Mr. C with a written reprimand because he carbon-copied Ms. A on an email concerning new trucks, even if true,<sup>40</sup> fall far short of the type of misconduct that warrants a two-day suspension. Ms. A testified that while there was consideration of a written reprimand, there was no consideration of an Oral Admonishment. H.T. at 130.

Early on, Ms. A determined that an organizational effectiveness assessment and subsequent training was needed for Appellant and Appellant's staff. The Board believes this was the correct course of action. Yet, unfortunately, it was mishandled by Ms. A. As the supervisor of Appellant, who believed that Appellant needed this assistance, it was Ms. A's responsibility to ensure that the organizational effectiveness training was done correctly.<sup>41</sup> Instead, she tasked Appellant with contacting Mr. K and arranging for the training. When the session did occur, Appellant and the unit managers all attended. Sometime thereafter, Ms. B told Ms. A that Mr. K had not spoken separately with any of the unit managers. According to Ms. A, this was not what was suppose to occur; rather, Mr. K was to meet with Appellant alone, then separately with each of Appellant's unit managers and then follow-up with Appellant and/or Ms. A and provide a report. Despite the fact that Ms. A never received a report from Mr. K, she never followed-up with directly Mr. K to determine why. While the Board recognizes Ms. A had serious health issues for the period August-November 2005, there is still no explanation why it took Ms. A until June 2006 to inquire about Mr. K.

Moreover, given the fact that Mr. K had not done what Ms. A had wanted him to

---

<sup>39</sup> As previously noted, Appellant disagrees with Mr. C's assertion that the yelling incident occurred in May 2006. As Ms. A failed to interview Ms. E, the witness to the event, the Board finds that the County did not prove the May 2006 yelling charge by a preponderance of the evidence. However, as Appellant has conceded that there was a yelling incident between Mr. C and Appellant, the Board does find that Appellant did yell at Mr. C but not on the date charged by the County.

<sup>40</sup> Appellant, in Appellant's detailed rebuttal, stated that Appellant never threatened Mr. C with a written reprimand on September 12, 2006; rather, Appellant ordered Mr. C to cease and desist carbon-copying Ms. A on emails and if he didn't stop then Appellant would prepare a written reprimand. C. Ex. 4. Appellant denied orally admonishing Ms. B. Id.

<sup>41</sup> The Board agrees with Ms. A that the consultant should have met with Appellant separately, Ms. A separately, then with each of the unit managers separately, then perhaps with Appellant and the unit managers together to discuss what issues had arisen in the separate meetings. Subsequently, the consultant should have developed a course of action to address the issues.

do,<sup>42</sup> the Board does not understand why Ms. A wanted Appellant to follow-up with Mr. K. The prudent course of action would have been to arrange for a new organizational consultant to come in and do the contract, following Ms. A's directions. This was not done.

Significantly, because of Ms. A's failure to handle the contract with Mr. K properly, the message that ended up being conveyed to Appellant by Mr. K was directly contrary to what Ms. A believed – i.e., that Appellant was a very good manager and nothing was wrong with Appellant's communications skills. Thus, while Ms. A criticized Appellant for Appellant's "half-hearted effort" with regard to improving Appellant's communications skills, Appellant felt free to ignore this criticism as the County's organizational consultant had applauded Appellant's "eagerness" and "willingness" to improve. While Ms. A continued to berate Appellant for Appellant's interactions with Appellant's subordinates, Mr. K told Appellant that Appellant was handling them properly. There could not have been a greater disconnect between the message Ms. A was sending and the one that the County's organizational effectiveness expert was sending.

The Board has determined that given the record of evidence which establishes that there is a dysfunctional relationship between Ms. A and Appellant as discussed in greater detail *infra*, as well as problems with regard to the interactions between Appellant and Appellant's two subordinates, the appropriate course of action is to order an organizational effectiveness assessment and training for Ms. A, Appellant and Appellant's subordinate supervisors on improving the organizational environment.

### **The Board Has Concerns About Various Issues Raised In Testimony During The Hearing.**

It appears that the precipitating event which led Ms. B to complain to Ms. A about Appellant was the fact that Ms. B was required to write up a justification for keeping the Program Specialist II position and she disliked being made to do so. The Board finds that Appellant was doing Appellant's job as a manager by ensuring that Appellant was satisfied that the position that was to be filled was properly classified. The Board is very concerned over the cavalier attitude displayed by the Division Chief regarding whether the Program Specialist II position was correctly graded. She testified that she had no intention of downgrading the position and the analysis required by Appellant was excessive. The Board would remind the Division Chief that she has a responsibility to ensure positions are correctly graded and Appellant was correct to require this analysis be done.

One of the underlying themes throughout the hearing was the concept of chain-of-command. It is clear that Appellant believes in this concept; it is just as clear that Ms. A does not. Having previously been the Section Z Chief, Ms. A testified that she had a different management style – a much freer style. Appellant has asserted that Ms. A

---

<sup>42</sup> There is nothing in the record to suggest that the consultant did not get paid for his session with Appellant and Appellant's staff. The Board is deeply concerned that Ms. A failed to receive the services for which she contracted; her failure to monitor the contract led to the wasteful expenditure of County funds.



undermines the chain-of-command. It is clear to the Board that this is true. After Ms. A and Ms. B had a discussion concerning the filling of the Program Specialist II position, instead of instructing Ms. B to go back to Appellant and begin the recruitment process, Ms. A empowered Ms. B to move ahead.<sup>43</sup> Clearly, this undermined Appellant's authority as a supervisor. Likewise, it is clear from the various exhibits submitted by the County (although not formally placed into evidence at the hearing), that Ms. A has authorized Mr. C to either blind carbon-copy (bcc) her on correspondence between Mr. C and Appellant or forward such correspondence to her.

The Board wishes to make clear that there is nothing wrong with requiring a subordinate to run issues by his/her supervisor before taking them higher. That is the normal process in running an organization. Nor is there anything wrong with requiring a subordinate, who has been tasked by a higher level of management to do something, to run the matter by his/her immediate supervisor before responding, in order to keep the immediate supervisor in the loop, so long as the immediate supervisor is available. If the immediate supervisor is not available, then the subordinate should provide the response and let the immediate supervisor know when he/she returns. Moreover, it is unfair to copy higher level management on requests by subordinates to their immediate supervisors to make a decision. So long as the subordinate has the ability to raise the issue higher if not satisfied with the immediate supervisor's response, such as was the case under Appellant (e.g., Ms. B going to Ms. A on the filling of the position; Mr. C going to Ms. A on the issue of the budget), the subordinate owes it to the immediate supervisor to start with the immediate supervisor first.

### **ORDER**

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

1. The Board sustains the appeal, and orders that the County revoke the two-day suspension, and make the Appellant whole for lost wages and benefits.
2. In as much as Appellant prevailed, the Board authorizes a request for attorney fees. Appellant must submit a detailed request for attorney fees to the Board, with a copy to the County Attorney, who shall have ten (10) days from receipt to file a response. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, Section 33-14(c)(9).
3. The Board orders removal of all mention of Appellant's failure to follow-up with Mr. K from all official documents, including Appellant's performance evaluations. Based on this removal, the County is ordered to reevaluate all elements where Appellant's rating was lowered because of this failure.

---

<sup>43</sup> The Board also believes that Ms. B should have waited for Appellant to return to begin the recruitment process. As Ms. A acknowledged when questioned by a Board member, nothing negative would have occurred had Ms. B waited until Appellant returned to start the process.

4. The Board orders the OHR Director to obtain an organizational effectiveness assessment for Ms. A, Appellant, Mr. C, Ms. B, and the other unit managers in Section Z. After the assessment is conducted, the consultant is to issue a report to the OHR Director on steps to improve the environment of the organization.

5. The Board orders training by OHR for the Department Director, the three deputies, and all DPWT Division Chiefs on the various due process requirements in taking disciplinary actions. OHR shall report back to the Board when this training is completed and provide the names of all attendees.

# **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 and December 11, 2007), 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 ten (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 ten (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 fifteen (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 2008, the Board issued the following decisions on appeals concerning the denial of employment.

# **EMPLOYMENT**

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

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Office of Human Resources (OHR) Director, to disqualify Appellant for the position of Mechanic Technician II in the Fleet Management Services Division (Fleet Services) of the Department of Public Works and Transportation (DPWT).

### **FINDINGS OF FACT**

Appellant began employment with the County as a Mechanic Technician II<sup>1</sup> in Fleet Services in July 2000. The incumbent of the position of Mechanic Technician II is responsible for the repair and preventive maintenance of a variety of heavy duty vehicles and mobile equipment, transit vehicles, and/or fire/rescue apparatus and equipment. See Class Specification, Mechanic Technician II, Code No. 5009 available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm>. The position also requires the incumbent, by the end of the probationary period, to possess a Commercial Driver's License (CDL). Id. Accordingly, pursuant to Section 32-2(b)(4) of the Montgomery County Personnel Regulations (MCPR),<sup>2</sup> the Mechanic Technician II position has been designated a Safety-Sensitive Transit position.

The County is required under federal law to conduct random drug and alcohol testing of employees in Safety-Sensitive Transit positions. See MCPR, Section 32-5(d). On April 28, 2005, Appellant was requested to submit to a random drug/alcohol test. Appellant tested positive for a prescribed controlled substance. Subsequently, the County prepared a Statement of Charges (SOC) for Dismissal of Appellant based on Appellant's positive drug test but prior to issuing the SOC Appellant resigned from County employment effective June

---

<sup>1</sup> The Class Specification for Mechanic Technician II indicates that this class was formerly entitled Mechanic II and Mechanic. See Class Specification, Mechanic Technician II, Code No. 5009 available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm>.

<sup>2</sup> MCPR Section 32-2(b) provides that an employee in DPWT who performs any of certain designated safety-sensitive functions is in a Safety-Sensitive Transit position. Subsection (b)(4) specifically covers maintaining (including repairing, overhauling, and rebuilding) a Montgomery County revenue service vehicle or equipment used in revenue service. Section 32-3 designates all positions as Safety-Sensitive Transit positions where an employee must have a CDL and maintains Montgomery County transit vehicles, to include the position of Mechanic.

26, 2005. The Personnel Action Form (PAF) documenting Appellant's resignation was annotated "DO NOT REHIRE."

On or about August 17, 2007, Appellant applied for the position of Mechanic Technician II in Fleet Services. OHR reviewed Appellant's application, found that Appellant met the minimum qualifications and placed Appellant on the eligible list forwarded to Fleet Services for review. According to Appellant, Appellant contacted the County many times and was told Appellant was "highly qualified" but never received an interview. See Appellant's Appeal, block 10. Appellant even sent an email to the Chief of Fleet Services, about the status of Appellant's application on December 5, 2007, but never heard anything.

The County asserts in its response to the instant appeal (County Response) that as of the date of its response there are 114 applicants on the eligible list for Mechanic Technician II. The County notes that 10 applicants have been hired for Mechanic Technician II positions and 15 more applicants are awaiting medical clearances before being offered positions. According to the County, Fleet Services made the determination not to rehire Appellant.<sup>3</sup> However, from the date of the filing of Appellant's application up until the filing of this appeal, Appellant has never been informed that Appellant would not be rehired because of Appellant's earlier failing of a drug test.<sup>4</sup>

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant previously performed the position of Mechanic Technician II and was a hard working team member and drug-free for five years.
- Although the County claims that it has a zero tolerance policy for drug or alcohol use, Appellant is aware that the County has made an exception for another employee facing a similar situation.

#### County:

- The position of Mechanic Technician II performs safety-sensitive functions.

---

<sup>3</sup> While the County asserts that Fleet Services made the determination not to rehire Appellant, it cites to MCPR Section 6-4 for the proposition that the OHR Director may disqualify an applicant for various reasons, including dismissal from prior County service for cause. The County also asserts that it properly disqualified Appellant from consideration for the Mechanic Technician II position. As will be discussed in greater detail infra, the Board finds that OHR should have made this determination to disqualify Appellant before placing Appellant on the eligible list and submitting it to Fleet Services for consideration.

<sup>4</sup> The County acknowledges that Appellant sent an email, dated December 5, 2007, to the Chief of Fleet Services regarding the status of Appellant's application. The County states that Fleet Services inadvertently did not respond to Appellant's email. See County Response at 2.

- There are no second chances for an employee in a Safety-Sensitive Transit position who fails a drug test.

### **APPLICABLE REGULATION**

**Montgomery County Personnel Regulations, 2001 (as amended January 18, 2005 and December 11, 2007), Section 6, *Recruitment and Application Rating Procedures***, which states in applicable part:

**6-4. Review of applications.** The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant if:

...

- (c) the applicant was separated from prior County service for cause or is not eligible for re-hire; . . .

### **ISSUE**

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

### **ANALYSIS AND CONCLUSIONS**

When Appellant resigned from County employment, Appellant's PAF clearly indicated that Appellant was not eligible to be rehired. Thus, when Appellant applied for the position of Mechanic Technician II, OHR should have reviewed the application and disqualified Appellant based on Appellant's ineligibility for rehire pursuant to MCPR Section 6-4. However, this did not occur. Rather, the OHR staffing team found Appellant met the minimum qualifications for the Mechanic Technician II position and placed Appellant's name on the eligible list which was forwarded to Fleet Services. Upon receipt of the eligible list, the County states that Fleet determined that Appellant would not be rehired. However, Fleet Services failed to communicate this decision to Appellant, even after Appellant contacted the Chief of Fleet Services about the status of Appellant's application.

Thus, the Board finds that the County did not comply with the requirements of the MCPR. However, the Board finds that this failure to comply constitutes harmless error. There is no showing that the County would have reached a different conclusion than was reached concerning Appellant's application had it followed properly the procedures of the MCPR. See Kimm v. Department of the Treasury, 64 M.S.P.R. 198, 208 (1994); Mercer v. Department of Health and Human Services, 772 F.2d 856, 859 (Fed. Cir. 1985).

The County has demonstrated that its determination not to rehire Appellant was not arbitrary and capricious, illegal or based on other non-merit factors. As the County has established, the Mechanic Technician II position is a Safety-Sensitive Transit position, whose

incumbent is subject under federal law to drug testing. Appellant previously failed a random drug test while holding the position. The Board finds that the use of illegal drugs by an employee while working in the Mechanic Technician II position poses an unacceptable risk to the safety of others who use the equipment maintained by the employee. See, e.g., Thomas v. Department of the Air Force, 67 M.S.P.R. 79, 82-84, aff'd, 66 F.3d 346 (Fed. Cir. 1995) (upholding the removal of an Aircraft Mechanic based on a positive random drug test because of concern for the safety of those who used the equipment the appellant maintained); Patterson v. Department of the Air Force, 77 M.S.P.R. 557 (1998)(same). Therefore, the Board has determined that Appellant was properly disqualified for consideration for the Mechanic Technician position based on a merit-related factor.<sup>5</sup>

However, the Board is concerned that OHR failed to properly disqualify Appellant from consideration before placing Appellant on the eligible list. Accordingly, the Board will order the OHR Director to ensure all applications are properly screened for disqualification before an applicant is placed on an eligible list.

The Board is also concerned that it was only after an appeal by Appellant that Appellant was notified that the County had determined not to rehire Appellant. To address this concern, the Board will order OHR to notify employees in writing in a timely manner when a determination is made that they should be disqualified from consideration for an announced vacancy.

### **ORDER**

Based on the above, the Board denies Appellant's appeal from Appellant's nonselection for the position of Mechanic Technician II.

Based on the foregoing, the Board hereby orders the OHR Director to take the following actions:

1. Ensure that staff properly screen all applications for disqualification before placing an applicant on an eligible list; and
2. Notify all applicants in writing in a timely manner when a determination is made to disqualify them pursuant to MCPR Section 6-4 from consideration for a position for which they have applied. This written notification will also inform the applicant of their right to file an appeal with the Board.

---

<sup>5</sup> Although Appellant has alleged that another employee in similar circumstances was treated differently from Appellant and given a second chance, Appellant has not provided the Board with sufficient information so as to address this allegation.

## **CASE NO. 08-10**

### **FINAL DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Office of Human Resources (OHR) to rate Appellant only as "Qualified" for the position of Senior Executive Administrative Aide at the Montgomery County Upcounty Regional Services Center, thus resulting in Appellant's nonselection for the position.<sup>1</sup>

### **FINDINGS OF FACT**

On October 16, 2007, Appellant applied for the position of Senior Executive Administrative Aide at the Upcounty Regional Services Center. A total of one hundred and four individuals applied for the position. Initially, the OHR staffing team reviewed the applications to insure that the applicants satisfied the minimum qualifications. OHR determined that eleven applicants did not meet the minimum qualifications and two applicants were eligible for transfer into the position. OHR then referred the remaining ninety-one applications to two subject matter experts to rate the applications based on the eight preferred criteria listed in the job vacancy announcement.<sup>2</sup> The subject matter experts rated thirty-three applicants "Well Qualified" and fifty-eight applicants, including Appellant, as "Qualified".

---

<sup>1</sup> At the time of the filing of Appellant's appeal, there was a hiring freeze implemented by the County Executive and so the position in question was not being filled. See County's Response at 1 n.1. Subsequently, the County made the decision to exempt the position in question from the freeze and the County notified the Board that it was in the process of filling the position. Id. Because OHR referred thirty-three applicants who were rated "Well Qualified" for the position, the County indicated that Appellant would not be selected for this position. Id.

<sup>2</sup> The eight preferred criteria in the announcement were:

1. Experience providing professional level executive administrative/office support demonstrating broad knowledge of general government (or similar organization) operations, procedures, policies, and organization (to include personnel and purchasing procedures);
2. Experience working with and understanding of county, municipal, State and federal political process and protocol in order to interact appropriately with officials at all levels of government;
3. Experience utilizing computers and other technology, word processing, software applications and PC-based systems;
4. Experience supervising staff and volunteers;



Upon learning that Appellant had been rated as “Qualified”, Appellant questioned the rating and a member of the OHR staffing team requested the two subject matter experts again review Appellant’s application. Upon doing so, both once more deemed Appellant to be “Qualified” for the position.

On February 26, 2008, OHR notified Appellant of the results of the second review of Appellant’s application and informed Appellant that Appellant could appeal the decision on Appellant’s application to the Board pursuant to Section 33-9 of the Montgomery County Code. On February 28, 2008, the Board received Appellant’s notice of intent to appeal OHR’s determination regarding Appellant’s application.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant is the most qualified for the position based on Appellant’s work experience at Motorola. In fact, every single job that Appellant has held would qualify Appellant for the position in question.
- Using criteria to rate an individual’s application is not the best way to judge the person’s abilities and skills and is unfair.
- Appellant was never told in the announcement that Appellant had to highlight Appellant’s resume regarding certain accomplishments.

#### **County:**

- Appellant bears the burden of persuasion under the Montgomery County Personnel Regulations and has not met this burden.
- Appellant’s application failed to provide detailed information regarding each of the eight preferred criteria. Instead, Appellant devoted two paragraphs to summarily addressing the criteria.

---

5. Experience maintaining a calendar, scheduling appointments, establishing priorities of appointments and rescheduling appointments as directed and at own discretion;

6. Experience conducting research, summarizing data and preparing draft reports;

7. Experience managing and tracking the timely completion of time sensitive assignments through correspondence control; and

8. Written communications skills such as composing and preparing memoranda, executive correspondence, reports, etc. and oral communication skills such as communicating with the public, interacting with government/community officials, Boards and Commission members, etc.

- It appears based on a review of Appellant’s application that Appellant lacks experience in supervision, maintaining calendars/schedules, time management and written communications. Although Appellant has discussed these areas in Appellant’s appeal, the information does not appear in Appellant’s application.
- It is an applicant’s responsibility to address comprehensively each of the criterion listed in the vacancy announcement.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part:

...

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. . . Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the Merit System Protection Board. . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005 and December 11, 2007), Section 6, Recruitment and Application Rating Procedures**, which states in applicable part:

**6-5. Competitive rating process.**

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-6 or 27-3(b) of these Regulations.
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

**ISSUE**

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

## ANALYSIS AND CONCLUSIONS

OHR clearly provided a description of the rating process and rating criteria that would be used to create the eligible list for the position of Senior Executive Administrative Aide. The job announcement for the Senior Executive Administrative Aid states under the heading of “Preferred Criteria”:

The selection process for this position will consist of an evaluation of your training, education, and experience in the following areas. You will be asked to include information specific to the preferred criteria (if listed) when you apply. It is important to comprehensively address each criterion so that your qualifications can be fairly assessed.

See County Response, Attachment (Attach.) 1 (emphasis added). As the County accurately notes, Appellant only provided two paragraphs of information under the Preferred Criteria portion of Appellant’s application. See County Response, Attach. 2. This falls far short of comprehensively addressing each of the eight criteria in the job announcement.

While Appellant has provided much more comprehensive information about Appellant’s qualifications during the appeal process, this information was not before the subject matter experts when they rated Appellant’s application. Although Appellant objects to the use of criteria to rate an application for employment, it is an accepted rating process in the County.<sup>3</sup> Accordingly, based on the totality of evidence presented to the Board, the Board finds that the County’s decision on Appellant’s application was not arbitrary and capricious, illegal, or based on political affiliation or other non-merit factor.

### ORDER

Based on the above, the Board denies Appellant’s appeal from Appellant’s non-selection for the position of Senior Executive Administrative Aide.

---

<sup>3</sup> The Board notes that the Federal Government also requires applicants for employment to address rating factors and/or provide information on the knowledge’s, skills and abilities needed for the position in question. See U.S. Office of Personnel Management Information Center’s Hiring Process available at <http://www.usajobs.gov/infocenter/>.

# **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 ten (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 ten (10) working days. Upon receipt of the completed Appeal Petition, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. The County must also provide the employee with a copy of all information provided to the Board. After receipt of the County'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 2008, the Board issued the following decisions on appeals concerning grievance decisions.

# **RETIREMENT PLAN COVERAGE**

## **Case No. 07-12**

### **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 Appellant's grievance regarding whether Appellant's position should be covered by the Group E Retirement Plan<sup>1</sup> on the merits.

### **FINDINGS OF FACT**

Appellant serves as an Administrative Specialist II (Records Supervisor),<sup>2</sup> position number 12208, Grade 21, Detention Center, Department of Correction and Rehabilitation (DOCR). Appellant applied for and was promoted to Appellant's current position on April 2, 2006. There was no indication on the job posting as to which retirement plan would cover the selectee. Appellant thought that promotion into the position made Appellant eligible for coverage under the Group E Retirement Plan, which covers public safety positions.

Sometime in early July 2006, Appellant contacted the Office of Human Resources (OHR) to verify Appellant's annual increase and confirm Appellant's retirement designation in Group E. Appellant was informed by Ms. A of OHR that Appellant's position was not covered by the Group E Retirement Plan but rather Group AK.<sup>3</sup> Appellant raised the matter of Appellant's retirement coverage on July 5, 2006, in a memorandum to the Warden. The Warden responded back to Appellant indicating that the Warden did not have the authority to place a County employee into (or remove a County employee from) a particular retirement group/class; rather, the Warden indicated that this was a function of OHR. The Warden suggested that Appellant meet with OHR or with Ms. B, the Human Resources (HR) Manager for DOCR, to discuss the matter.

---

<sup>1</sup> An employee who participates in Group E must contribute 4.75% of one's regular earnings into the pension trust fund. Normal retirement under Group E is at age 55 with 15 years of credited service or age 46 with 25 years of credited service. An employee may elect early retirement (with the employee receiving a smaller benefit) under Group E at age 45 with 15 years of credited service or age 41 with 20 years of credited service.

<sup>2</sup> This position has the working title of Assistant Records Manager. Previously, this position had been classified as a Program Specialist I but was reclassified to the occupational classification of Administrative Specialist II in July 2003.

<sup>3</sup> Employees who participate in the Group AK Retirement Plan are required to contribute 4% of their regular earnings into the pension trust fund. Normal retirement for employees in Group AK is at age 60 with 5 years of credited service or age 55 with 30 years of credited service.

Subsequently, on July 10, 2006. Ms. B sent an email to Appellant regarding Appellant's position's retirement designation. Ms. B indicated that OHR had contacted Appellant regarding Appellant's questions about Group E retirement designation. Ms. B noted that the criteria for inclusion in Group E retirement focus on the extent of the employee's exposure to danger in a maximum security setting. Such exposure needs to involve direct contact with an inmate population as required by the employee's position for the purpose of carrying out special security and/or monitoring procedures which could prove confrontational.

Ms. B stated in Ms. B's July 10<sup>th</sup> email that Ms. B had researched DOCR's historical records and obtained information from Appellant's supervisor, Mr. C, who is the Records Manager. Based on this research, Ms. B concluded that the Administrative Specialist II (Records Supervisor) position no longer met the criteria for inclusion in Group E retirement. According to Ms. B, in the late 1990's, the former Warden required the position of Records Supervisor to participate in the "call line" when the Records Manager could not be present to address inmates concerns regarding diminution of time and documents related to their incarceration. Ms. B stated that call line duties stopped after the former Warden retired on August 1, 1998.

Ms. B concluded her email by stating that

[w]hile the Administrative Specialist II positions within the Records Section of the Montgomery County Detention Center **will be excluded** from Group E retirement, anyone currently in the positions who meet the criteria for early retirement (based on age and years of service) will retain Group E designation. Once the position has been vacated, Group E designation will no longer be associated to that position. In addition, any time earned under Group E retirement should be converted into the new retirement system. (Emphasis added.)

By memorandum dated July 10, 2006, the DOCR Director requested the OHR Director remove position numbers 12208 and 12209 (Administrative Specialist II positions) from the Group E designation. The Director indicated that in the late 1990's both positions were assigned job duties and responsibilities that met the Group E retirement criteria. Once the former Warden left, the Director asserted that the duties and responsibilities of the positions which made them eligible for Group E designation were removed. The Director indicated that it was only recently that DOCR's Human Resources section had been made aware of the changes within the job duties and responsibilities which prompted the Director's request to have them removed from Group E designation.

On July 14, 2006, Appellant filed a grievance with DOCR management regarding having Appellant's position designated for Group E coverage. On July 17, 2006, Appellant followed-up with a memorandum to DOCR management, in response to Ms. B's July 10<sup>th</sup> email. Appellant noted that the past four Records Supervisors had been included in Group E retirement. All four were promoted after the former Warden retired. Moreover, since then, Appellant indicated that the Records Supervisor's job description duties have increased.

Appellant also pointed out that the location of the Records Office has expanded into the secured portion of the facility. In the Past Records section, Appellant indicated Appellant comes into direct contact with the inmate population. Appellant asserted that anytime an individual is exposed to an inmate population, there is always the possibility of a confrontation. Appellant stated that Appellant must do periodic checks and monitor the inmate workers within the Past Records section. According to Appellant, when the Records Manager (who is included in Group E retirement) is absent, Appellant is expected to assume the Records Manager's responsibilities. Appellant also asserted that management staff still participates daily in the "call line" whether the Records Manager is present or absent. Appellant also maintained that Appellant explains and clarifies the week-end prisoners' questions in reference to the diminution of time for their sentences.

On July 20, 2006, the Deputy Warden denied Appellant's grievance, indicating the Deputy Warden was unable to grant the relief requested. On July 21, 2006, Appellant raised the grievance to the next step by providing a copy to OHR. On October 2, 2006, Appellant called OHR to check on the status of the grievance. Appellant was informed by OHR that the Director had not yet provided a response to Appellant's grievance. Appellant then called the Director's office and left a verbal message with the Director's assistant, requesting that the Director respond to Appellant's grievance. On October 9, Appellant followed up with an email to the Director, requesting the Director respond to the grievance. On October 16, 2006, Appellant called OHR about the status of the grievance. Appellant was informed by OHR that the Director still had not responded. On October 18, 2006, Appellant discussed the matter with the Warden and asked the Warden to assist Appellant in getting a response from the Director to Appellant's grievance. The Warden indicated the Warden would send an email to the Director, reminding the Director that the Director needed to respond to Appellant's grievance. On October 24, 2006, Appellant wrote OHR, requesting that Appellant's grievance be raised to the CAO as Appellant had done everything possible to obtain a response from the Director but did not see any response forthcoming.

A Step 3 meeting was held by the CAO's designee, Mr. D, with Appellant on December 18, 2006.<sup>4</sup> Almost three months later, on March 8, 2007, Appellant received a Step 3 Grievance Response from the CAO. The CAO indicated that in order for a position to be eligible for Group E retirement coverage, the position must involve direct contact with an inmate population for the purpose of carrying out special security and/or monitoring procedures which could prove confrontational. Such contact must be regular and includes work involving securing inmates, confronting them regarding their failure to appear as specified, subduing them if they become uncontrollable, and/or recommending that they be placed in the Detention Center if it is determined that they should not be in the community.

---

<sup>4</sup> According to Appellant, Mr. D informed Appellant that Mr. D could not have a Step 3 meeting with Appellant for a few months because Mr. D was tied up with union contract meetings. Appellant indicated Appellant spoke on several occasions with Mr. D's superiors but was informed to go back to Mr. D. Mr. D informed the Board that Mr. D never had a formal discussion with the Appellant about an extension of time to hold the Step 3 meeting.

The CAO acknowledged that Appellant's position involves contact with inmates, but noted that Appellant's duties do not involve the requirement to take action to secure, confront, and/or subdue inmates, as well as the authority to recommend individuals be placed in the Detention Center. The CAO also noted that the master list of positions approved to participate in Group E coverage in March 2006 and again in February 2007 did not include either of the two Assistant Records Manager positions (position numbers 12208 and 12209).

The CAO's decision did indicate that four previous individuals who had encumbered the Assistant Records Manager positions prior to Appellant were all included in Group E coverage. According to the CAO's decision, two of the individuals, Mr. E and Mr. F, were eligible for participation by virtue of the fact that they both met the criteria for early retirement under the plan. However, the only explanation provided for inclusion of the other two individuals, Mr. G and Ms. H,<sup>5</sup> was administrative error.

The CAO concluded that there was no evidence to support Appellant's contention that the work of Appellant's position qualifies for participation in Group E retirement and accordingly, denied Appellant's grievance on the merits. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- The previous four incumbents of the Records Supervisor positions, all promoted to their positions after the former Warden retired, were covered by Group E retirement.
- There was no indication in the vacancy announcement for the Record Supervisor position that it was not covered by Group E retirement.
- The duties of Appellant's position bring Appellant in contact with inmates. Within the Past Records section, located within the secured portion of the Detention Center, inmate workers are monitored daily as they move equipment, boxes, storage materials and carry out daily cleaning of the area. In addition, management staff still participates in the call line, whether the Records Manager is present or absent. In the absence of the Records Manager, Appellant fills in for the Records Manager.
- Appellant was unable to obtain a Step 2 decision from the Director on the grievance despite repeated attempts.

#### County:

- Appellant's position does not qualify for Group E retirement coverage as Appellant's contact with inmates does not require Appellant to secure, confront, and/or subdue

---

<sup>5</sup> According to information provided by the County, Mr. G only occupied the position of Administrative Specialist II for two months. Ms. H was placed in Group E retirement effective May 5, 2002, when Ms. H was promoted to the Administrative Specialist II position. However, Ms. H moved from the "EK" ("EK" designates participation in the Group E Retirement Plan with mandatory integration) to the "HK" retirement plan when Ms. H transferred to a position outside DOCR.



- inmates. Moreover, Appellant is not required to have specialized training to handle emergency situations.
- The inclusion of two individuals who previously encumbered the Assistant Records Manager position was due to the fact that they met the early retirement criteria for Group E as permitted by the Montgomery County Code. The inclusion of two other individuals was due to administrative error.
  - A review of the master list of positions approved for Group E coverage in 1996 and 2007 confirms that neither of the two Assistant Records Manager positions was included.
  - While OHR does not have a record of a Step 2 decision, the Director indicated to OHR that the Director intended to deny the grievance.

**APPLICABLE LAWS AND REGULATIONS**

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

[t]he County Executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article III, Employee’s Retirement System, Section 33-37, Membership requirements and membership groups**, which states in applicable part:

(f) Membership groups and eligibility. Any full-time or part-time employee is eligible for membership in the appropriate membership group outlined below if the employee meets all of the requirements for the group:

...

- (4) Group E: The chief administrative officer, the director of the council staff, the hearing examiners, the county attorney and each head of a principal department, office or agency of the county government, if appointed to such position before July 30, 1978, or a member having held such position on or before October 1, 1972. Any sworn deputy sheriff and any County correctional staff or officer as designated by the chief administrative officer. Any group E member who has reached elective early retirement date may retain membership in group E in the event of transfer from the position which qualified the member for group E. Any group E member who is temporarily transferred from the position which qualified the member for group E may retain membership in group E as long as the temporary transfer from the group E position does not exceed 3 years. . . .

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

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

- (a) ***Objectives.*** The objectives of the grievance-resolution process are to:
  - (1) resolve grievances at the lowest level and provide an opportunity for resolution at each step;
  - (2) provide for review and resolution of grievances by the immediate supervisor, department director, and CAO; and
  - (3) provide specific and reasonable time limits for each level or step in the review of a grievance.
  
- (b) ***Responsibilities of department directors and supervisors.*** A department director or supervisor:
  - ...
  - (3) must consider an employee's grievance fairly and promptly.

**34-9. Grievance procedure.**

- (a) ***Time limit for filing a grievance.***
  - ...
  - (3) If the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level.
  - ...
  - (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 . . . steps of the grievance procedure, the applicable time limits, and the

responsibilities of the parties at each step.

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

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

**ISSUE**

Should Appellant's position fall within coverage of Group E Retirement?

**ANALYSIS AND CONCLUSIONS**

**Appellant Had A Reasonable Belief That The Administrative Specialist II Position (Records Supervisor) Was Covered By The Group E Retirement Plan When Appellant Applied For It; Accordingly, The Board Has Determined That, As A Matter Of Equity, Appellant Should Be Included In The Group E Retirement Plan.**

The record of evidence clearly establishes that Appellant had a reasonable basis for the belief when Appellant applied for the position of Administrative Specialist II (Records Manager) that, if selected, Appellant would be covered by the Group E Retirement Plan. The County readily admits that four incumbents who held the Records Manager position prior to Appellant – Mr. E, Mr. F, Mr. G and Ms. H – were covered under Group E. While the County argues that the job duties of the Records Manager position changed sometime after the former Warden retired in August 1998, all four individuals were promoted after the former Warden retired.

The County argues that two of the individuals in question – Mr. E and Mr. F – were eligible based on the fact that they met the criteria for early retirement. The County Code clearly states that any Group E member who has reached the elective early retirement date may retain membership in Group E in the event of transfer from the position which qualified the member for Group E retirement. However, the two other individuals – Mr. G and Ms. H

– were included in Group E due to “administrative error.” Unfortunately, Appellant had no way of knowing at the time Appellant applied for the Administrative Specialist II position that two prior incumbents had obtained Group E coverage purportedly through an error.

The County also argues that the Assistant Records Manager position was not contained on the list of positions approved for inclusion in Group E coverage in 1996 or 2007. While the position may not have been listed in the group of positions approved in 1996, the County has already conceded that the position qualified for Group E coverage based on the call line duties required of the incumbent up until the time that the former Warden retired in August 1998. The fact that the position does not appear on a list generated in 2007 is of no import as Appellant was promoted into the position on April 2, 2006.

Significantly, it was not until July 10, 2006, several months after Appellant was promoted into the position of Assistant Records Manager that Ms. B, the HR Manager for DOCR, indicated to Appellant that the Assistant Records Manager position “will be excluded” from Group E retirement. On the same date, the DOCR Director wrote to the OHR Director requesting the removal of position numbers 12208 and 12209 from Group E designation. The Director stated “[i]t was not until recently that the Human Resources Section of this department was made aware of the changes with the job duties and responsibilities to have prom[p]ted us to remove the positions from the public safety retirement group.” Again, if DOCR’s own HR section was not aware of the change in duties that warranted the removal of the Assistant Records Manager position from Group E designation until after Appellant was promoted into the job, it is patently unfair to expect Appellant to be aware of the change. Moreover, DOCR management did not act to affirmatively remove Appellant’s position from Group E coverage until several months after Appellant was promoted.

Accordingly, based on the foregoing analysis, the Board concludes that as a matter of equity, Appellant should receive Group E Retirement Plan coverage for so long as Appellant remains in Appellant’s current position of Administrative Specialist II. At such time as Appellant vacates the position, DOCR management may remove the position from Group E coverage if the duties of the position are determined not to come within the Group E definition. Moreover, to preclude any additional administrative errors with regard to coverage by Group E, the Board has determined to order DOCR management to note on all job vacancy postings the specific retirement coverage for each vacancy.

**The Director’s Continuing Failure To Respond To Grievances Is Unacceptable.**

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

As the County readily admits, the Director failed to respond at all to the grievance. This is simply not acceptable. As a manager, the Director has a responsibility to adhere to the County's administrative grievance procedure. If the Director needed an extension of time to respond, the grievance procedure provides two methods for obtaining an extension.<sup>6</sup> Specifically, Section 34-9(5) of the MCPR permits the extension of the time limits stated in the grievance procedure if the parties agree. In addition, Section 34-9(a)(6) provides that the OHR Director may extend the time limits stated in the grievance procedure for compelling reasons. However, to fail to respond at all renders the grievance procedure meaningless in contravention of the intent of the County's merit system law. The County provides no reason for the Director's total failure to respond.

The Director's conduct is of particular concern given the fact that this is not the first time the Board has had to address the Director's failure to respond to a grievance. In MSPB Case No. 06-05, the Board likewise was faced with the fact that the Director was derelict in the Director's duty under the grievance procedure. The Board had hoped by addressing this matter in MSPB Case No. 06-05, there would be no more instances of such behavior. Unfortunately, it appears that the Director does not view the Director's responsibilities under the grievance procedure as important. Accordingly, the Board is left with no choice but to bring this to the CAO's attention and require the CAO to report back to the Board the actions taken by the CAO to ensure the Director's negligence in meeting his grievance responsibilities will not continue to occur.

### **ORDER**

Based on the above, the Board grants Appellant's appeal. The Board hereby orders the following actions:

1. The County is ordered to place Appellant in the Group E Retirement Plan retroactive to April 6, 2006.
2. The County is ordered to work out with Appellant an acceptable payment plan for recoupment from Appellant of the additional funds required to be deposited in the pension trust fund for Group E coverage.

---

<sup>6</sup> The Board would also note its dissatisfaction with OHR's handling of the Step 3 grievance. OHR does not have the right to unilaterally postpone a Step 3 meeting. Rather, OHR must either seek the concurrence of the grievant or the OHR Director must notify the parties that the OHR Director has determined that a compelling need exists to postpone a Step 3 meeting. Neither action was taken in the instant grievance. The Board has previously opined on this very issue in MSPB Case No. 06-03, a copy of which will be provided to the CAO with this decision.

Moreover, it is unacceptable for nearly three months to pass from the date of a Step 3 meeting to the date of issuance of the CAO's decision. The Board expects the CAO to take proactive steps to ensure that grievances are being responded to promptly at the Step 3 stage.

3. Effective the date of receipt of this Decision and Order, the County is ordered to indicate on all job vacancy announcement postings in the Department of Correction and Rehabilitation the specific retirement plan coverage for the vacancy.
4. The CAO is ordered to review this decision as well as the Board's decision in MSPB Case No. 06-05 (a copy of which will be faxed to the CAO along with this decision) and personally report back to the Board in writing within 15 days from receipt of this Decision and Order what actions the CAO has taken to ensure that the Director will respond to grievances from DOCR employees in a timely manner.

# **DELAY OF SERVICE INCREMENT**

## **Case No. 08-04**

### **FINAL 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 Appellant's grievance regarding the delay of Appellant's annual service increment<sup>1</sup> on the merits

### **FINDINGS OF FACT**

Appellant was promoted to the position of Program Manager I (Fiscal Unit Supervisor), Child Welfare Services (CWS) Fiscal Unit, in the Children, Youth, and Family Services Division of the Department of Health and Human Services (HHS), on November 28, 2005. Appellant was responsible for the supervision of three subordinate positions and the administration of work activities of the CWS Fiscal Unit. The CWS Fiscal Unit is charged with ensuring compliance with programmatic and fiscal guidelines.

Appellant received a performance rating on or about July 28, 2006, for the review period November 2005 – June 2006. Appellant received an overall rating of "Meets Expectations", although Appellant received a rating of "Does Not Meet Expectations" on two performance expectations. The two performance expectations which Appellant was rated as not meeting were: 1) Demonstrates effective oral and written communication skills; and 2) Provides accurate, timely and appropriate service/assistance to coworkers, citizens, etc. and ensures sufficient follow up/follow through to resolve problem/request. With regard to Appellant's communication skills, Appellant's rating official, Ms. A, noted that Appellant "has been encouraged to monitor [Appellant's] verbal tone due to the reported perception of curtness or rudeness by others. Some of [Appellant's] written products lack clarity, in terms of intended meaning and word usage." Concerning Appellant's assistance to coworkers and citizens, Ms. A noted that

[o]verall, this is a performance area requiring improvement. The immediate supervisor and [Appellant] have discussed [Ms. A's] receipt of complaints about calls not being returned and/or the fact that some matters are dealt with on a delayed basis or not at all. Timeliness and responsiveness in all aspects of [Appellant's] work must be improved, as these are critical elements of good customer service and building trusting, collaborative relationships with others.

---

<sup>1</sup> A service increment is defined as: "An increase in base salary granted on an annual basis to an eligible employee whose performance is at least satisfactory." See Montgomery County Personnel Regulations (MCPR), 2001, Section 12-1(a) (as amended January 18, 2005).



Concerns about oral communications and tone have been noted above. It is expected that courtesy and professionalism will be maintained at all times.

Appellant responded to this evaluation, indicating that Appellant had assumed the role of Fiscal Unit Supervisor under very trying times. Appellant indicated that except for training classes with regard to ADPICS<sup>2</sup> and FAMIS,<sup>3</sup> Appellant had not received formal training in various HHS systems and processes. According to Appellant, knowledge of these systems was important in order to provide timely services and benefits to clients. Appellant's supervisor responded to Appellant's comments, indicating that she had acknowledged that Appellant had assumed the role of Fiscal Unit Supervisor under trying times and difficult circumstances. Ms. A asked Appellant to prepare a list of topics and procedural areas in which Appellant needed additional training so that she could assist Appellant in getting the training.

On January 5, 2007, Appellant was notified in writing by the Acting Director, HHS, that Appellant's January 13, 2007 service increment would be delayed because Appellant's work performance was not satisfactory. Specifically, Appellant was informed that Appellant had failed to improve Appellant's performance in the two performance expectations for which Appellant had been rated as not meeting expectations in July 2006. The Acting Director noted that Appellant failed "to ensure that reporting and/or project management deadlines are met and [Appellant] delegate[s] assignments to [Appellant's] subordinates who then also fail to meet deadlines and complete tasks on time." In addition, the Acting Director informed Appellant that Appellant did "not communicate well, either orally or in writing, with [Appellant's] subordinates and others. Often the person on the receiving end of communication from [Appellant] is confused by what [Appellant has said] and must seek clarification from [Appellant's] supervisor." The Acting Director concluded that Appellant does "not demonstrate the leadership skills necessary to effectively manage CWS's fiscal operation." Appellant was notified that Appellant's service increment would be delayed until July 13, 2007.

Appellant asked Ms. A for more specific examples related to the performance concerns that had led to the decision to delay Appellant's increment. Ms. A, in a memorandum dated January 5, 2007, provided examples for both performance expectations.

With regard to Appellant's failure to meet reporting and/or project management deadlines, Ms. A detailed five examples. First, she noted that CWS had significantly under-reported 1<sup>st</sup> quarter expenditures. No comparison had been made between the FAMIS expenditure reports and the manually prepared information submitted by program managers.

---

<sup>2</sup> ADPICS stands for Advanced Purchasing and Inventory Control System. See Core Business Systems, FY 08 Training Program at 3 available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/files/CBS.pdf>.

<sup>3</sup> FAMIS stands for Financial Accounting Management Information System. See Core Business Systems, FY 08 Training Program at 3 available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/files/CBS.pdf>.

Appellant was required to review the matter and provide an analysis to Ms. A. Appellant's report was due to Ms. A by December 8, 2006. When she had not received it by late in the day, she asked Appellant the status of the report and was informed it was incomplete. When Ms. A was subsequently asked about the results of Appellant's analysis by Ms. A's supervisor, Ms. B, on December 11, 2006, Ms. A couldn't provide it, as it wasn't finished and had to inform Ms. B that CWS had under-counted expenditures.

In her second example, Ms. A also noted that on December 8, 2006, the Fiscal Unit was scheduled to be audited. One of Appellant's subordinates did not place documentation in the file which should have been there before the audit began. While the auditor allowed Appellant's subordinate to provide the documentation after the audit began, some auditors would not have permitted this and an audit finding would have resulted. Ms. A indicated that as the supervisor of the Fiscal Unit, it was Appellant's responsibility to ensure that documentation was included in the files prior to the audit beginning.

Ms. A, in her third example, stated that on or about November 20, 2006, she went into ADPICS to process the approval of a check. She noted that several CWS transactions had been pending approval from Appellant for 11 days. Ms. A stated that the approval of ADPICS transactions was one of Appellant's primary duties and customer service becomes an issue when approvals are not completed in a timely manner.

Ms. A indicated to Appellant in her fourth example that she had been unable to complete her review of Appellant's p-card<sup>4</sup> transactions for October 2006 as she had questions and the backup documentation was not in Appellant's file. She returned the file to Appellant with a note to get the information to her but Appellant did not get back to her promptly and the October review deadline passed without completion of the review process.

Ms. A, in her fifth example, stated that on numerous occasions the monthly Flex Fund Report was completed by Appellant the day before or the morning of the Supervisors' Briefing.<sup>5</sup> Ms. A indicated that she had little or no time to review the report for accuracy prior to its distribution and had repeatedly asked Appellant to provide her the report a few days in advance to allow her to carefully review it.

Ms. A provided three examples to Appellant about Appellant's failure to communicate well. The first example dealt with two payment discrepancies and Ms. A's intercession to resolve the matters. The second example dealt with an email from Appellant to another supervisor, Ms. C. Ms. C had to go to Ms. A for clarification of the email. The third example dealt with questions Ms. A had about instructions Appellant had given to staff concerning the process to be followed regarding SSI Monthly Ledger Sheets.

---

<sup>4</sup> The term "p-card" stands for purchasing card. The County's purchasing card policy requires timely reconciling of purchasing card transactions. See Montgomery County Maryland Purchasing Card Program Policy and Procedure Manual available at [http://portal.mcgov.org/finance/data/controller/PCARDpolicy\\_procedure.pdf](http://portal.mcgov.org/finance/data/controller/PCARDpolicy_procedure.pdf)

<sup>5</sup> The Flex Fund Report is distributed during the Supervisors' Briefing.

Finally, Ms. A noted that with regard to Appellant's leadership, members of Appellant's staff routinely came to Ms. A to ask clarifying questions or seek conformation that the information provided to them by Appellant was correct. Ms. A also pointed out that one of Appellant's subordinates, by Appellant's own admission, was insubordinate and disrespectful towards Appellant. Ms. A counseled Appellant that Appellant needed to take action to address this behavior.

Appellant subsequently filed a grievance over the denial of Appellant's increment. In the grievance, Appellant alleged that the decision to withhold Appellant's increment was in retaliation for Appellant's decision to hire an employee, Mr. D,<sup>6</sup> who Appellant had been warned not to hire.<sup>7</sup> Appellant also alleged that at no time prior to the January 5, 2007 memorandum concerning the withholding of Appellant's service increment had Appellant been made aware of any problems with Appellant's job performance. Finally, Appellant alleged that Appellant was required by Appellant's immediate supervisor to hire Ms. E, even though she performed poorly during her interview and received a bad reference from her immediate supervisor.<sup>8</sup>

As previously noted, the CAO denied Appellant's grievance and this appeal followed.

### **APPLICABLE REGULATION**

**MCPR, 2001 (as amended March 5, 2002), Section 12, *Service Increments***  
(as amended January 18, 2005), which states in applicable part:

#### **12-7. Delay of a service increment.**

- (a) A supervisor should submit a timely written recommendation to the department director to delay an employee's service increment if the employee's latest annual or interim performance rating was less than satisfactory or the employee's performance, attendance, or conduct has been unsatisfactory.
- (b) To delay an eligible employee's service increment, a department director must:

---

<sup>6</sup> According to the CAO's Step 3 Grievance Response (CAO's Grievance Decision), Mr. D was promoted to the position of Program Specialist I on December 24, 2006. See CAO's Grievance Decision at 1 n. 2.

<sup>7</sup> Specifically, Appellant alleged that Appellant was told not to hire Mr. D because of Mr. D's prior activity against the County and his religious affiliation.

<sup>8</sup> In the CAO's Grievance Decision, it was noted that in a memorandum, dated February 15, 2006, Appellant recommended to Appellant's supervisors that Ms. E be selected as she interviewed well and received excellent references. See CAO's Grievance Decision at 8.

- (1) give written documentation of the decision and the reason for the delay to the OHR Director at least 15 calendar days before the beginning of the pay period in which the employee's assigned increment date falls and obtain the OHR Director's approval;
- (2) give written notice to the employee before the beginning of the pay period in which the employee's increment date falls;
- (3) include in the notice to the employee:
  - (A) a statement of the reasons for the delay;
  - (B) the next date on which the employee's performance will be reviewed and the service increment may be granted if the employee's performance or attendance has improved; and
  - (C) if the employee may file a grievance over the decision and the time limit for filing a grievance.

### **POSITIONS OF THE PARTIES**

#### **County:**

- Appellant maintains that Appellant's service increment was delayed for reasons unrelated to work performance. The County denies this.
- The County notes that even though Appellant received a 'Meets Expectations' rating in July 2006, Appellant was rated as "Does Not Meet Expectations" on two performance expectations. At the time Appellant was notified that Appellant's service increment would be delayed, Appellant had not improved in Appellant's performance for these two performance expectations.

#### **Appellant:**

- The County bears the burden of proof in a grievance on a delay of a service increment and has failed to meet this burden.
- Although Appellant was rated "Does Not Meet Expectations" in two areas of Appellant's 2006 evaluation, overall Appellant was rated as satisfactory.
- At no time prior to receiving the memorandum informing Appellant that Appellant's increment would be delayed, was Appellant notified of any problems with Appellant's job performance.
- The increment delay was in retaliation for Appellant hiring Mr. D despite being warned not to do so.

### **ISSUE**

Was the delay of Appellant's service increment reasonably justified and consistent with applicable regulatory provisions?

## **ANALYSIS AND CONCLUSIONS**

It is clear from the record of evidence that, as of July 28, 2006, Appellant's immediate supervisor had concerns about Appellant's performance. Although it is true that Appellant received an overall rating of "Meets Expectations", Ms. A clearly indicated that Appellant was not meeting expectations on two performance elements – oral and written communications and providing accurate, timely and appropriate service/assistance to coworkers and citizens. Thus, contrary to Appellant's contention that Appellant never received feedback concerning problems with Appellant's job performance, Appellant was unmistakably on notice in July 2006 that there were problems. Moreover, when Appellant asked for concrete examples of Appellant's poor performance after Appellant was notified of Appellant's service increment delay, Ms. A immediately responded to Appellant with detailed information.<sup>9</sup>

Appellant alleges that the delay in Appellant's service increment was due to Appellant's ignoring Appellant's supervisor's warning not to hire Mr. D. The Board notes that Mr. D's appointment was effective December 24, 2006, some five months after Appellant was notified in writing that Appellant wasn't meeting performance expectations in two areas. Moreover, most of the examples of poor performance cited in Ms. A's memorandum of January 5, 2007 predate Mr. D's selection. Accordingly, the Board rejects Appellant's allegation of retaliation.<sup>10</sup>

Therefore, based on the foregoing analysis, the Board concludes that the delay in Appellant's service increment was justified.

## **ORDER**

Based on the above, the Board denies Appellant's appeal of the delay in Appellant's service increment.

---

<sup>9</sup> The Board would note that Ms. A did an excellent job of documenting examples of Appellant's poor performance.

<sup>10</sup> Even if Appellant is correct that Ms. E should not have been selected for one of the positions in the Fiscal Unit, it is unclear how this selection has anything to do with Appellant's service increment delay.

# **RECALCULATION OF RETIREMENT BENEFIT**

## **Case No. 08-06**

### **DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County, Maryland, Chief Administrative Officer (CAO), that the method used by the Office of Human Resources (OHR) to recalculate Appellant's retirement benefit, upon Appellant's reaching normal Social Security retirement age (SSNRA), was in accordance with the County Code.

### **FINDINGS OF FACT**

On October 1, 1994, Appellant retired.<sup>1</sup> On January 20, 1995, OHR sent Appellant a letter, informing Appellant that Appellant's monthly pension payment, as provided under the Ten Year Certain and Continuous Option of the Optional Integrated Plan would be \$3,928.44. OHR stated that, as of July 1, 2007, this monthly pension payment would be reduced to \$2,764.14.<sup>2</sup> OHR informed Appellant that Appellant's monthly pension amount would be subject to annual cost-of-living adjustments, less any authorized deductions. On July 1, 2007, Appellant was issued a Statement of Benefits by Aetna, on behalf of Montgomery County, indicating that Appellant would receive a monthly retirement payment of \$3,744.43 before deductions and withholdings. The Statement indicated that the payment reflected a scheduled reduction in Appellant's monthly payment. Just prior to this reduction, Appellant had been receiving a monthly retirement payment of \$5,321.66 before deductions and withholdings. This latter amount represented an increase of \$1,393.22 from Appellant's original 1995 monthly pension payment based on the application of annual cost-of-living adjustments (COLAs).

Appellant wrote OHR about the reduced payment. Appellant noted that the amount of \$3,744.43 was only \$980.29 more than the originally quoted reduced monthly pension payment of \$2,764.14. According to Appellant, this reduced amount deprived Appellant of \$412.92 of previously awarded COLAs between 1995 and 2006.

OHR explained to Appellant how it had calculated the reduced benefit. OHR reduced Appellant's original monthly benefit of \$3,928.44 to \$2,764.14. It then increased the monthly

---

<sup>1</sup> According to Appellant's submission, Appellant's retirement date was subsequently changed to January 4, 1995, based on a court decision.

<sup>2</sup> This reduction would occur at Appellant's SSNRA.

benefit by applying the COLAs from 1995 to 2006 to bring the amount to \$3,744.43.<sup>3</sup>

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Although Appellant had a clear understanding when Appellant retired that Appellant's base pension would be reduced when Appellant reached Social Security normal retirement age, Appellant was never told that the COLAs previously awarded to Appellant by law since Appellant's retirement could be taken back by the County and recalculated.
- To support its position, the County cites to Section 33-42(b)(2)(D) of the County Code which was not the relevant provision when Appellant retired. The correct provision is Section 33-42(b)(2)(b).
- In addition, Sections 33-44(c)(3) & (5) of the County Code, governing COLAs, guaranteed that Appellant would never receive less than the amount of pension benefit for which Appellant was eligible at the time of Appellant's retirement.
- The OHR letter of January 20, 1995 could clearly be construed as ambiguous and therefore should be construed in favor of Appellant.

#### **County:**

- OHR has correctly recalculated Appellant's pension.
- Although it is true that Code Section 33-42(b)(2)(b) applied when Appellant retired, Section 33-42(b)(2)(D) is now the relevant provision and its content has not changed from the provision applicable when Appellant retired.
- The issue in this case is similar to the one addressed in a Board opinion on March 23, 1998. In that opinion, the Board held that OHR correctly applied the COLA.

### **APPLICABLE LAW**

**Montgomery County Code, Section 33-42(b)(2)(b), Amount of pension at normal retirement date**, which stated in applicable part:

- (2) Integrated Retirement Plan. The annual pension for a member of the integrated retirement plan who retires on a normal retirement must be computed as follows:
  - a. From date of retirement to the month of attainment of social security retirement age: 2 percent of average final earnings multiplied by years of credited service up to a maximum of 36 years, plus sick leave credits. Years of credited service of less than one full year must be prorated.

---

<sup>3</sup> This amount did not include the 2007 COLA.

b. From the month of attainment of social security retirement age: One percent of average final earnings up to the social security maximum covered compensation level at time of retirement, plus 2 percent of average final earnings in excess of the social security maximum covered compensation level at time of retirement, multiplied by years of credited service, up to a maximum of 36 years, plus sick leave credits. Years of credited service less than one full year must be prorated. This amount is subject initially to the cost-of-living adjustment provided in subsection (c) of section 33-44 from date of retirement to social security retirement age, if any.

**Montgomery County Code, Section 33-42(c), Cost-of-living adjustment**, which stated in applicable part:

(5) Pension benefits are subject to decreases in the consumer price index. In no instance, however, shall a retired member or beneficiary receive less than the amount of pension benefits for which eligible at the time of the member's retirement.

### **ISSUE**

Is the County's calculation of Appellant's retirement benefit in accordance with applicable law?

### **ANALYSIS AND CONCLUSIONS**

In determining whether Appellant's retirement benefit has been calculated in accordance with applicable law, it is necessary to look at the wording of the statute. As Appellant correctly points out, the applicable statute is Section 33-42(b)(2)(b), which was in effect at the time of Appellant's retirement, not Section 33-42(b)(2)(D), which currently applies to employees who retire.

The Board finds that there is no ambiguity in the statute. As noted above, Section 33-42(b) provided for two calculations of benefits for employees who retired when this provision was in effect. The first calculation, delineated in Section 33-42(b)(2)(a), determined the amount the retiree would receive up until the month of the employee's attainment of social security age. Having reached social security age, Section 33-42(b)(2)(b) delineated the amount the retiree would henceforth receive. Section 33-42(b)(2)(b) required OHR to recalculate the retirement amount and then subject the recalculated retirement amount to the cost-of-living adjustment provided in subsection (c) of Section 33-44 from the date of Appellant's retirement to the date of Appellant's attainment of social security retirement age. The Board finds this is exactly what OHR did in computing Appellant's benefit.

Appellant's argument that somehow Section 33-44(c) supports Appellant's position is unavailing. Section 33-44(c) clearly states that the County can give Appellant no less



than what Appellant was entitled to in pension benefits at the time Appellant retired. This is exactly what the County is doing.

Likewise, the Board rejects Appellant's argument that OHR's letter of January 20, 1995 was somehow ambiguous and should be construed against the County. Even, assuming arguendo, the County had provided inaccurate advice to Appellant, the County cannot be prevented from enforcing a statutory provision governing the calculation of Appellant's benefits. See, e.g., Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)(wherein the Supreme Court held that even where an employee is misled as to the calculation of appellant's benefits, the Federal Government cannot be estopped from enforcing a statutory provision governing eligibility for public funds).

**ORDER**

Based on the above, the Board denies Appellant's appeal.

# **DIVISION OF DEATH RETIREMENT** **BENEFIT**

## **CASE NO. 08-08**

### **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) that the Office of Human Resources (OHR) correctly determined to divide the death retirement benefit of Appellant's father, between Appellant and the surviving spouse of the Appellant's father.

### **FINDINGS OF FACT**

Appellant is the only child of Mr. A. Mr. A was a firefighter with the County and participated in the Montgomery County Employees' Retirement System (ERS). On May 18, 1994, Mr. A designated Appellant as Mr. A's primary retirement beneficiary. In the course of Mr. A's employment with the County, Mr. A incurred a service-connected illness and subsequently died while his application for a service-connected disability retirement was still pending.<sup>1</sup>

On April 20, 2007, OHR wrote to Appellant informing Appellant of various benefits Appellant was entitled to as Mr. A's surviving dependent child. OHR noted that Appellant was entitled to service-connected retirement death benefits under ERS. Appellant was informed that Appellant would receive a lifetime annuity, effective September 2, 2006, in the amount of \$1,646.10 per month. Appellant was told that this amount is 50% of the 100% joint and survivor pension option selected by Mr. A.

On December 6, 2007, Appellant's counsel wrote to the CAO asking for a determination that Appellant was entitled to receive 100% of the survivor's benefit based on Appellant's father's designation of Appellant as his sole beneficiary. On January 30, 2008, the Assistant CAO responded to the request. In the response, the Assistant CAO indicated that while various provisions of the ERS provide benefits to the beneficiary designated by the member employee, Section 33-46(b)(2) of the ERS, which governs the death benefits of a firefighter who dies due to a service-connected illness does not. Rather, Section 33-46(b)(2) provides benefits to the surviving spouse and children. Therefore, the Assistant CAO concluded that OHR correctly divided the retirement benefit between Mr. A's surviving spouse and Appellant, even though Mr. A designated Appellant as his sole beneficiary.

This appeal followed. By memorandum dated February 11, 2008, the County indicated it believed that the Board should permit Mr. A's spouse, Mrs. A., to be a party to the instant

---

<sup>1</sup> The County acknowledges Mr. A died of a service-connected illness.

appeal and have the right to present her case because if the Board determined that Appellant should receive the entire death benefit, Mrs. A would lose her portion of the death benefit. The County copied Mrs. A's attorney, on this correspondence prior to the Board making a determination on this request.<sup>2</sup>

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The ERS treats members and beneficiaries differently depending on whether a death of a member is service-connected or not. If the member's death is not service-connected, the ERS honors the member's designation of beneficiary. If the member's death is service-connected, the member's designation will be ignored. The refusal to honor the member's choice of beneficiary simply because his death was service-connected penalizes the member and his potential beneficiaries.

#### **County:**

- While it is true that other sections of the ERS allow a member to designate a beneficiary, Section 33-46(b)(2), which governs the instant case, does not. Section 33-46(b)(2) specifically provides benefits to the surviving spouse and children in the case of a service-connected death of a firefighter.
- This provision of the ERS is identical to one which governs the police and was bargained for by the union representing firefighters.

### **APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-46,** provides in applicable part that

- (b) Spouse's, or domestic partner's, and children's benefits of a member whose death is service connected. If a member dies while in the service of the County or a participating agency on or after August 15, 1965, and satisfactory proof that death was the result of injuries sustained in the line of duty or was directly attributable to the inherent hazards of the duties performed by the member is submitted and the death was not due to willful negligence, payments must be made as follows:
  - (2) The Chief Administrative Officer must pay death benefits to the spouse or domestic partner and child of a

---

<sup>2</sup> Because the Board has determined that OHR made the correct determination with regard to Appellant's benefits, there is no need for the Board to address the County's request. However, the Board cautions the County that until it rules on whether an individual may be joined as a party in a case before the Board that individual is not a party and has no entitlement to information concerning the appeal being considered by the Board.

Group F or G<sup>3</sup> member as if the member had been receiving a service-connected disability pension on the date of the member's death and had selected a joint and survivor pension option of 100 percent of the amount payable to the member, if:

- (A) the Group F or G member died while employed by the County; and
- (B) the employing department, a beneficiary, or another person submits satisfactory proof to the Chief Administrative Officer that the member's death:
  - (i) resulted from injuries the employee received in the line of duty or was directly attributable to the inherent hazards of the duties the employee performed; and
  - (ii) was not due to the employee's willful negligence.

### **ISSUE**

Did OHR correctly calculate Appellant's service-connected death benefit?

### **ANALYSIS AND CONCLUSIONS**

The parties agree that Section 33-46(b) of the Montgomery County Code applies to the instant case. The wording of this statutory provision is clear and unambiguous – the Chief Administrative Officer must pay death benefits to the spouse and child of a Group G member as if the member had been receiving a service-connected disability pension on the date of the member's death. While Appellant is correct that the statutory provision places the member and his potential beneficiaries in a class separate and distinct from how members and beneficiaries are treated if the member's death is not service-connected, it is nevertheless the law. The Board does not have the authority to change the law, even if it views the law as being unfair.

### **ORDER**

Based on the above, the Board denies Appellant's appeal.

---

<sup>3</sup> The County Code defines Group G as: "Any paid firefighter, paid fire officer, and paid rescue service personnel." Montgomery County Code, Section 33-37(f)(6).

# **SHOW CAUSE ORDERS**

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, 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." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board will issue a Show Cause Order to the CAO. The Board will order 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.

Alternatively, a Show Cause Order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the personnel regulations provide employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a Show Cause Order to determine whether the appeal is in fact timely.

During FY 2008, the Board issued the following Show Cause Order Decision.

# **SHOW CAUSE ORDER DECISION**

## **CASE NO. 08-13**

### **SHOW CAUSE ORDER DECISION**

On April 14, 2008, the Montgomery County Merit System Protection Board (Board or MSPB) received a notice of intent to file an appeal<sup>1</sup> of the decision of the Director, Department of Health and Human Services (HHS), to dismiss Appellant on April 7, 2008. The Board's staff provided Appellant's representative with a copy of its Appeal Form, which needed to be completed. On April 30, 2008, the Board received the completed Appeal Form. The Appeal Form indicated that Appellant received the Notice of Disciplinary Action, informing Appellant of Appellant's dismissal on March 19, 2008.

Pursuant to MCPR Section 35-3, an employee has ten (10) working days to file an appeal with the MSPB after the employee receives a notice of disciplinary action resulting in dismissal. As Appellant had indicated that Appellant received the Notice of Disciplinary Action (NODA) on March 19, 2008, Appellant had until April 2, 2008 to file the instant appeal. As previously noted, the Board did not receive the notice of intent to file an appeal until April 14, 2008. Thus, it appeared that Appellant failed to submit Appellant's appeal within the time limits specified in Section 35-3(a) of the Montgomery County Personnel Regulations.

Before making a determination regarding the timeliness of the appeal, the Board ordered Appellant to provide a statement of such good cause as exists for failing to meet the time limits in the MCPR. Appellant submitted a response (Appellant's Response) on May 7, 2008. In Appellant's Response, Appellant admitted that Appellant wrote March 19, 2008, as the date Appellant received the NODA on Appellant's Appeal Form. However, Appellant alleged that this was an inadvertent mistake. Moreover, Appellant alleged that Appellant could not recall the precise date Appellant received the NODA but alleged it was received the week before April 7, 2008.

The County responded (County Response) to Appellant's Response on May 14, 2008.<sup>2</sup> Appellant replied to the County's Response (Appellant's Reply) on May 19, 2008.<sup>3</sup>

---

<sup>1</sup> Pursuant to Section 35-4 of the Montgomery County Personnel Regulations (MCPR) (as amended February 15, 2005), an employee may initiate an appeal by filing a notice of intent to appeal. Upon receipt of a notice of intent, the Board acknowledges the intent, and provides the appellant with ten working (10) days to complete the Board's Appeal Form.

<sup>2</sup> The Board notes that the County's Response was one day late as the Show Cause Order established May 13, 2008, as the date for the County's Response.

<sup>3</sup> The Board's Show Cause Order did not provide a right of reply to Appellant.

## FINDINGS OF FACT

At all times applicable to this appeal, Appellant served as an Income Assistance Program Specialist II in HHS. On February 26, 2008, Appellant was informed by Appellant's supervisor that Appellant would be issued a Statement of Charges for dismissal. The Statement of Charges was delivered to Appellant via courier and certified mail, return receipt requested. Appellant was provided with the opportunity to respond to the Statement of Charges but did not do so.

A Notice of Disciplinary Action, dated March 19, 2008, was issued by the Director, HHS to Appellant. On March 27, 2008, Ms. A, Senior Executive Administrative Aide to the Director, HHS, sent the NODA to Appellant via three methods: first class mail, postage prepaid; certified mail, return receipt requested; and by courier. See County's Response, Exhibit (Ex.) 1, Affidavit of Ms. A ¶ 2. According to Ms. A this three-way method of delivery is standard practice in situations such as dismissal. Id. The courier delivered the NODA on March 27, 2008 to Appellant's home address and it was signed for by Mr. B at 12:05. Affidavit of Ms. A, Ex. 2. The copy of the NODA sent by certified mail to Appellant was signed for on March 28, 2008 by a Ms. C. Affidavit of Ms. A, Ex. 3.

On April 7, 2008, Appellant called Appellant's supervisor and asked about the "letters" Appellant had received. County's Response, Ex. 5, Affidavit of Appellant's supervisor ¶ 3. While Appellant stated to Appellant's supervisor that Appellant did not know whether Appellant had received the NODA, Appellant did indicate several times that Appellant had to respond by April 7 and since Appellant's supervisor had been copied on the matter,<sup>4</sup> Appellant thought Appellant had to respond to Appellant's supervisor. Id. During Appellant's supervisor's conversation with Appellant, Appellant's supervisor informed Appellant that Appellant should read the NODA thoroughly for instructions as to Appellant's options and contact Appellant's union for assistance. Id.

As previously noted, Appellant's counsel filed a notice of intent to appeal the NODA with the Board on April 14, 2008.

## APPLICABLE REGULATION

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 35, *Merit System Protection Board Appeals, Hearings, and Investigations***, which states in applicable part:

### **35-3. Appeal period.**

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

---

<sup>4</sup> The Board notes that the NODA indicated Appellant's supervisor was to receive a copy of it.

- (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; . . .

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant alleges that Appellant cannot recall the date Appellant received the NODA. To the best of Appellant’s recollection, it was the week before April 7, 2008.
- Appellant was living between two residences at the time – Silver Spring, to where the NODA was sent, and Potomac. Appellant does not recall what days over this period Appellant was at either residence.
- Appellant was unaware of the necessity to properly document dates of receipt of correspondence in this matter and the legal requirements for timely filing of appeals. Any mistakes that Appellant has made in the process to date were inadvertent.

#### **County:**

- The County sent Appellant the NODA at Appellant’s home address of record by three different ways: courier, certified mail, and first class mail.
- Mr. B signed for the courier delivery of the NODA on March 27, 2008. Ms. C signed for the certified mail delivery of the NODA on March 28, 2008.
- The NODA clearly explained Appellant’s appeal rights. Moreover, when Appellant spoke with Appellant’s supervisor on April 7, 2008, Appellant’s supervisor repeatedly advised Appellant to call the union for assistance.

### **ISSUE**

Has Appellant shown good cause as to why the Board should accept Appellant’s appeal as timely filed?

### **ANALYSIS AND CONCLUSIONS**

#### **Appellant Has Failed To Submit Any Evidence To Support Appellant’s Allegations.**

It is well established that statements made by a representative in a pleading are not evidence. See, e.g., Joos v. Department of Treasury, 79 M.S.P.R. 342, 348 (1998); Leaton v. Department of Interior, 65 M.S.P.R. 331, 337 (1994); Perez v. Railroad Retirement Board, 65 M.S.P.R. 287, 289 (1994); Rickels v. Department of Treasury, 42 M.S.P.R. 596, 603 (1989); Vincent v. Department of Justice, 32 M.S.P.R. 263, 268-69 (1987); Enos v. USPS, 8 M.S.P.R. 59, 63 (1981). The Board notes that Appellant has submitted no affidavit or unsworn statement or other evidence to support the allegations made in either Appellant’s



Response or Appellant's Reply.<sup>5</sup> Thus, the Board concludes that Appellant has failed to submit any evidence to support Appellant's allegations regarding the timeliness of Appellant's appeal.

**Appellant Has Failed To Show Good Cause As To Why The Board Should Accept Appellant's Appeal As Timely Filed.**

The County sent the NODA to Appellant by three methods: first class mail, postage prepaid; certified mail, return receipt requested; and courier service.<sup>6</sup> Appellant alleges that Appellant's son, Mr. B, and Ms. C were living at Appellant's Silver Spring address, which the County had as Appellant's official home address,<sup>7</sup> at the time of the events in question. The record of evidence indicates that Appellant's son received the NODA on March 27, 2008 and Ms. C received the NODA on March 28, 2008. Appellant also alleges that during the days in question Appellant lived between Appellant's two residences in Potomac and in Silver Spring.

The Board finds that Appellant has a duty to keep the County informed of Appellant's mailing address. See, e.g., Schorr v. Department of Navy, 79 M.S.P.R.594, 598 (1998); Leslie v. USPS, 83 M.S.P.R. 361 (1999). The Board further finds that the NODA was properly sent to the mailing address provided by Appellant, and therefore was constructively received by Appellant on March 27, 2008. Anderson v. Department of Transportation, 735 F.2d 537 (Fed. Cir. 1984) (holding that appellant was constructively served with a notice of proposed removal when it was sent to the mailing address furnished by appellant and signed for by his mother); White v. Merit System Protection Board, No. 07-3007 (Fed. Cir. Apr. 16, 2007) (holding appellant constructively received the decision letter when it was sent to his home address by certified mail and signed for by his mother-in-law; accordingly, appellant was required to file his appeal within thirty days of that receipt).

The NODA clearly instructed Appellant that Appellant had ten working days from receipt of the NODA to file an appeal with the Board. As Appellant had constructive service of the NODA on March 27, 2008, Appellant should have filed an appeal with the Board by April 10, 2008. However, Appellant's appeal was not filed until April 14, 2008. Accordingly, the Board has determined that Appellant has failed to show good cause as to why it should accept Appellant's appeal as timely filed.

---

<sup>5</sup> In marked contrast, the County submitted evidence regarding Appellant's receipt of the NODA, in the form of two affidavits, as well as the courier's tracking sheet and the return receipt for the copy of the NODA sent by certified mail.

<sup>6</sup> According to the NODA, Appellant was served the Statement of Charges via courier and certified mail, return receipt requested. Thus, the County followed a very similar procedure in serving Appellant with the NODA as it followed when serving the Statement of Charges on Appellant.

<sup>7</sup> As Ms. A testified, the NODA was sent to Appellant's home address of record. See Affidavit of Ms. A ¶ 4.

**ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal based on untimeliness.

# **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 2008, during the course of proceedings in one case, the Board issued a decision on a request for reconsideration of a preliminary matter. It also issued two decisions on requests for reconsideration of a Final Decision.

# **RECONSIDERATION DECISIONS**

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

### **DECISION ON APPELLANT'S MOTION FOR RECONSIDERATION**

On September 4, 2007, Appellant filed a Motion for Reconsideration (Motion),<sup>1</sup> seeking to have the Merit System Protection Board (MSPB or Board) reconsider its Decision and Order dated August 20, 2007 (Decision). In the Board's Decision, it found that Appellant did not qualify for the position to which Appellant had been demoted – Projects Manager, Grade 26<sup>2</sup> – and ordered the County to place Appellant in another position for which Appellant qualified. In Appellant's Motion, Appellant seeks to have the Board alter its determination, which was based on Appellant's own testimony that Appellant did not qualify for the Projects Manager position. Appellant now requests that the Board allow Appellant to remain in the position of Projects Manager, based on the fact that Appellant has almost seven months of successful performance in the position. Appellant also notes in Appellant's Motion that Appellant has finally been placed on a performance plan. The County responded on September 10, 2007 to Appellant's Motion. In its Response, the County noted that Appellant had admitted Appellant had no construction or design experience and lacked the education as required in the Class Specification for the Projects Manager position.

### **FINDINGS OF FACT**

Appellant was a Management Leadership Service (MLS) Manager III, Fleet Services Coordinator, Fleet Management Services Division (FMS), Department of Public Works and Transportation (DPWT), just prior to Appellant's demotion to the position of Projects Manager, Grade 26, effective February 5, 2007. The issue of Appellant's qualifications for the position of Projects Manager position was first raised by Appellant in Appellant's appeal of Appellant's demotion. See Appeal, Attachment to Merit System Protection Board Appeal Form, ¶ 10.

In Appellant's counsel's opening statement at the hearing on June 5, 2007, counsel indicated:

---

<sup>1</sup> The letter transmitting the Motion for Reconsideration is dated August 31, 2007 and indicates "Via Hand Delivery." However, the Board was closed on August 31, 2007, as it is only open from Monday – Thursday each week. The following Monday, September 3, 2007, was Labor Day, which is a County holiday. Therefore, the Board's first business day after August 30, 2007 was September 4, 2007. Because the Board was closed until September 4, 2007, it did not receive the Motion for Reconsideration until September 4, 2007.

<sup>2</sup> Appellant was placed at the maximum step for the Grade 26.

It should be noted that in [Appellant's] new position, which we have doubts about whether [Appellant] even meets the minimum qualifications for that position, there has been no work plan prepared, so [Appellant] hasn't been, [Appellant] can't be evaluated, and no pay adjustments can be made.

Hearing Transcript for June 5, 2007 (H.T. I) at 35. Counsel further elaborated about Appellant's concern over Appellant's lack of qualifications for the Projects Manager when questioning Mr. K, the DPWT management official who chose the position that Appellant was placed in:

Sure. I'll move quickly. Let me just, the point here is that [Appellant] has been demoted to a position that [Appellant] doesn't have experience in engineering and qualifications for the class specifications. Our great concern here is that [Appellant's] been put into a job where [Appellant] could easily be just terminated, because [Appellant] doesn't meet the minimum qualifications.

[Appellant's] been sent off into a job where [Appellant] doesn't meet the qualifications, doesn't have any experience in this kind of work. But let's just put [Appellant] somewhere, where we can easily get rid of [Appellant].

H.T. I at 253.

An incumbent in the position of Projects Manager “monitors and guides the activities of architectural/engineering consultants and construction contractors carrying out major capital projects for the County including the design, construction, alteration, restoration, and/or rehabilitation of public buildings and housing, public improvements and/or roads from plan inception through the post-construction stages.” Joint Exhibit (Jt. Ex.) 5. The Projects Manager position requires a minimum of five years of experience in design/construction project management, design consultant and contractor construction contract administration, or architectural work, civil engineering or a similar engineering field which included project management responsibility. Id. Alternatively, it requires graduation from an accredited college or university with a Bachelor's degree in architecture, civil engineering, construction management or a related field. Id.

During the hearing, Appellant indicated that Appellant had worked for the County for twenty eight years, beginning in the position of Mechanic which Appellant held for eleven years. Hearing Transcript for June 6, 2007 (H.T. II) at 137-38. Appellant indicated Appellant subsequently moved to the position of Mechanic Leader, then Mechanic Supervisor, then Equipment Services Coordinator and finally Fleet Services Coordinator.

Appellant was questioned at length by Appellant's counsel regarding Appellant's qualifications for the position of Projects Manager. Appellant testified thusly:

BY APPELLANT'S COUNSEL:

Q: Now, what position have you been demoted to?

A: Project Manager with Facilities and Services.

Q: Would you describe for me what a work plan is?

A: It's a plan that you have at the beginning of a year in order to indicate what goals and accomplishments, goals, and what happens to the workforce, and basically tell me what I'm supposed to do. And I'm evaluated based on whether or not I do it.

Q: Has a work plan been developed for your Project Manager position that you've been demoted to?

A: No.

Q: I'm showing you joint exhibit 5. What is this document?

A: It's the classification position description as some people call it for Capital Project Manager.

Q: Is this the position to which you have been demoted?

A: Yes.

Q: And looking at this exhibit and looking at your own qualifications the first thing listed is under experience five years of experience in design, construction project management and design, consultant, and contractor construction, contract administration. Do you have that experience?

A: No.

Q: The next is architectural work, civil engineering, or, civil engineering field which includes project manager responsibility.

A: I've never had any management or any civil engineering or any other line of training.

Q: Your educational requirement is graduation from an accredited college or university with a bachelors degree in architecture, civil engineering, construction management or a related field. Do you have that?

A: No.

Q: The equivalency is an equivalent combination of education and experience. Do you have that?

A: I have no engineering experience and certain management experience equivalent.

Q: All right. The knowledge, skills, and abilities required. It says a thorough practical knowledge of the principles and practices of civil, architectural, or, other construction-related engineering using mechanical systems.

A: No.

Q: Do you have that?

A: No.

Q: Thorough knowledge of federal, state, and local building construction codes and regulations. Do you have that?

A: No. I only have a limited knowledge. No. I have no knowledge of that.

Q: A thorough knowledge of the principles and practices of design, construction contract preparation and administration project scheduling and management and project cost estimating. Do you have that?

A: No.

Q: Skill and knowledge in directing large scale construction projects?

- A: No. I don't know how to do concrete, slump and patching tests or anything like that. I can do a couple of things. I can use the computer and I can prioritize work.
- Q: And you deal tactfully, effectively, and equitably with people?
- A: Always have.
- Q: And you can communicate effectively?
- A: Hope so, yes.
- Q: And you have attended meetings or performed at work locations outside the Office of –
- A: Yes.

H.T. II at 184-86.

As previously noted in the Board's Final Decision, Mr. K was the individual who selected the Projects Manager position for Appellant. Appellant's counsel queried Mr. K about Appellant's qualifications for the position during the hearing. Mr. K responded thusly:

BY APPELLANT'S COUNSEL:

- Q: Now, does [Appellant] me[e]t the minimum qualifications for the position of projects manager to which [Appellant] has been demoted?
- A: Based on class specs, maybe.
- Q: Well, let's take a look at the minimum qualifications. This is Joint Exhibit 5. It's on the second page, down at the bottom where it says, minimum qualifications. Experience. Five years of experience in design, construction, project management, and design consultant and contractor, construction contract administration or architectural work, civil engineering, or similar engineering field which included project management responsibility. Does [Appellant] meet those minimum qualifications?
- A: I assume that. [Appellant] never said, no, [Appellant] doesn't, or [Appellant] does.

H.T. I at 251.

Mr. K also testified that, in selecting the Projects Manager position, he was aware that Appellant did not have construction management. H.T. I at 254. However, he had been instructed by the Director, DPWT, to come up with a position that had the least impact on Appellant's salary. Id. at 246. Mr. K tried to find a Grade 27 position but was unable to find one that would work with Appellant's background. Id. Mr. K explained that a Grade 25 Program Manager was the best fit based on Appellant's experience. Id. However, he placed Appellant in the Grade 26 position as it would have the least impact on Appellant's salary. Id.

The Board, in its final Decision, found that the County had failed to prove that Appellant met the qualifications for the Projects Manager position and ordered the County to place Appellant in a non-supervisory position for which Appellant was qualified, located

outside FMS. On September 4, 2007, the County filed a Certification of Placement (Certification) with the Board. The Certification stated that Appellant had been placed in the newly created non-supervisory position of Program Manager II – Advertising Contracts Manager, Grade 25, located in Transit Services, Customer and Operations Support, in DPWT. This Program Manager II position is responsible for overseeing and coordinating the bus vehicle advertising contract and the advertising aspect of the bus stop shelter franchise. The Certification, signed by the Office of Human Resources Director, indicates that Appellant’s experience as a Manager III in FMS, where Appellant was responsible for monitoring the automotive contract and dealing with outside vendors, as well as Appellant’s many years of service as a Crew Chief and Mechanic Leader in Fleet Services, where Appellant scheduled and monitored repairs performed by outside vendors, makes Appellant qualified for this position.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- Appellant has successfully performed the Projects Manager position for seven months. Appellant has received positive feedback related to Appellant’s performance from Appellant’s manager and customers.
- In addition, a performance plan has now been developed for Appellant.
- Appellant should be allowed to remain in the Projects Manager position under the “equivalency” provision in the class specification based on Appellant’s prior managerial experience and almost seven months of successful performance in the position.

#### **County:**

- Appellant was placed, effective September 2, 2007, in the newly created position of Program Manager II – Advertising Contracts Manager in Transit Services, Customer and Operations Support, Grade 25, a non-supervisory job for which Appellant is qualified. The Human Resources Director has certified that Appellant qualifies for this position.
- Appellant has demonstrated Appellant’s lack of credibility as Appellant has previously testified that Appellant was not qualified for the Projects Manager position and now claims that Appellant is qualified.

### **APPLICABLE LAW**

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

- (a) Generally. In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against



arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein shall be fully exercised by the Board as needed to rectify personnel actions found to be improper. . . .

### **ISSUE**

Has Appellant shown good cause as to why the Board should reconsider its Decision and Order of August 20, 2007?

### **ANALYSIS AND CONCLUSIONS**

As previously noted, the Projects Manager position is a highly technical one. The incumbent “monitors and guides the activities of architectural/engineering consultants and construction contractors carrying out major capital projects for the County including the design, construction, alteration, restoration, and/or rehabilitation of public buildings and housing, public improvements and/or roads from plan inception through the post-construction stages.” To successfully accomplish the tasks of the position, the incumbent is required to have a minimum of five years of experience in design/construction project management, design consultant and contractor construction contract administration, or architectural work, civil engineering or a similar engineering field which included project management responsibility. Alternatively, the position requires graduation from an accredited college or university with a Bachelor’s degree in architecture, civil engineering, construction management or a related field. The Class Specification provides that an equivalent combination of education and experience may be substituted. These minimum qualifications are necessary given the job duties of the incumbent – i.e., monitoring and guiding the activities of architectural/engineering consultants and construction contractors carrying out major capital projects.

As previously noted, Appellant’s experience is as a Mechanic and a supervisor of Mechanics. Appellant testified on June 6, 2007 that Appellant lacked the five years of experience required by the Class Specification for the Projects Manager. Appellant also testified that Appellant did not have the education required for the position. Appellant’s counsel also asked Appellant about the equivalency provision in the Class Specification and Appellant testified “I have no engineering experience and certain management experience equivalent.”<sup>3</sup>

---

<sup>3</sup> While the Board found in its Decision that Appellant’s testimony regarding Appellant’s misconduct lacked credibility, the Board credited Appellant’s testimony with regard to Appellant’s lack of qualifications for the position of Projects Manager as Appellant had nothing to gain by admitting Appellant did not qualify for the position. A witness’s lack of credibility on one issue does not necessarily discredit his/her testimony on another issue. See, e.g., Anderson v. Department of Transportation, 827 F.2d 1564, 1570 (Fed. Cir. 1987).

Appellant now argues that Appellant should be allowed to remain in the Projects Manager position as Appellant suddenly qualifies for the very same position which Appellant testified Appellant did not qualify for two months ago. Appellant's argument lacks credence. Appellant indicates that Appellant has received positive feedback related to Appellant's performance from Appellant's manager and customers. Yet significantly Appellant fails to identify the exact tasks Appellant has accomplished which resulted in the positive feedback.

Appellant also argues that the Board should find Appellant qualifies for the position based on the "equivalency" provision in the Class Specification, based upon Appellant's prior managerial experience and almost seven months of successful performance. Again, Appellant's argument lacks merit. The Projects Manager position requires five years of experience in design, construction project management and design, consultant, and contractor construction, contract administration. Appellant testified Appellant did not have this experience. When asked if Appellant had experience in architectural work, civil engineering, or, civil engineering field which includes project manager responsibility, Appellant again indicated that Appellant had no such experience. Appellant was also queried as to whether Appellant met the educational requirement which was graduation from an accredited college or university with a Bachelor's degree in architecture, civil engineering, construction management or a related field. Once again, Appellant denied meeting this educational requirement. The "equivalency" provision specifically allows the substitution of an equivalent combination of education and experience. Appellant's proffer of Appellant's prior managerial experience over Mechanics together with Appellant's seven months in the Projects Manager position falls far short of meeting the "equivalency" provision.

As indicated in the Montgomery County Code, the Board is vested with the responsibility to protect the merit system. The Board has been granted broad remedial and enforcement powers in order to enable it to rectify personnel actions it finds to be improper. The Board fully exercised its remedial and enforcement powers in the instant case when it determined that Appellant's placement in the Projects Manager position was improper. The Board is satisfied that the position which Appellant has now been placed in – Program Manager II, Grade 25, is one for which Appellant qualifies.

### **ORDER**

Based on the foregoing, the Board hereby denies Appellant's Motion for Reconsideration.

## **Case No. 07-17**

### **DECISION ON COUNTY'S MOTION FOR RECONSIDERATION**

On September 27, 2007, the County filed a Motion for Reconsideration, seeking to

---

However, the Board does agree with the County that Appellant, by submitting this Motion for Reconsideration, has undermined Appellant's credibility.

have the Merit System Protection Board (MSPB or Board) reconsider two rulings it made during the Prehearing Conference held on September 20, 2007. Specifically, the County seeks to have the Board reconsider its decision to exclude Ms. A, Chief of the Division, Department of Public Works and Transportation (DPWT), as the Department representative in this matter. The County also seeks to have the Board reconsider its decision to include Appellant's allegation of retaliation for filing the instant appeal as an issue during the hearing by the Board on Appellant's challenge to Appellant's disciplinary action.

### **BACKGROUND**

This appeal involves the two-day suspension of Appellant, Chief, Section Z, Department of Public Works and Transportation (DPWT), based on Appellant's purported harassment and intimidation of Appellant's subordinates, Ms. B and Mr. C. Ms. B complained to her second-line supervisor, Ms. A, about the alleged harassment in October 2006 and Mr. C complained about abusive behavior on December 11, 2006.

On February 2, 2007, Ms. A issued Appellant a Statement of Charges for a five-day suspension. Appellant responded on February 16, 2007. On April 20, 2007, the Director, DPWT, issued a Notice for Disciplinary Action (NODA) for a two-day suspension, effective June 8, 2007.

On June 10, 2007, Appellant filed the instant appeal. On September 19, 2007,<sup>1</sup> Appellant filed a request with the Board to add the issue of retaliation to Appellant's appeal based on the following four actions:

1. On August 16, 2007, Appellant received Appellant's FY 07 performance evaluation. Appellant alleges that Ms. A made many substantive changes to Appellant's draft narrative concerning performance, unlike in prior years. Appellant also alleges that several of the criticisms in the FY 07 evaluation appear to be pretextual. Finally, Appellant indicates that Ms. A, without explanation, rated Appellant's performance element of "Personal Accountability" as "Does Not Meet Expectations". Appellant notes that this is the first time Ms. A has ever made any negative comments about Appellant in this area. Appellant also notes that Ms. A did not mention this in Appellant's mid-year review in February 2007.

2. Appellant also alleges that on August 16, 2007, when Ms. A gave Appellant the FY 08 performance plan, it contained performance standards that Appellant is unlikely to meet.

3. On September 11, 2007, just prior to Appellant's monthly staff meeting, Ms. A came to Appellant's office and announced that she would speak to Appellant and Appellant's staff but would not tell Appellant the content of her comments in advance. At the meeting, she indicated to Appellant's staff that she

---

<sup>1</sup> On October 9, 2007, Appellant filed a corrected letter regarding the issue of retaliation.

often goes to staff for information but she does not expect staff to keep Appellant in the dark, staff must keep Appellant informed. Ms. A then stated that she had directed Appellant to take chain-of-command out of the staff's performance reviews. She also noted that there would be no reprimands of staff for speaking with her. Appellant states that Ms. A's comments and her failure to discuss them with Appellant before the staff meeting undercut Appellant's authority in front of the staff.

4. On September 12, 2007, Ms. A denied Appellant the opportunity to attend a conference concerning automated customer information. The conference was related to one of the goals in Appellant's FY 08 performance plan having to do with providing customer information. Ms. A has never denied Appellant's request to attend conferences in the past.

On September 20, 2007, the Board held a Prehearing Conference on this appeal. During the Prehearing Conference, the Board discussed with the parties Appellant's request to add the retaliation claim to the instant appeal. The County's representative argued that the Board did not have jurisdiction over the retaliation claim as it had to be presented to the Office of Human Resources (OHR) Director first, pursuant to Section 34-7 of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005). The Board disagreed, asserting that the provision cited by the County only applied to the issue of retaliation based on the filing of a grievance. The Board noted that Appellant was alleging retaliation for filing an appeal. The Board then ruled that it would include the retaliation claim as part of Appellant's appeal.

During the Prehearing Conference, the County also informed the Board that Ms. A, who had previously been identified in the County's Prehearing submission as a potential witness in this appeal, would be serving as the Department's representative in this case. The Board, after conferring, determined that it would not be appropriate for Ms. A, who is the individual that proposed the disciplinary action at issue in this case, to serve as the Department's representative. The Board informed the County's representative that it would set the hearing for November 8, 2007, in order to give the County sufficient time to locate another Department representative.

At the conclusion of the Prehearing Conference, the County requested permission to file a Motion in Limine with the Board regarding certain of Appellant's proposed exhibits. The Board gave the County until September 27, 2007 to file its motion and informed Appellant's representative that the representative had until October 4, 2007 to respond. Instead of a Motion in Limine, the County filed the instant Motion for Reconsideration on September 27, 2007. Appellant's counsel responded to the Motion on October 4, 2007.

### **POSITIONS OF THE PARTIES**

#### **County:**

- The Maryland Administrative Procedure Act, the Maryland Rules and arbitration

case law all make clear that a party that is not an individual may designate an employee or officer as its representative to remain in the hearing room even though the employee or officer may be a witness. The Montgomery County APA does not specifically address the point of parties who are not individuals.

- The County should be allowed to appoint its representative to assist counsel with the case, even if that representative will also be a witness. To exclude Ms. A would simply be unfair.
- The County does not dispute that Appellant may bring a complaint of retaliation to the Board. However, the issue of retaliation is a separate issue which should be given separate consideration.

Appellant:

- The Montgomery County APA permits the Board to sequester witnesses other than a party. The County's reliance on the Maryland APA, Office of Administrative Hearings rules, an arbitration treatise and two reported decisions from other foras are clearly inappropriate as it is the Montgomery County APA which governs the instant proceedings.
- Ms. A's disciplinary and retaliatory acts are at the heart of this hearing. The risk that her testimony will be influenced by exposure to the testimony of other witnesses clearly outweighs the inconvenience to the County that switching technical representatives will cause.
- Section 34-7 of the Montgomery County Personnel Regulations, cited by the County, does not govern Appellant's retaliation claim as Appellant is being retaliated against for filing an appeal not a grievance.
- The MSPB hearing process is the most efficient and appropriate way to resolve Appellant's retaliation claim.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act,** which states in applicable part:

**Section 2A-2. Applicability.**

This Chapter governs the following administrative appeals and proceedings and applies equally when a hearing is conducted by a hearing examiner or another designated official.

...

- (c) Appeals, grievances and complaints filed pursuant to Chapter 33, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Merit System Protection Board.

**Section 2A-8. Hearings.**

...

- (g) **Right to counsel.** In any case governed by the procedures established in this chapter, the parties have the right to be represented by themselves or by legal counsel of their choice. The appearance of counsel shall be entered and the hearing authority shall be notified in writing expeditiously following counsel's retention. All parties of record shall be notified simultaneously with the hearing authority.
- (h) **Powers of the hearing authority.** In addition to any other power granted by this article, a hearing authority is empowered:

...

- (10) To take any other action authorized by this article or necessary to a fair disposition of the case.

...

- (13) Upon its own motion and at the request of an affected party to order that witnesses other than a party be excluded from the hearing room until called to testify.

**Montgomery County Personnel Regulations (MCPR), Section 33, *Disciplinary Actions*** (as amended December 10, 2002), which states in applicable part:

**33-9. Right of an employee to appeal a disciplinary action.**

...

- (b) ***Right to appeal a disciplinary action to the MSPB.***
  - (1) ***Right to file a direct appeal to the MSPB.*** An employee with merit system status may appeal a demotion, suspension, or dismissal by filing an appeal directly with the MSPB under Section 35 of these Regulations. An employee who files a direct appeal must not also file a grievance on the same disciplinary action.

**MCPR, Section 34, *Grievances*** (as amended February 15, 2005), which states in applicable part:

**34-7 Investigation of complaints of harassment or retaliation for filing a grievance.**

- (a) An employee may file a complaint with the OHR Director if the

employee was harassed or retaliated against by a supervisor or coworker for filing a grievance.

### **ISSUES**

1. Has the County shown good cause as to why the Board should reconsider its determination to exclude Ms. A as the Department representative in this case?
2. Has the County shown good cause as to why the Board should reconsider its determination to include Appellant's retaliation claim in the hearing on Appellant's disciplinary action?

### **ANALYSIS AND CONCLUSIONS**

#### **The County Has Failed To Show Good Cause As To Why The Board Should Not Exclude Ms. A As The Department Representative In This Case.**

As Appellant points out, the Montgomery County APA governs this case, not the Maryland APA or arbitration procedures. The Montgomery County APA provides the parties with the right to represent themselves **or** the right to be represented by counsel. No where in the Montgomery County APA does it provide that the County has the right to have a Department representative as well as County counsel. The Board wishes to make clear that while it has previously permitted the County to have a Department representative at an appeal, this was a matter of courtesy, not a right.<sup>2</sup>

The County has cited to Jacocks v. Montgomery County, 58 Md. App. 95, 472 A.2d 485 (1984), which held that it was not an abuse of discretion when, during an administrative hearing, a witness was allowed to remain in the room as the County's representative. Jacocks involved an administrative hearing before the Law Enforcement Officer Bill of Rights Hearing Board (hearing board) regarding a disciplinary action of a police officer. At the beginning of the hearing, the appellant requested that the witnesses be sequestered. One witness, who testified first, was allowed by the hearing board to remain in the hearing room as the County's representative. The appellant subsequently appealed, arguing, *inter alia*, that the decision to permit the witness to remain in the hearing room was prejudicial. In support of this proposition, the appellant cited the exclusion rule, Md. Rule 755, which requires that if the exclusion of a witness is requested in a criminal trial then the court must comply with the request.

In Jacocks, the Court of Special Appeals reviewed the applicability of the exclusion rule to administrative hearings. The Court explained that "[t]he purpose of the exclusion rule is to prevent witnesses from being taught or prompted by another's testimony." 58 Md. App. at 109, 472 A.2d at 492 (quoting Gwaltney v. Morris, 237 Md. 173, 176-77, 205 A.2d 266

---

<sup>2</sup> Indeed, the Board notes that the County has not articulated a reason as to why it is necessary to have anyone assist the County's counsel in the presentation of the County's case.

(1964)). The Court held that the exclusion rule applies to courts of the state but not to quasi-judicial proceedings by state administrative agencies. The Court went on to hold that “the decision whether to sequester witnesses in an administrative adjudicatory hearing is a matter resting in the sound discretion of the presiding officer(s).” 58 Md. App. at 110, 472 A.2d at 492. The Court found that the administrative tribunal did not abuse its discretion as the witness who was not excluded was the first witness to testify and therefore his testimony was not influenced by others. Id.

As Appellant notes, the County has not made any promise that like the technical representative in Jacocks, Ms. A will be the first witness to testify. Nor does it matter, as the County would also have to represent that Ms. A would not be called as a rebuttal witness in order to ensure that Ms. A’s testimony would not be affected by what others testify to during the course of the hearing.

The Board finds that Ms. A is a key witness in this matter as she is the individual who issued the Statement of Charges against Appellant and also is the one who Appellant alleges has retaliated against Appellant for filing the instant appeal. Accordingly, the Board has determined that the risk that Ms. A’s testimony might be influenced by exposure to the testimony of others far outweighs the administrative inconvenience to the County of finding another individual to assist it in the presentation of the County’s case. Accordingly, the Board reaffirms its determination to exclude Ms. A as the Department representative in this case.

**The County Has Failed To Show Good Cause As To Why The Board Should Not Include Appellant’s Retaliation Claim In The Hearing On Appellant’s Disciplinary Action.**

The County, which previously had claimed that Appellant had to use the process found in MCPR Section 34-7 to address his retaliation claim, now acknowledges that Appellant has the right to bring the claim of retaliation to the Board.<sup>3</sup> County Motion for Reconsideration at 5. However, the County believes that as this is a separate issue, the Board should deal with it separately.

Under the County’s merit system law, employees have the right to file an appeal challenging a disciplinary action and must be able to do so without fear of retaliation. The Board considers Appellant’s retaliation claim a very serious allegation, which if true needs to be dealt with immediately.

The Board also notes that the County has identified Ms. A as a potential witness in this appeal. Appellant’s counsel indicates that Appellant may be called as a witness in this appeal. Appellant’s retaliation claim involves Ms. A. Thus, likely witnesses in the retaliation claim are Ms. A and Appellant. As the retaliation claim involves the same witnesses as the disciplinary action appeal and there is a need to address the retaliation claim

---

<sup>3</sup> As the Board indicated at the Prehearing Conference, and as Section 33-9(a)(1) of the MCPR makes clear, a grievance is separate and distinct from an appeal.



expeditiously, the Board has determined that judicial economy is best served if the merits of all of Appellant's claims are addressed at the hearing. See, e.g., Fitzpatrick v. Department of Justice, 91 M.S.P.R. 556 (2002); West v. United States Postal Service, 44 M.S.P.R. 551 n.1 (1990). Therefore, the Board reaffirms its determination to include the retaliation claim in the hearing to be held on November 8, 2007.

### **ORDER**

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

The Board hereby orders the following:

1. Appellant shall file with the Board a list of any additional witnesses that will be called at the hearing to address Appellant's retaliation claim by October 22, 2007. Appellant shall also provide to the Board by October 22, 2007 an original and three copies of any additional exhibits to be submitted in support of the retaliation claim. Appellant will serve on the County a copy of all information filed with the Board.

2. The County shall provide the Board with a list of any additional witnesses it may call regarding Appellant's retaliation claim by November 1, 2007. The County shall also provide by to the Board by November 1, 2007 an original and three copies of any exhibits to be submitted to defend against the retaliation claim. The County will serve on Appellant a copy of all information filed with the Board.

## **CASE NO. 08-10**

### **DECISION ON APPELLANT'S REQUEST FOR RECONSIDERATION**

On June 14, 2008, Appellant filed three faxes with the Merit System Protection Board (Board), challenging the Board's Final Decision on Appellant's appeal from the determination of the Office of Human Resources to rate Appellant only as "Qualified" for the position of Senior Executive Administrative Aide. In addition, Appellant filed several faxes with the Office of the County Attorney challenging the Board's Final Decision. Appellant has also filed various emails with the Board and the Office of the County Attorney.

The Board determined to treat Appellant's various filings as a Request for Reconsideration. In response, the Office of the County Attorney filed an email with the Board, asserting that the Board should uphold its Final Decision.

### **ORDER**

Having reviewed all of the correspondence submitted in this matter, the Board has determined to affirm its Final Decision.

# **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) of the APA, 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 2008, the Board issued the following decision on a discovery dispute.

# **DISCOVERY DECISION**

## **CASE NO. 07-17**

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

On October 23, 2007, Appellant filed a Motion to Compel, seeking to have the Merit System Protection Board (MSPB or Board) order the County to respond to a document request. Appellant seeks to have the County produce various notes from Appellant's supervisor's investigation of Appellant in 2002.<sup>1</sup> The County responded to Appellant's Motion (County Response), asserting it has not produced interview notes connected with the investigation as Appellant's supervisor promised to keep the contents of the interviews confidential. The County also asserts that the notes are privileged from disclosure under the Maryland Public Information Act (MPIA) as their release would be contrary to the public interest. The County indicates that it cannot produce the notes taken by Mr. P during the investigation as he is retired and it is not in possession of his notes.

Appellant filed a Motion for Leave to File a Reply and Appellant's Reply to the County's Response to Appellant's Motion to Compel (Appellant's Reply). The County then filed a Response to Appellant's Motion for Leave to File Reply, requesting the Board deny Appellant the right to file a reply.

### **BACKGROUND**

This appeal involves the two-day suspension of Appellant, Chief of Section Z, Department of Public Works and Transportation (DPWT), based on Appellant's purported harassment and intimidation of Appellant's subordinates, Ms. B and Mr. C. Ms. B complained to her second-line supervisor, Ms. A, about the alleged harassment in October 2006 and Mr. C complained about abusive behavior on December 11, 2006.

On February 2, 2007, Ms. A issued Appellant a Statement of Charges for a five-day suspension. The Statement of Charges specifically referenced an investigation of Appellant conducted by Ms. A and Mr. P, concerning allegations of threatening and demeaning behavior, in 2002 (2002 investigation).<sup>2</sup> Appellant responded to the Statement of Charges on February 16, 2007. On April 20, 2007, the Director, DPWT, issued a Notice for Disciplinary

---

<sup>1</sup> Specifically, Appellant states that there are two categories of documents: 1) notes from the interviews conducted as part of the 2002 investigation with Appellant's subordinates, other than Ms. L, Mr. C and Ms. B; and 2) notes and documents from Mr. P, a former County employee, who assisted Appellant's supervisor in the 2002 investigation.

<sup>2</sup> In an email submitted by Appellant as Exhibit E to Appellant's Motion to Compel, it appears that Mr. P provided comments to Ms. A on the write-up of the 2002 investigation. In this email, Mr. P repeatedly makes reference to his notes.

Action (NODA) for a two-day suspension, effective June 8, 2007. The NODA specifically referenced the 2002 investigation.

Moreover, in the County's Prehearing submission, it provided, *inter alia*, the following exhibits:

1. Exhibit 33 – Memorandum from Ms. L to Ms. A, dated 07/29/03, subject: Request for Unit to be moved from Section Z, referencing Ms. A's investigation of Appellant.
2. Exhibit 36 – Memorandum from Ms. A to Appellant, dated 09/30/02, subject: Performance, discussing Ms. A's conclusions based on her investigation into Appellant's interaction with subordinates.
3. Exhibit 37 – Investigative Report – Appellant, undated
4. Exhibit 38 – Memorandum marked CONFIDENTIAL, undated
5. Exhibit 40 – Hand-written notes entitled "Ms. L", dated 04/30/02

The above-listed exhibits deal with the 2002 investigation.

### **APPLICABLE LAW**

**Maryland Public Information Act, Section 10-618**, which states in applicable part:

#### **10-618. Permissible denials**

(a) *In general.* - Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part, as provided in this section.

(b) *Interagency and intra-agency documents.* - A custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.

**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.

- (2) No investigative agency involved in the complaint or proceeding shall unreasonably refuse to any party to a hearing access to files and personnel connected with any matter relevant to the complaint.

...

- (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. Failure of a party to submit to ordered discovery may be cause for entry of a default judgment against the offending party or such other equitable sanction as the hearing authority may deem appropriate and just.

- (c) **Motions.** Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, motions for continuance, motions to amend a charging document or other submissions to the hearing authority, motions to compel discovery and motions to quash subpoenas shall be made promptly; however, nothing herein shall preclude the hearing authority, on its own motion, from reaching a determination on any preliminary matter as the interests of justice may require without a hearing.

### **ANALYSIS AND CONCLUSIONS**

In support of his Motion to Compel, Appellant asserts that the 2002 investigation mentioned in the Statement of Charges involved at least fifteen witnesses, yet the County has only produced documents relating to interviews with three witnesses – Ms. L, Mr. C, and Ms. B. Significantly, Appellant alleges that some of the other witnesses did not share the views of Ms. L, Mr. C and Ms. B, concerning Appellant. Therefore, Appellant seeks production of all of the notes of the interviews involved in the 2002 investigation.

Appellant also asserts that Mr. P, who participated in the 2002 investigation and interviews, took notes and gathered documents and these notes and documents provide a view of the 2002 investigation more favorable to Appellant. Accordingly, Appellant seeks the production of Mr. P's notes.

The County states that Ms. A's interview notes of employees who spoke to her on condition of confidentiality are protected by the Maryland Public Information Act (MPIA). Specifically, the County argues that the notes may be denied to Appellant as they constitute interagency or intra-agency memorandum covered by Section 10-618(b) of the MPIA and their release would be contrary to the public interest under Section 10-618(a) of the MPIA. The County also argues that the notes are sheltered from production under the deliberative process privilege. Finally, the County argues that the notes are shielded by the executive privilege as they constitute pre-decisional staff papers.

The County states in its Response that it does not have possession of any notes taken by Mr. P during the 2002 investigation.

The Board notes at the outset that the exception the County relies on to shield the interview notes is a discretionary one – it does not mandate nondisclosure.<sup>3</sup> See MPIA Manual at 15 (exceptions in Section 10-618 allow the custodian to exercise discretion whether the specific records are to be disclosed).

As the MPIA Manual notes, “Maryland’s Public Information Act (“PIA”), Title 10, Subtitle 6, Part III of the State Government Article (“SG”), grants the public a broad right of access to records that are in the possession of State and local government agencies.” MPIA Manual at 1. As the Court of Appeals indicated in Cranford v. Montgomery County, 300 Md. 759, 771 (1984), “[w]ithout doubt the bias of the [MPIA] is toward disclosure.” Moreover, as the MPIA Manual counsels, “[a] ‘person in interest,’ generally the person who is the subject of the record, SG §10-611(e), has a greater right of access to the information contained in investigation . . . records.” MPIA Manual at 37.

Finally, the MPIA Manual instructs that the determination of what constitutes the “public interest” is made after conducting a balancing test:

Whether disclosure would be “contrary to the public interest” under th[is] exception[] is in the custodian’s “sound discretion,” to be exercised “only after careful consideration is given to the public interest involved.” 58 *Opinions of the Attorney General* 563, 566 (1973). In making this determination, the custodian must carefully balance the possible consequences of disclosure against the public interest in favor of disclosure. 64 *Opinions of the Attorney General* 236, 242 (1979).

MPIA Manual at 37.

Having reviewed the arguments for and against disclosure of these notes, the Board finds that the public interest warrants their disclosure to Appellant. First, the Board rejects the County’s argument that disclosure of these notes would be contrary to the public interest as Ms. A assured the employees their statements would be confidential. There was no need for Ms. A to offer confidentiality to the individuals she interviewed in order to have them cooperate in her investigation. County employees are expected to cooperate with County investigations and may face discipline for failure to cooperate. See Montgomery County Personnel Regulations, 2001 Section 33-5(z) (cause for discipline if employee fails to cooperate or provide information during an investigation).

The Board agrees with Appellant’s contention that Appellant has the right to all statements or other investigative reports or portions thereof pertaining to Appellant’s charging documents. The 2002 investigation was cited in both the Statement of Charges and

---

<sup>3</sup> In reviewing this matter, the Board has turned to the Maryland Public Information Act Manual (MPIA Manual) (10<sup>th</sup> ed., January 2007), issued by the Maryland State Attorney General’s Office, for guidance.

the Notice of Disciplinary Action. The County chose to make the investigation part of these two documents. It cannot now argue that it has the right to pick and choose which portions of the investigation it will permit the Appellant to see. The Montgomery County APA allows a party to develop a complete factual picture of a case through discovery. See also MSPB Case No. 07-08 (wherein the Board ordered the release of all transcripts of an investigation wherein the appellant's name was mentioned). As the Board finds that these notes would be available under the Montgomery County APA to Appellant in litigation with the County, the Board has determined that they do not come within the scope of Section 10-618(b).<sup>4</sup> Accordingly, the Board has determined that the County shall release to Appellant all interview notes taken during the course of the 2002 investigation.

It is unclear why the County waited until its Response to inform Appellant that it was not in possession of Mr. P's notes. As the County does not have the notes, there is nothing further to decide on this matter.

### **ORDER**

Based on the foregoing, the Board hereby orders the County to produce all interview notes taken by Ms. A in connection with the 2002 investigation to Appellant's counsel by COB Tuesday, November 6, 2007. The County shall either fax or hand-deliver the notes to Appellant's counsel.

---

<sup>4</sup> The Board has determined to grant the Appellant's Motion for Leave to File a Reply.

# **MOTIONS**

The County's Administrative Procedures Act (APA), Montgomery County Code Section 2A-7(b), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to quash subpoenas, and motions in limine (which are motions to exclude evidence from a proceeding). Motions may be filed at any time during a proceeding. The opposing party is given five (5) calendar days to respond. The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning of the hearing, rule on the motion.

During FY 2008, the Board issued the following decisions on various motions filed.



# MOTION DECISIONS

## Case No. 07-13

### DECISION ON APPELLANT'S MOTION TO DISMISS

On July 16, 2007, the Merit System Protection Board (Board) held a Prehearing Conference in the above-captioned appeal. During the Prehearing Conference, Appellant made an oral Motion to Dismiss and sought to enter an exhibit into the record to support the motion. The County opposed the entry of the exhibit on the grounds of relevancy. Specifically, Appellant sought to enter an unsigned certificate of service for Appellant's Notice of Disciplinary Action. The Board requested that Appellant's counsel provide legal support for counsel's contention that the exhibit counsel was seeking to enter supported counsel's assertion that the Board should dismiss the instant appeal. Absent legal support, the Board indicated that it would deny admission of the exhibit as Appellant's counsel had failed to adhere to the Board's Prehearing submission requirements. Specifically, Appellant should have submitted Appellant's exhibits to the Board on July 9, 2007, but failed to do so.<sup>1</sup>

---

<sup>1</sup> By Order dated June 12, 2007, Appellant's counsel was notified that counsel's Prehearing submission was due on or before July 9, 2007. When the Board did not receive the Prehearing submission on July 9, 2007, the Board's Executive Secretary emailed Appellant's counsel on July 10, 2007, requesting information as to when the Board would receive the Prehearing submission. When this email was not responded to, the Executive Secretary called and left a message with Appellant's counsel's receptionist on July 11, 2007. The Executive Secretary subsequently spoke with Ms. A, a paralegal in Appellant's counsel's office, on July 12, 2007, and faxed her a copy of the Prehearing submission requirements that were overdue. Ms. A indicated that the Appellant's Prehearing submission would be filed by Friday, July 13, 2007.

However the Board received nothing on July 13, 2007. Instead on July 16, 2007, the Board received a fax from Appellant's counsel, requesting leave to file a witness list out of time. Appellant's submission, however, did not conform to the Board's Prehearing requirements. It did not indicate what, if any, exhibits would be submitted. Nor did it provide a summary of the witnesses' proposed testimony so as to permit the Board to determine the relevancy of each witness named. Finally, Appellant's submission did not indicate how long it would take to present Appellant's case.

At the Prehearing Conference, the Board instructed Appellant's counsel that it needs the **complete** Prehearing submission of the parties **before** the Prehearing so that the Board members may review the parties' pleadings and determine what issues need to be discussed or resolved during the Prehearing Conference. All parties are expected to adhere to the deadlines set by the Board. The Board cautioned Appellant's counsel that this was not the first case in which Appellant's counsel had failed to file in a timely manner and any additional failure to adhere to timeframes set by the Board or the filing of incomplete submissions would result in sanctions.

On July 17, 2007, Appellant submitted a Memorandum of Authority (Memorandum) and three exhibits, A, B & C. In Appellant's Memorandum, Appellant renewed Appellant's Motion to Dismiss. The County filed a Response to Motion to Dismiss (Response) on July 19, 2007.

### **FINDINGS OF FACT**

This appeal concerns Appellant's dismissal from Appellant's position of Correctional Shift Commander – Lieutenant with the Department of Correction and Rehabilitation (DOCR). The record of evidence indicates that the Department investigator issued a report concerning Appellant's conduct on December 1, 2006. Specifically, DOCR investigated allegations of inappropriate internet use by Appellant and another Lieutenant. The County's Department of Technical Services (DTS) issued eleven computer reports on January 4, 2007 (County Exhibits (Exs.) 33-44) and thirteen reports on January 5, 2007 (County Exs. 19-32). On January 16, 2007, the County issued its Statement of Charges to Appellant.

The record of evidence indicates that on March 1, 2007, DOCR issued a Notice of Disciplinary Action – Dismissal (NODA) signed by Ms. B on behalf of the DOCR Director, dismissing Appellant effective March 16, 2007. Because Ms. B lacked written delegated authority to sign on behalf of the DOCR Director,<sup>2</sup> on March 29, 2007, the DOCR Director reissued the NODA, dismissing Appellant effective April 15, 2007. The reissued NODA was sent by Federal Express on April 6, 2007, and was received by Appellant on April 9, 2007.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Section 33-2(b) of the MCPR indicates that charges are to be served within 30 days. The certificate of service has incorrect dates on the top portion of the page to conceal that the County did not meet this deadline.

#### County:

- MCPR Section 33-2(b)(2) permits the Department to issue a Statement of Charges more than 30 calendar days after becoming aware of the circumstances warranting

---

<sup>2</sup> In a recent appeal involving a disciplinary action at DOCR, the Board had the occasion to review the authority of Ms. B 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 authority to take disciplinary action in writing to Ms. B and accordingly held that the disciplinary action at issue was null and void.

discipline if there is an investigation or other circumstances that justify a delay. Although the Department investigator issued his report on December 1, 2006, the Department continued to collect documentation to support the Statement of Charges until January 5, 2007.

- The County issued its Statement of Charges on January 16, 2007, within eleven days of receiving the last documentation to support the Statement of Charges. Accordingly, the County issued its Statement of Charges in a timely manner.
- The exhibit Appellant seeks to have admitted, Appellant's Exhibit B, is a service page for the March 29, 2007 NODA. There is no requirement that the County serve the NODA by any specific time limit.

### **APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), Section 33, Disciplinary Actions (as amended December 10, 2002),** which states in applicable part:

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

...

(b) ***Prompt discipline.***

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
- (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

...

**33-6. Disciplinary process.**

...

(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.

## ISSUE

Did the County fail to adhere to the requirements of Section 33 of the MCPR in issuing the Statement of Charges and the reissued Notice of Disciplinary Action so as to warrant the dismissal of the charges against Appellant?

## ANALYSIS AND CONCLUSIONS

Appellant seeks to have the Board agree to the submission of Appellant's Exhibit B, which is a certificate of service for the reissued Notice of Disciplinary Action. Appellant also seeks to have the Board dismiss the charges against Appellant based on this certificate of service. In support of this proposition, Appellant cites to Section 33-2(b) of the MCPR.

As the County correctly notes in its Response, Section 33-2(b) deals with the issuance of the Statement of Charges not the Notice of Disciplinary Action. Specifically, Section 33-2(b) requires prompt discipline. The Department Director is to issue a statement of charges within 30 calendar days of when the supervisor became aware of the employee's conduct. However, the Department Director may wait more than 30 calendar days to issue the Statement of Charges if there is an investigation of the employee's conduct or other circumstances which justify a delay.

In the instant case, the record of evidence shows that on or about October 31, 2006, the Warden received an anonymous tip from the Montgomery County Government Employees Organization that Appellant was spending too much time on the computer/internet and not enough time supervising staff. Mr. C, at the request of the Department Director, met with the Warden on October 31, 2006 and subsequently conducted an investigation into the allegation. Mr. C submitted his report on his investigation on December 1, 2006. Subsequently, DOCR received additional documentation demonstrating Appellant's internet use from DTS on January 4 and 5, 2007. On January 11, 2007, the Warden issued the Statement of Charges.

Based on the record of evidence before the Board, the Board finds that the County acted in a prompt manner in issuing the Statement of Charges in the instant case.

With regard to the reissued Notice of Disciplinary Action, the Board notes that the MCPR does not impose a time limit for its issuance. Thus, the Board finds that Appellant's Exhibit B is not relevant to the instant case and will deny its admission.

The Board will also deny the admission of Appellant's Exhibits A and C, which Appellant submitted with Appellant's Memorandum of Authority as it should have been submitted to the Board prior to the Prehearing Conference on July 16, 2007. Appellant has offered no reason why Exhibits A and C could not have been submitted in a timely manner.

## ORDER

Based on the foregoing, the Board denies Appellant's Motion to Dismiss. Moreover,

the Board denies admission of Appellant's Exhibits A, B, and C as they were filed out of time.

## **Case No. 07-17**

### **DECISION ON APPELLANT'S MOTION IN LIMINE**

On September 5, 2007, Appellant filed a Motion in Limine, seeking to have the Merit System Protection Board (MSPB or Board) exclude exhibits 30-40 submitted by the County as part of its Prehearing submission, on the basis that they are not relevant. The County responded to Appellant's Motion, asserting the exhibits at issue are probative. The County also argued that the exhibit to Appellant's Motion in Limine, an affidavit by Mr. K, should be excluded as it is not relevant.

### **BACKGROUND**

This appeal involves the two-day suspension of Appellant, Chief of Section Z, Department of Public Works and Transportation (DPWT), based on Appellant's purported harassment and intimidation of Appellant's subordinates, Ms. B and Mr. C. Ms. B complained to her second-line supervisor, Ms. A, about the alleged harassment in October 2006 and Mr. C complained about abusive behavior on December 11, 2006.

On February 2, 2007, Ms. A issued Appellant a Statement of Charges for a five-day suspension. Appellant responded on February 16, 2007. On April 20, 2007, the Department Director, DPWT, issued a Notice for Disciplinary Action (NODA) for a two-day suspension, effective June 8, 2007.

In the County's Prehearing submission, it provided, *inter alia*, the following exhibits which are at issue:

1. Exhibit 30 – Hand-written notes of a meeting with Ms. L, concerning Appellant, dated 09/29/03<sup>1</sup>
2. Exhibit 31 – Hand-written notes of a meeting with Appellant, concerning performance, dated 08/04/03<sup>2</sup>
3. Exhibit 32 – Performance Evaluation, for the period 07/01/02-06/30/03, for Appellant, dated 08/04/03
4. Exhibit 33 – Memorandum from Ms. L to Ms. A, dated 07/29/03, subject: Request for Unit to be moved from Section Z
5. Exhibit 34 – Email from Appellant to Ms. L, dated 07/23/03, subject: RE: [Printing] 7/23/03
6. Exhibit 35 – Email from Ms. A to Appellant, dated 01/27/03, subject: training

---

<sup>1</sup> According to the County's Index of Exhibits, these are Ms A's notes.

<sup>2</sup> According to the County's Index of Exhibits, these are Ms. A's notes.

7. Exhibit 36 – Memorandum from Ms. A to Appellant, dated 09/30/02, subject: Performance
8. Exhibit 37 – Investigative Report – Appellant, undated<sup>3</sup>
9. Exhibit 38 – Memorandum marked CONFIDENTIAL, undated<sup>4</sup>
10. Exhibit 39 – Performance Evaluation, for the period 07/01/01-06/30/02, for Appellant, dated 07/11/02
11. Exhibit 40 – Hand-written notes entitled “Ms. L”, dated 04/30/02<sup>5</sup>

As previously noted, Appellant filed a Motion in Limine seeking to exclude the above-listed exhibits. In support of Appellant’s Motion, Appellant filed an affidavit from Mr. K, whose company has a contract with the County to provide management and leadership training seminars. Mr. K is mentioned in the Notice of Disciplinary Action issued to Appellant.<sup>6</sup>

### APPLICABLE LAW AND REGULATION

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part:

- (e) **Evidence.** The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable,

---

<sup>3</sup> According to the County’s Index of Exhibits, the report was generated before 09/30/02.

<sup>4</sup> According to the County’s Index of Exhibits, these notes concerning Appellant are by Ms. L and were provided to Ms. A sometime before 09/30/02.

<sup>5</sup> According to the County’s Index of Exhibits, these are notes by Ms. A about a meeting with Ms. L regarding Appellant.

<sup>6</sup> Specifically, the NODA states as follows:

In 2005, [Ms. A] arranged for [Mr. K] to conduct an intervention session with you and your managers concerning your management behavior. This session was conducted in 2005. Your summation of the meeting was that it was a good meeting and there was no need for follow-up as many of your managers apparently were happy because their positions have not “turned over.” When [Ms. A] discussed this with you in June 2006, you asked her to contact [Mr. K] who would validate your conclusion. She followed up with [Mr. K] who said there was definitely a need for follow-up. No follow-up occurred.

NODA at 3.

irrelevant or unduly repetitious evidence, or produce evidence at its own request. The hearing authority may take official notice of commonly cognizable facts, facts within its particular realm of administrative expertise and documents or matters of public record. Parties shall be notified of matter and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.

**Montgomery County Personnel Regulations (MCPR), Section 33, *Disciplinary Actions*** (as amended December 10, 2002), which states in applicable part:

**33-2 Policy on disciplinary actions**

...

(b) Prompt discipline

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
- (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

**ANALYSIS AND CONCLUSIONS**

In support of Appellant's Motion in Limine, Appellant cites to Fed. R. Evid. 404(a) and Md. Rule 5-404(a) and (b). These rules deal with character evidence. The Federal Rule precludes the introduction of evidence of an individual's character or trait for purpose of proving action in conformity therewith. The Maryland Rules cited exclude character evidence in general and evidence of other crimes, wrongs or acts unless, as Appellant notes, the evidence is "specially" relevant. Appellant argues that County Exhibits 30-40 are documents dated between 2002 and 2003, which are being used to prove that Appellant engaged in misconduct in 2006. According to Appellant, these documents are not relevant and their admission is likely to result in prejudice to Appellant. Appellant also notes that the County's personnel regulations indicate that a Statement of Charges should be issued within 30 calendar days of the date the supervisor became aware of the employee's conduct or performance.

The County argues that admissibility of evidence is controlled by the County's Administrative Procedures Act and that Appellant has incorrectly relied upon the Federal Rules of Evidence and the Maryland Rules to exclude County Exhibits 30-40. The County states that although it took more than 30 days after Ms. B's initial complaint to Ms. A to issue the Statement of Charges this was due to Ms. A's need to investigate Ms. B's allegations. Finally, the County objects to Mr. K's affidavit being admitted into the record as

it is outside of the County's Administrative Procedures Act process.<sup>7</sup>

While the County is correct that the Board is not bound by either the Federal Rules of Evidence or the Maryland Rules of Evidence, see Travers v. Baltimore Police Department, 115 Md. App. 395 (1997) (administrative agencies not bound by technical rules of evidence), it must observe basic rules of fairness so as to comport with the requirements of procedural due process. Id. Accordingly, the Board may look to the Federal Rules of Evidence and the Maryland Rules for guidance. Cf. Woodward v. Office of Personnel Management, 74 M.S.P.R. 389 (1997).

Appellant is correct that County Exhibits 30-40 appear to be stale. Nevertheless, the Board is not willing to exclude them at this juncture. Rather, the Board will permit the County to present evidence at the hearing regarding why they should be considered relevant to the instant appeal. Appellant has the right to seek exclusion of these exhibits at the hearing through the use of objections to the exhibits.

The Board also agrees with Appellant that the County's disciplinary system calls for prompt discipline and the County should issue a Statement of Charges within 30 days from the date of the performance or conduct which gave rise to the Statement of Charges. The Board notes that the personnel regulations provide an exception where there is a need to conduct an investigation or other circumstances that justify a delay. Accordingly, the Board will permit the County to provide evidence regarding the reason for its delay before opining on this issue.

Finally, the County specifically cited to Appellant's interactions with Mr. K to support the two-day suspension at issue. Therefore, the Board finds that Mr. K's affidavit concerning his interactions with Appellant and Appellant's supervisor, Ms. A, is clearly relevant.

### **ORDER**

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

1. Appellant's Motion in Limine is denied in its entirety. Appellant may raise Appellant's objections to County Exhibits 30-40 during the course of the hearing.
2. The County shall produce evidence during the hearing regarding the need to delay issuing the Statement of Charges in this matter.
3. Mr. K's affidavit shall remain a part of the proceedings before the Board.

---

<sup>7</sup> The County cites to Section 2A-7(a)(1)(A) of the Administrative Procedures Act which deals with submissions by the County not the Appellant.



# **ATTORNEY FEE REQUESTS**

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

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

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

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

If an 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 2008.

# **ATTORNEY FEE DECISION**

## **CASE NO. 07-17**

### **DECISION ON ATTORNEY FEE REQUEST**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellant for reimbursement of itemized attorney fees and costs related to the above-referenced case. The County responded (County Response),<sup>1</sup> objecting to multiple attorneys billing for the case, the hourly rates being requested, the hours billed for the preparation of the fee petition, and payment of Appellant's direct costs, which the County stated were unexplained.

The Appellant has submitted a request for attorney fees and costs in the amount of \$64,799.25,<sup>2</sup> and expenses in the amount of \$1,437.92 for a total of \$66,237.17. See Appellant's Motion for An Award of Attorney's Fees and Costs and Memorandum of Points and Authorities in Support Thereof (Appellant's Memorandum). As previously noted, the County has filed a response raising issue with respect to the hourly rate charged for the services rendered by the attorneys in this matter as well as the number of hours billed. Set forth below is a discussion of the issues of this case and the Board's determinations.

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

Appellant's counsel claim that they exercised billing judgment and took a number of steps to control litigation costs. Mr. A, a partner in the Law Firm, worked with Ms. B, a Law Firm associate, to produce "quality work at a reasonable cost." Appellant's Memorandum at 7. Appellant's attorneys have submitted separate time records showing Mr. A's work and Ms. B's work were not duplicative. Only one of the two Law Firm attorneys attended meetings with Appellant and conducted witness interviews. Appellant also seeks fees for work done on Appellant's retaliation claims, as they were clearly related to the underlying charges. It was only because of the Board's swift ruling in Appellant's favor during the hearing that Appellant chose to drop the retaliation claim, as the Board, by its action, had sent a clear message to Appellant's supervisors.

---

<sup>1</sup> The County had ten days from receipt of Appellant's request for fees to respond. See Final Decision and Order, MSPB Case No. 07-17 at 25 (December 17, 2007). The Board notes that the County's response was three days late without any explanation as to why. However, as Appellant's counsel, according to the County, did not object to the County's late submission, the Board has considered it.

<sup>2</sup> Appellant is seeking attorney fees of \$58,049.25 for Mr. A, Ms. B, and Mr. C of the Law Firm, and \$6,750.00 for Appellant's previous attorney, Mr. D, a sole practitioner.

Appellant's counsel assert that, although Appellant agreed to pay the Law Firm attorneys at specified rates, the Law Firm attorneys should be compensated at the Laffey rates as they are the well-established customary rates for civil rights attorneys in fee-shifting cases in Washington, D.C. Administrative tribunals, such as the U.S. Equal Employment Opportunity Commission and the U.S. Merit System Protection Board, have awarded Mr. A attorney fees at the Laffey rate.<sup>3</sup> Appellant's attorneys charge the same rates to clients in neighboring jurisdictions, such as Montgomery County, Maryland, as they do to clients in Washington, DC.

Alternatively, if the Board does not grant an award of fees based on the Laffey matrix, Appellant's counsel state that the Board should compensate the Law Firm's attorneys at the rates they charged Appellant, pursuant to the Retainer Agreement between Appellant and the Law Firm. These Law Firm rates are on par with guidelines regarding hourly rates contained in the Local Rules for the United States District Court for the District of Maryland (Maryland Local Rules).<sup>4</sup>

The County notes that the Board has previously ruled that the Laffey rate claimed by Appellant's attorney has "no controlling precedence over the Board." County Response at 2 (quoting MSPB Case No. 04-01 (Jul. 11, 2005) at 2-3). The County asserts that the Board most recently awarded an hourly rate of \$175 in fee cases before it, based on the factors set forth in the County Code.<sup>5</sup> The County argues that if the Board should wish to look for guidelines as to reasonable attorney fees, the Maryland Local Rules, while not binding on the Board, are more relevant. Under these guidelines, Mr. A, who has over seventeen years of experience, would be entitled to between \$200 - \$275 an hour, while attorneys admitted less than five years, such as Ms. B, would be entitled to between \$135 - \$170 an hour. The County goes on to assert that, because this was not a complex case, Mr. A should receive \$200 an hour and Ms. B should receive \$135 an hour.<sup>6</sup>

---

<sup>3</sup> Appellant's counsel also submitted information regarding the fact that the U.S. Bankruptcy Court in 2005 approved hourly rates for employment litigation work done by attorneys at another law firm in the Circuit Court for Montgomery County which actually exceeded the Laffey rates.

<sup>4</sup> The Board notes that both Appellant's counsel and the County's counsel cite to the Maryland Local Rules regarding fee rates but they cite to differing versions. Appellant's counsel cites to the Maryland Local Rules that became effective January 1, 2008, **after** the litigation phase of this case had ended but before the fee petition was submitted. The County cites to the Maryland Local Rules which were effective from August 16, 2004 until December 31, 2007.

<sup>5</sup> The Board would note that in the most recent case in which it awarded attorney's fees, MSPB Case No. 06-04, while it awarded \$175 for work done in 2004, it awarded \$275 for work done in 2005 and 2006.

<sup>6</sup> The County also asserts that Ms. B should be paid \$125 an hour but has offered no explanation as to why the Board should award this amount as opposed to \$135 as provided in the Maryland Local Rules.

The County also challenges the use of multiple attorneys in this case. The County indicates that the Maryland Local Rules indicate that only one attorney should be compensated for attending depositions, client and third party conferences and hearings. Moreover, the Maryland Local Rules generally provide that only one lawyer is to be compensated for intra-office conferences, and if one lawyer is seeking advice from another, the time may be charged at the rate of the more senior lawyer. According to the County, the billing statement submitted by Appellant's counsel shows numerous instances of time billed for Mr. A and Ms. B to confer, as well as several instances of both attending a client conference. Moreover, the County states that the billing statement shows Mr. A reviewed and edited virtually every thing that Ms. B prepared. Finally, the County cites to a previous Board decision, MSPB Case No. 01-08,<sup>7</sup> wherein the Board awarded fees to the primary attorney but denied reimbursement to additional legal support used by the primary attorney. In MSPB Case No. 01-08, the Board held that the term "the employee's reasonable attorney's fees" was intended to provide reimbursement for the employee's attorney but not for work done by co-counsel, paralegals, and law clerks.<sup>8</sup>

### **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's 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;

---

<sup>7</sup> The Board notes that only in 2005 did it begin to publish in its Annual Reports its decisions on attorney fee petitions. However, it has always served the County Attorney's Office with a copy of all decisions, as the County is a party to all cases before the Board. Therefore, when the County cited to MSPB Case No. 01-08 (Mar. 18, 2003), it had a copy of that decision but Appellant's counsel did not. The Board hereby orders the County henceforth to provide a copy of every Board decision to which it cites in a pleading to the other party unless the decision is available in the Board's Annual Reports published on the Board's website.

<sup>8</sup> Appellant's counsel submitted a letter addressing this last issue raised by the County, urging the Board to reconsider its holding in Case No. 01-08. Appellant's counsel noted that the phrase "attorney's fees", has been interpreted under Title VII of the Civil Rights Act of 1964 as permitting reimbursement for a team of attorneys in class actions brought under the statute.

- 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. To The Extent MSPB Case No. 01-08 Stands For The Proposition That The Term "Attorney's Fees" Precludes The Payment Of Fees For Work Done By Co-Counsel, Paralegals And Law Clerks, It Is Hereby Overruled.

While the County is correct that MSPB Case No. 01-08 stands for the proposition that only the work of the primary attorney in a case will be reimbursed, the Board believes that its prior interpretation of the statutory phrase "attorney's fees" was erroneous. Specifically, in MSPB Case No. 01-08, the Board indicated it was "unaware of any of its precedents speaking directly on the appropriateness of including in an award of attorney fees, hours worked by co-counsels, paralegals, and law clerks. Moreover, experience does not indicate that such claims have been made in Board proceedings." MSPB Case No. 01-08 at 2.

In MSPB Case No. 05-05, the Board had the occasion to consider an attorney's fee petition, wherein the appellant was represented by two attorneys. The Board, while not specifically overruling MSPB Case No. 01-08, implicitly did so when it awarded fees for work by both attorneys.<sup>9</sup>

In the case of Manor Country Club v. Betty Flaa, 387 Md. 297 (2005), the Court of Appeals for Maryland considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The Board notes that the provisions of § 27-7(k)(1) then in effect were identical to § 33-14(c)(9), as set forth supra, which is controlling for the Board. The Court of Appeals noted that the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974),<sup>10</sup> vacated in part, Blanchard v.

---

<sup>9</sup> The Board awarded lead counsel the fee that lead counsel was seeking. However, the Board noted that the associate assigned to the case basically performed work which could have been performed by a non-attorney. Moreover, lead counsel stated that the associate's attendance during the hearing was for "his acclimation to such proceedings." Accordingly, the Board determined to reimburse the associate's time at a substantially reduced rate.

<sup>10</sup> Johnson dealt with an award of a reasonable attorney's fee pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964. Johnson set forth twelve factors to be considered in determining the amount of an attorney's fee award. See 488 F.2d at 717-19.

Bergeron, 489 U.S. 87 (1989), were “in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)” for determining an appropriate attorney’s fees award.<sup>11</sup> 387 Md. at 313.

Thus, in interpreting § 33-14(c)(9), the Board in MSPB Case No. 01-08 should have looked to cases involving similar statutory wording. As previously noted, the Fifth Circuit, in Johnson, set forth various factors to be considered in determining a reasonable attorney’s fee under Title VII of the Civil Rights Act of 1964.<sup>12</sup> For the factor “time and labor required”, the court instructed that

[t]he trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

488 F.2d at 717.

Thus, it is clear from Johnson, that an award of a reasonable attorney’s fee, may include fees for more than one counsel and for non-lawyers assisting counsel. Accordingly, the Board finds that it correctly interpreted § 33-14(c)(9) in MSPB Case No. 05-05<sup>13</sup> and hereby overturns its contrary precedent in MSPB Case No. 01-08.

B. Appropriate Hourly Rates For The Law Firm

The Board notes at the outset that one of the Code’s factors is whether the attorney fee is fixed or contingent. Appellant’s counsel has submitted the Retainer Agreement between Appellant and counsel for this case. The Retainer Agreement indicates that Appellant was required to reimburse the Law Firm at the fixed rate of \$325 per hour for

---

<sup>11</sup> The Maryland Court of Appeals noted that the Johnson factors were later adopted by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). See 387 Md. at 313.

<sup>12</sup> As noted by Appellant’s counsel, Title VII, like § 33-14(c)(9) of the Montgomery Code, uses the phrase “a reasonable attorney’s fee”.

<sup>13</sup> The Board indicated in MSPB Case No. 05-05 that if more than one attorney is involved in a case, the Board will scrutinize the fee petition for duplication of effort along with proper utilization of time.

services performed by Mr. A, \$275 for services performed by Mr. C,<sup>14</sup> and \$160 for services performed by Ms. B. See Appellant's Memorandum, Declaration of Mr. A (Mr. A's Declaration), Attachment (Attach.) C at 1.

Notwithstanding the Retainer Agreement, Appellant's counsel seek reimbursement at the rates set by the Laffey matrix for various attorneys of the Law Firm. The Laffey rates claimed by Appellant's attorneys are actually a matrix of hourly rates for attorneys of varying experience levels prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. See Appellant's Memorandum, Mr. A's, Attach. E. The matrix is based on the hourly rates for attorneys allowed by the Federal District Court of the District of Columbia in Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985). The matrix's rates for subsequent years are determined by adding the cost of living for the Washington, D.C. area to the applicable rate for the prior year. See Appellant's Memorandum, Mr. A's Declaration, Attach. E.

While the Laffey rate may be binding in the federal district court, the County is correct in asserting that it has no controlling precedence over the Board. The Code specifically provides that the Board is authorized to reimburse or pay all or part of the employee's reasonable attorney's fees. In Brady Miller v. Montgomery County, MSPB Case No. 98-02 (Jun. 15, 1998), rev'd on other grounds, Civ. No. 188676 (Cir. Ct. for Montgomery County, MD, Jan. 22, 1999), the Board specifically rejected the use of the Laffey matrix. Likewise, in a case cited by Appellant's counsel, Mathena v. MSPB, et al., Civ. No. 263758V (Cir. Ct. for Montgomery County, MD, Apr. 18, 2006), the Board refused to award counsel the Laffey rate of \$345 she was seeking. Although the Circuit Court overturned the Board's fee award of \$175 per hour in Mathena, it awarded counsel only \$275 an hour not the Laffey rate of \$345, which counsel sought.

In Mathena v. MSPB, et al., 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 per hour.<sup>15</sup> Appellant's counsel has similar qualifications. He is an experienced employment lawyer with 17 years of experience. 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, as well as the Retainer Agreement between Appellant and the Law Firm's attorneys, and finds that \$300 an hour for Mr. A's services is

---

<sup>14</sup> Mr. C was not one of the attorneys designated as Appellant's counsel in this case. Appellant's counsel is claiming Mr. C expended 2.25 hours on this case – .15 hours for obtaining a labor arbitration decision for Ms. B at the law library and 2.10 hours for work in connection with the attorney fee petition. See Appellant's Memorandum, Mr. A's Declaration, Attach. D.

<sup>15</sup> The Board notes that this rate was consistent with the Maryland Local Rules.

reasonable under the Code's factors.

The Board has also considered the experience of Ms. B, the customary fees charged for someone with her experience,<sup>16</sup> as well as the Retainer Agreement, and has determined that \$160 an hour for Ms. B's services is reasonable under the Code's factors.

As explained in greater detail *infra*, the Board has determined to disallow all 2.25 hours of Mr. C's billed time. Accordingly, there is no need for the Board to determine an appropriate rate for his services.

C. Appropriate Hourly Rate For Mr. D

Unlike the Law Firm, which submitted detailed information to the Board on the experience of each of the attorneys for which Appellant is seeking an award of attorneys' fees, Mr. D has submitted no such information. The only information provided to the Board was a brief billing statement from Mr. D and a statement in Appellant's Memorandum that Mr. D operated a solo general law practice from his home for four years. *See* Appellant's Memorandum at 2 & Mr. A's Declaration, Attach. F. The Board is not familiar with Mr. D as he has not previously practiced before it. Therefore, the Board lacks any information to support Mr. D's \$250 hourly rate. Moreover, as pointed out by the County, there is no indication that Mr. D specialized in employment cases. Accordingly, the Board has determined that \$135 an hour for Mr. D's services is reasonable under the Code's factors.

D. The Amount Of Time Billed

1. The Litigation Phase

For the litigation phase of this case, Mr. D billed 27 hours. Among other things, Mr. D drafted the affidavit of Mr. K, which the Board relied on in making certain factual determinations. The County indicates it does not challenge the hours billed. However, as previously noted, Mr. D never appeared before the Board on this case and only submitted Appellant's appeal form. The billing information provided indicates that Mr. D worked on a number of documents never filed with the Board – e.g., Mr. F's affidavit, Ms. G's affidavit, client's affidavit. Therefore, the Board has determined to award compensation for only 5 hours, which would appear to be a reasonable amount of time to complete Appellant's appeal form and draft and finalize Mr. K's affidavit.

As for the Law Firm, Mr. A billed 73.50 hours during the litigation phase of this case and Ms. B billed 75.35 hours. The Board has reviewed the billing statement of the Law Firm, as well as Appellant's Memorandum and Mr. A's Declaration, which detail the steps taken by the Law Firm to control litigation costs and commends the Law Firm for exercising billing judgment. Accordingly, the Board has determined to award compensation for Mr. A's

---

<sup>16</sup> In particular, at the suggestion of Appellant's counsel, the Board has considered the Local Maryland Rules. The Board notes that the guidelines in effect during the litigation portion of this case suggest a rate of \$135-\$170 for someone with Ms. B's experience.



73.50 hours and Ms. B's 75.35 hours.

With regard to Mr. C, a partner in the Law Firm, he billed .15 hours for "obtain[ing] Labor Arbitration decision at Law Library for EBR re: motion to reconsider." See Appellant's Memorandum, Mr. A's Declaration, Attach. D, entry for Oct-08-07. It is unclear to the Board why a partner in a law firm would be required to obtain a labor arbitration decision at a law library for an associate. Moreover, there is no explanation in Mr. C's Declaration regarding the need for him to do this work. It appears to the Board that this work could easily have been done by Ms. B or a non-lawyer. See Johnson, 488 F.2d at 717; MSPB Case No. 05-05. Accordingly, the Board has determined to disallow reimbursement for the time billed by Mr. C during the litigation phase of this case.

## 2. The Fee Petition

The Board agrees with the County that the hours sought by the Law Firm for preparation of the fee petition are excessive. As the County points out, much of the fee petition argument is geared toward the goal of promoting adoption of the Laffey matrix despite the fact that the Board has on two separate occasions rejected such an approach. As the County notes, the Law Firm billing statement indicates that it contacted Ms. H, the appellant's counsel in Mathena v. MSPB, et al., twice before filing its fee petition. See Appellant's Memorandum, Mr. A's Declaration, Attach. D, entries for Jan-02-08 & Jan-11-08. Ms. H, on two occasions, has previously sought reimbursement of attorney fees at the Laffey rate from the Board and on both occasions the Board has denied her request. See Brady Miller v. Montgomery County, MSPB Case No. 98-02 (1998), rev'd on other grounds sub nom. Brady Miller, et al. v. Montgomery County Merit System Protection Board, Civ. No. 188676 (Cir. Ct. for Montgomery County, MD, Jan. 22, 1999); Renee Mathena v. Montgomery County, MSPB Case No. 04-05 (1995), rev'd on other grounds sub nom. Renee Mathena v. Merit System Protection Board, et al., Civ. No. 263758V (Cir. Ct. for Montgomery County, MD, Apr. 18, 2006). Moreover, when Ms. H, on behalf of her client, appealed both of the Board's decisions refusing to award her the Laffey rate, while the Circuit Court reversed the Board's hourly rate determinations, on both occasions the Circuit Court did not award Ms. H an hourly rate based on the Laffey matrix.<sup>17</sup> Thus, the Board agrees with the County that the Law Firm should have been aware at the time it filed its fee petition that the Laffey matrix had repeatedly been rejected not only by the Board but by the Circuit Court.

---

<sup>17</sup> In Brady Miller v. Montgomery County Merit System Protection Board, Civ. No. 188676 (Cir. Ct. for Montgomery County, MD, Jan. 22, 1999), Ms. H sought reimbursement at an hourly rate of \$190 based on the Laffey matrix. The Board awarded her \$140; on appeal, the Circuit Court awarded her \$150. In Renee Mathena v. Merit System Protection Board, et al., Civ. No. 263758V (Cir. Ct. for Montgomery County, MD, Apr. 18, 2006), Ms. H sought reimbursement at an hourly rate of \$345 based on the Laffey matrix. Again, the Board rejected this approach and awarded Ms. H an hourly rate of \$175. The Circuit Court, on appeal, granted Ms. H an hourly rate of \$275.

The County argues that Mr. C's 2.10 hours for fee petition preparation be rejected in total. According to the County, Mr. C's affidavit goes to supporting application of the Laffey matrix, previously rejected by the Board. The Board agrees with the County's argument and rejects an award of any fees to Mr. C for the fee petition preparation.

The Law Firm seeks an award of fees for 11.15 hours for work performed by Mr. A on the fee petition and an award of fees for 20.05 hours for work performed by Ms. B on the fee petition. The Board has determined to cut these amounts in half, based on the fact that at least half of the fee petition and attachments filed with the Board dealt with the Laffey matrix argument. Therefore, the Board will allow reimbursement for 5.575 hours of Mr. A's time and reimbursement for 10.025 hours of Ms. B's time.

E. Costs Claimed

The Law Firm has requested \$1,346.90 in costs. The County does not oppose these costs.<sup>18</sup> Having reviewed the billing statement, the Board finds these costs are reasonable and will order reimbursement for them. Appellant seeks \$91.02 in direct costs. The County requests that these costs be disallowed as Appellant never indicated in Appellant's Declaration an explanation for these costs. While the County is correct, the Board notes that Mr. A, in his Declaration, explained that the costs incurred by Appellant included \$46.20 for Federal Express charges incurred in sending documents to the Law Firm, as well as \$44.62 for mileage to and from the Law Firm's office on four dates, with mileage computed at the County's reimbursement rate. The Board finds that these costs are reasonable and will order the County to provide reimbursement.

**ORDER**

Based on the foregoing, the Board concludes the following:

1. A total of 79.075 hours of Mr. A's time shall be reimbursed at an hourly rate of \$300, for a total of \$23,722.50;
2. A total of 85.375 hours of Ms. B's time shall be reimbursed at an hourly rate of \$160, for a total of \$13,660.00;
3. A total of 5.00 hours of Mr. D's time shall be reimbursed at an hourly rate of \$135, for a total of \$675; and
4. Costs in the amount of \$1,437.92 shall be reimbursed.

Accordingly, the County is hereby ordered to reimburse Appellant for attorney fees and costs in the amount of \$39,495.42.

---

<sup>18</sup> The County, in its submission, indicated it did not challenge the \$1,336.71 in costs. The Board assumes this was a typographical error. See County Response at 4.

# **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 08, the Board reviewed and where appropriate provided comments on the following new class creations:

- 1) Election Aide II , Grade 10;
- 2) Public Safety Emergency Call-Taker I, Grade 15;
- 3) Public Safety Emergency Call-Taker II, Grade 16;
- 4) Assistant Inspector General I, Grade 21;
- 5) Assistant Inspector General II, Grade 26;
- 6) Public Policy Intern, Grade 18;
- 7) Housing Code Inspector III, Grade 23;
- 8) Occupational Therapist, Grade 23;
- 9) Security Specialist III (Sergeant), Grade 21; and
- 10) Visual Information Specialist, Grade 21.